

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 284 of 2016

STATE

v.

AD

Counsel: Ms. K. Semisi for State
Mr. A. Chand, Ms R. Boseiwaqa for Accused

Date of Hearing: 20th February 2018

Date of Summing Up: 21st February 2018

SUMMING UP

1. The names of the Complainant and the Accused are suppressed.
2. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. You will then retire to consider your respective opinions.
3. Our functions are different. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
4. You are to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse.

You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

5. I may comment on the facts if I think it will assist you when considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard it unless it coincides with your own independent opinion.
6. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The purposes of the opening address by the learned counsel for the prosecution is not evidence, it is to outline the nature of evidence intended to be put before you. The closing addresses of the counsel of the prosecution and the defence are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
7. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. As judges of facts you are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own conclusion or form your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I form and deliver my judgment.
8. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to

influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

Burden and Standard of Proof

9. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused is guilty for the offence.
10. The burden of proof of the charge against the accused is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.
11. The standard of proof in criminal trial is "proof beyond reasonable doubt". It means that you must be satisfied in your mind that you are sure of the accused's guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you found any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

Information and the Elements of the Offences

12. The accused is charged with one count of Rape, contrary to Section 207 (1) (2) (b) of the Crimes Act and one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act. The particulars of the offences are before you. Therefore, I do not wish to reproduce them in my summing up.

13. Section 207 (1) and 2 (b) of the Crimes Act states that:

*‘A person rapes another person if-
The person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person’s body that is not a penis without other person’s consent’*

14. Accordingly, the main elements of the offence of rape as charged are that:

- i) The Accused,
- ii) Penetrated the vagina of the Complainant with his tongue,
- iii) The Complainant did not consent to the Accused to penetrate into her vagina with his tongue,
- iv) The Accused knew or believed that the complainant was not consenting for him to insert his tongue in that manner.

15. The main elements of the offence of Sexual Assault are that:

- i) The accused,
- ii) Unlawfully and Indecently,
- iii) Assault the Complainant.

16. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act as indecent. It is your duty as Assessors to consider and decide whether the accused had indecently sucked the breast of the complainant without any lawful excuse, in this case without properly obtaining the consent of the Complainant.

17. The accused is charged with two separate counts. One count of Rape and one count of Sexual Assault. It is your duty to consider each of these two counts separately. If you find

the accused guilty for one count, that does not automatically make him guilty for the remaining count for which he is charged with.

Admitted Facts

18. I now request you to draw your attention to the agreed facts, which are before you. They are the facts that the prosecution and defence have agreed without dispute. Hence, you are allowed to consider them as proven fact by the prosecution beyond reasonable doubt.
19. The accused has admitted in the agreed fact that he had entered into the room of the Complainant, when she was lying down on the bed. He has then sucked her breast and then sucked her vagina.
20. In view of the agreed facts, the main disputed issues that you have to determine in respect of the offence of rape are whether the Accused has penetrated into the vagina of the Complainant with his tongue, when he sucked the vagina of the Complainant. If you are satisfied that the Accused had penetrated into the vagina of the Complainant with his tongue, then you have to determine whether the Complainant consented the accused to penetrate into her vagina in that manner or whether the Accused knew or believed that she was consenting for him to penetrate her vagina in that manner.
21. In respect of the offence of Sexual Assault, the Accused has admitted in the agreed facts that he has sucked her breast. Therefore, the main issue in respect of the second count is whether the Accused had a lawful authority or excuse, in this case the consent of the Complainant to suck her breast in that manner.
22. In view of the admitted facts, the identity of the accused is not disputed by the Prosecution and the Defence.

Penetration

23. Let me explain to you the element of penetration. Evidence of slightest penetration of the tongue of the Accused in to the vagina of the Complainant is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

Consent

24. Let me now draw your attention to the issue of consent. It is your duty to decide whether the prosecution has proven beyond reasonable doubt that the Complainant did not give her consent to the Accused to insert his tongue into her vagina.
25. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of rape, the Complainant consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. A consent obtained through fear, by threat, by exercise of authority, by use of force or by intimidation could not be considered as a consent given freely and voluntarily. A submission without physical resistance by the Complainant to an act of another person shall not alone constitute consent.
26. The Complainant must have the freedom to make the choice. It means that she must not being pressured or forced to make that choice. Moreover, the Complainant must have a mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. The consent for sexual intercourse must be comfortable to the person who made such choice. It should not be an optional choice. The consent of a person for sexual intercourse should not be assumed.
27. If you are satisfied, that the accused had inserted his tongue into the vagina of the Complainant and she had not given her consent, you are then required to consider the last element of the offence that is, whether the accused honestly believed or knew that the

Complainant was freely consenting for this alleged sexual activity. I must advise you that belief in consent is not the same thing as a hope or expectation that the Complainant was consenting. You must consider whether the Accused knew either that the Complainant was not in a condition or a position to make a choice freely and voluntarily, or the Complainant had made no choice to agree to sexual activity. If you conclude that the Accused believed or knew that the Complainant was consenting, you must then consider whether such belief of the Accused was reasonable under the circumstances that was prevailed at the time of the alleged incident took place.

Evidence of Corroboration

28. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. It means that 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.
29. One or more of you may have assumptions as to what constitutes rape, what kind of person may be the victim of rape, what kind of person may be the rapist or what a person who is being or has been raped will do or say. Though such assumptions are natural in ordinary life, it is important that you must leave behind such assumptions as there is no stereotype of circumstances for a rape, a rapist or a victim of rape.
30. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety of ways. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgment strictly on the evidence that you have heard from the witnesses and the exhibits during the course of the hearing.
31. It is your duty as judges of facts to assess the evidence in order to determine whether the Complainant gave her consent to the accused for this alleged sexual intercourse. In doing that, you must be mindful that not to bring in to the assessment of the evidence any preconceived views as to how a victim of rape in a trial such as this should react to the

experience that the victim had gone through. Every person has his or her own way of coping with such incident. Some may display obvious signs of distress and others may not. Demeanours of the Complainant in the court while giving evidence is not necessarily a clue to the truth of the Complainant's account.

Alternative Count

32. If you find that the Accused has not penetrated the vagina of the Complainant with his tongue, in respect of the first count of Rape, but has sucked her vagina with his tongue without her consent, you are then allowed to look at lesser offence of "Sexual Assault" though it is not formally charged in the information.
33. Once again I remind you the main elements of the offence of Sexual Assault, that:
 - iv) The accused.
 - v) Unlawfully and Indecently.
 - vi) Assault the Complainant.
34. Accordingly, you have to determine whether the Accused had a lawful authority or excuse, in this case the consent of the Complainant to suck her vagina in that manner.

Evidence of the Prosecution

35. Let me now remind you the evidence presented by the prosecution during the course of the hearing.
36. The prosecution adduced the evidence of three witnesses, the Complainant, Uncle Filimoni and the father of the Complainant.
37. The Complainant was staying with her father at his home on the 23rd of July 2016. She had been living with her mother, but moved to live with her father recently. Her father

came home in the evening with a friend of him, the accused. The accused slept at their home in that night. The following morning, her father went to work, leaving the accused and the Complainant at home. The Complainant woke up and found the Accused was still asleep. She asked him when will he leave, for that he answered that he was going soon.

38. The Complainant then attended her normal house work. After completing her house works, she went to her room to have some rest. While she was lying on the bed, the Accused came into her room. She asked him why he was coming into her room. He did not answer, but kept on coming towards her. She got up and tried to push him. The Accused pushed her down to the bed. He then covered her mouth with one of his hands, when she tried to scream and shout. He then removed her upper dress and started to suck her breast. He then went down to the lower part of her body and started to suck inside her vagina. The Complainant in her evidence said that she felt that he sucked inside her vagina. The accused did it for sometimes. When she tried to get her mobile phone and call her father, he threw it away. After that he left the room, but remained inside the sitting room. The Complainant received a call from her father, asking her to bring him the bottle of honey. She then went to the bus-stand and gave it to him. The Complainant, in her evidence, said that she wanted to tell her father, but she felt scared, without knowing whether her father would shout at her or believe her story. The Complainant then comes home.

39. The Complainant further explained in her evidence that she was new to the area and did not know the people who are living in the vicinity. She said that she had no place to go. That was the reasons she stayed inside the house even after this incident. While she was staying inside her room, the Accused came into the room again, asking her to have sex with him. At that point of time, she heard that someone was knocking the front door and calling the name of her father. It was uncle Filimoni. The Complainant said that she felt that there is someone who can help her. She went and opened the door and ran into him. She hugged him and cried. According to the evidence given by Filimoni, she was scared, sweating, crying and shaking. She told him that a man who was inside the house was trying to rape her. Uncle Filimoni then saw the Accused was trying to flee way from the

back door. He chased him after and caught him. Uncle Filimoni brought the Accused back to the house. He then called the father of the Complainant and the Police. The Police then came and took the Accused to the Police Station.

40. I have summarized the evidence presented during the course of this hearing. However, I might have missed some. It is not because they are not important. You have heard every item of evidence and reminded yourselves of all of them. What I did only to draw your attention to the main items of evidence and help you in reminding yourselves of the evidence.

Conduct of the Accused

41. The Accused was present when the hearing was commenced. However, he chose not to attend to the hearing after the morning tea break. Therefore, the court decided to proceed with the hearing in the absence of the Accused. I have to advise you that the conduct of the accused and his absence prove nothing. You must not make any adverse inference about the Accused because of his conduct or the absence from the hearing. As I said before, you must decide this case based on the evidence adduced during the hearing.

Presentation of Evidence by the Complainant

42. You have seen that the Complainant gave evidence behind a screen. Giving of evidence in this way is perfectly normal in cases like this. It is designed to enable the witness to feel more at ease when giving evidence. It is not intended to prejudice the evidence which the witness gives. The fact that the evidence has been given in that manner, must not in any way be considered by you as prejudicial to the Accused.

Evaluation of Evidence

43. In order to determine whether the prosecution has proven beyond reasonable doubt that the Accused is guilty for these offences, you have to consider 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 accurate in another thing.

44. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is testifying in the evidence. You then should consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that, you are required to consider the consistency of the witness not only with his or her own evidence but also with other evidence presented in the case.
45. It is your duty as judges of facts to consider the demeanours of the witnesses, how they react to being cross examined and re-examined, were they evasive, in order to decide the credibility of the witness and the evidence. Moreover, you have to consider the knowledge of the witness on the facts that he or she is testifying, his or her disinterestedness, his or her integrity, and his or her veracity in order to determine the credibility of the witness and his evidence.
46. The most important part of your task is to judge whether the Complainant, who was fifteen years old at the time this incident has told the truth, and has given a reliable account of the events that she was describing. Children do not have the same life experience as adults. They do not have the same standards of logic and consistency. Their understanding may be severely limited for a number of reasons, such as their age and immaturity. Life viewed through the eyes and mind of a young adolescent may seem very different from life viewed by an adult. Remember how you normally talk to children of this age. You should bear those difficulties in mind when you consider the answers given by the Complainant. All decisions about the evidence are for you to make.

Inconsistencies and omissions

47. Madam and Gentleman, you have heard that the learned counsel for the accused cross examined the Complainant about the omissions and inconsistencies in the statement that she made to the police and the evidence given in the court.
48. The Complainant admitted in her evidence that certain incidents that she stated in her evidence have not been stated in the statement that she made to the Police. The Complainant in her evidence said that she told everything that she could recall in her evidence.
49. I 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 about the inconsistencies and the omissions in such statements when you consider whether the Complainant is believable and credible as a witness. However, the statement itself is not evidence of the truth of its contents.
50. It is 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.
51. If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to 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 such witness.

Evidence of Recent Complaint

52. You have heard the evidence that the Complainant told Uncle Filimoni that the Accused tried to rape her inside the house. Uncle Filimoni in his evidence said that the Complainant ran to him and told that the Accused was trying to rape her.
53. This form of evidence is known as evidence of recent complaint. It is not an evidence as to what actually happened between the Complainant and the Accused. Uncle Filimoni was not present and witnessed what happened between the Complainant and the Accused.
54. You are entitled to consider the evidence of recent complaint in order to decide whether or not the Complainant has told the truth. The Prosecution proposed you that Complainant's complaint to Uncle Filimoni is consistent with her account of this alleged incident and therefore she is more likely to be truthful. It is for you to decide whether the evidence of recent complaint helps you to reach a decision, but it is important that you must understand that the evidence of recent complaint is not independent evidence of what happened between the Accused and the Complainant. It therefore cannot of itself prove that the complaint is true.
55. The learned counsel for the Accused question the Complainant, why she did not leave the house and alert neighbours. The Complainant in her evidence said that she was new to the area and had no one or no place to go. The learned counsel for the Accused suggested you in his closing submissions that the evidence of the Complainant should not be believed as she did not leave the house or alert anyone when she had opportunities to do so.
56. It is a matter for you to consider and resolve. However, it would be wrong to assume that every person who has been the victim of a sexual assault will react to the situation in same manner. The experience of the courts is that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to

authority for some time. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response.

Final Directions

57. Ladies and gentleman, I now take your attention to the final directions of the summing up.
58. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the Prosecution has proven beyond reasonable doubt that the Accused has committed the offence of Rape as charged, you can find the Accused guilty for the said offence of Rape.
59. If you are not satisfied or have doubt whether the Prosecution has proven beyond reasonable doubt that the Accused has committed the offence of Rape as charged, you must find the Accused is not guilty for the said count of Rape.
60. If you find the Accused is not guilty for the offence of Rape, you are then allowed to consider the alternative count of Sexual Assault. If you are satisfied that the Prosecution has proven beyond reasonable doubt that the Accused has committed the offence of Sexual Assault, you can find him guilty of the alternative count of Sexual Assault.
61. If you are not satisfied or have doubt whether the Prosecution has proven beyond reasonable doubt that the Accused has committed the offence of Sexual Assault, you must find the Accused is not guilty for the said alternative count of Sexual Assault.
62. In respect of the second count, if you are satisfied that the Prosecution has proven beyond reasonable doubt that the Accused has committed the offence of Sexual Assault as charged, you can find the Accused guilty for the said offence of Sexual Assault.

63. If you are not satisfied or have doubt whether the Prosecution has proven beyond reasonable doubt that the Accused has committed the offence of Sexual Assault as charged, you must find the Accused is not guilty for the said count of Sexual Assault.

Conclusion

64. Madam and Gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.
65. Learned Counsel of the prosecution and the accused, do you have any redirections to the assessors?




R.D.R.T. Rajasinghe
Judge

At Suva
21st February 2018

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