

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 58 OF 2016

STATE

V

OSEA TUIKORO

Counsel: **Ms. S. Naibe for State**
 Ms. P. Reddy for Defence

Dates of Trial: **10 December 2019**
Date of Summing Up: **11 December 2019**

SUMMING UP

Ladies and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me, as the judge who presided over this trial to sum up the case to you. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my Summing- Up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.
2. I will direct you on matters of law which you must accept and act upon.

3. Matters of facts however, are a matter entirely for you to decide for yourselves. So, if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions. In other words you are the judges of fact. All matters of fact are for you to decide.
4. The counsel for Prosecution and Defence made submissions to you about the facts of this case. That is their duty as counsel. You are not bound to accept their submissions. You may properly take their submissions into account when evaluating evidence.
5. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I deliver my judgment.
6. On the matter of proof, I must direct you as a matter of law, that the accused person is innocent until he is proven guilty. The burden of proving his guilt rests on the prosecution and never shifts.
7. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty. Remember if you have any doubt, it must be reasonable. You cannot speculate. These doubts must be based solely on the evidence or lack of evidence that you have seen and heard in this court room.
8. Your opinions must be solely and exclusively based upon the evidence which you have heard in this court and upon nothing else. You must disregard anything you might have heard or read about this case outside of this court room. Your duty is to apply the law as I explain it to you to the evidence you have heard in the course of this trial. Approach the evidence with detachment and objectivity.
9. Your duty is to find the facts based on the evidence and apply the law to those facts. You are free to draw reasonable inferences from facts proved by evidence. However, the inferences should not be based on mere speculation.

10. An incidents of rape would certainly shock the conscience and feelings of our hearts. It is quite natural given the inherent compassion and sympathy with which human-beings are blessed. You may, perhaps, have your own personal, cultural, spiritual and moral thoughts about such an incident. You may perhaps have your personal experience of such a thing, which undoubtedly would be bitter. You must not, however, be swayed away by such emotions and emotive thinking. That is because you act as judges of facts in this case not to decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law to which every one of us is subject to.

11. It would be understandable if one or more of you came to this trial with certain assumptions as to what constitute rape, what kind of person may be the victim of rape, what kind of person may be a rapist, or what a person who is being, or has been, raped will do or say. It is important that you should leave behind any such assumptions about the nature of the offence because experience tells the courts that there is no stereotype for a rape, or a rapist, or a victim of rape. The offence can take place in almost any circumstances between all kinds of different people who react in a variety of ways. It is impossible to predict how a victim of rape individual will react, either in the days following, or when speaking publically about it in court or at the police station. The experience of the courts is that those who have been victims of rape react differently to the task of speaking about it in evidence. Please approach the case with open mind and dispassionately, putting aside any view as to what you might or might not have expected to hear, and form your opinion strictly on the evidence you have heard from the witness.

12. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. The agreed facts of this case are that:
 - i. That Kite Seninuqanuqa (hereinafter referred to as the "Complainant") at the material time was employed at the Nadi Airport, resided at Link Road, Kashmir, Lautoka and was 27 years old.
 - ii. That Osea Tuikoro (hereinafter referred to as the "Accused") at the material time was a Salesman, resided at Navutu Automart, Lautoka and was 35 years old.
 - iii. That the Complainant and the Accused were in a de-facto relationship for 5 years.

- iv. That the Complainant and the Accused have two children together.
- v. That the Accused went to the Complainant's home on the 14th of February, 2016.
- vi. That Ana Seseacagi is the mother of the Complainant.
- vii. That a Section 27 non-molestation domestic violence restraining order was made against the Accused namely Order No. 487 of 2015.
- viii. That the matter was reported to the Police and Accused was arrested, interviewed under caution and charged accordingly.

13. I have given you a copy of the Information. Please refer to the information. The Information reads as follows:

First Count

Statement of Offence

ABDUCTING WITH INTENT TO CONFINE PERSON: Contrary to Section 281 of the Crimes Act 2009.

Particulars of Offence

OSEA TUIKORO on the 14th of February, 2016 at Lautoka in the Western Division, abducted **KITE SENINUQANUQA** with intent to cause her to be secretly and wrongfully confined.

Second Count

Statement of Offence

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

Particulars of Offence

OSEA TUIKORO on the 14th of February, 2016 at Lautoka in the Western Division, penetrated the vagina of **KITE SENINUQANUQA** with his penis, without her consent.

Third Count

Statement of Offence

BREACH OF DOMESTIC VIOLENCE RESTRAINING ORDER:

Contrary to Section 77 (1) (a) of the Domestic Violence Act 2009.

Particulars of Offence

OSEA TUIKORO on the 14th of February, 2016 at Lautoka in the Western Division, breached the Domestic Violence Restraining Order number 487/15 of Lautoka Magistrates' Court dated 9th December, 2015 by interfering with **KITE SENINUQANUQA** a protected person under the said Order.

14. In order to prove the 1st count, the Prosecution must establish beyond reasonable doubt that the accused Osea Tuikoro abducted the complainant and the abduction was done with the intent to confine the complainant. Abduction means an action of forcibly taking someone away against his or her will.
15. In order to prove the 2nd count (Rape) the Prosecution must established that the accused Osea Tuikoro penetrated complainant's vagina with his penis without her consent.
16. On the issue of consent, it must be proved that the accused either knew that the complainant was not consenting or was reckless as to whether she consented. The accused was reckless as to whether the complainant consented to penetration if you are sure that he realised that 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.
17. 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 is obtained by force or by threat or intimidation or by fear of bodily harm. If somebody does not resist physically it does not necessarily mean that she or he had given consent. Different people react differently to situations. You don't necessarily need violence, kicking, and shouting etc. to show that one is not consenting.

18. The Third Count concerns the breach of a Domestic Violence Restraining Order. There is no dispute that a non- molestation domestic violence restraining Order under Section 27 of the Domestic Violence Act was made against the accused in 2015. The Prosecution must prove beyond reasonable doubt that the accused had breached that order.
19. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a complainant who saw, heard and felt the offence being committed. In this case, for example, the complainant was a witness who offered direct evidence as to what she saw, heard or felt.
20. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether the witness is consistent in her evidence.
21. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in court. You have seen how the complainant's demeanour in the witness box when answering questions. How was she when she was being examined in chief, then being cross-examined and then re-examined? Was she forthright in her answers or was she evasive? But, please bear in mind that many witnesses are not used to giving evidence and may find court environment distracting.
22. In testing the credibility of a witness, you may consider whether there is delay in making a prompt complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect 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 for such delay.
23. You may also consider whether there is a motive on the part of the complainant to make up an allegation against the accused. If she had such a motive, then you may think that this allegation has been fabricated.

24. Please remember, there is no rule in Fiji for you to look for corroboration of complainant's story to bring home an opinion of guilt in a case of sexual nature. The case can stand or fall on the testimony of complainant, depending on how you are going to look at her evidence.
25. I will now remind you the evidence led in the trial. It is a short trial and things should be fresh in your memory. I will only summarise the salient features. If I do not mention a particular piece of evidence that does not mean it is unimportant.

Case for Prosecution

PW 1 Kite Seninuqanuqa (The Complainant)

26. Kite is a mother of three children. She is not married but was in a *de-facto* relationship with Osea Since 2012. She preferred to stay away from Osea because he physically and mentally abused her. He would scream at her or throw things at her, punch her, sometimes in front of the kids. She still has that fear of being tortured. She reported him to the Police in 2015 and applied for a DVRO against Osea.
27. In the year 2016, she was residing at Link Road with her mum. On the 14th of February, 2016, she had come home early in the morning and when she was going to go towards the house, Osea was in a vehicle that was parked outside her house. He came and grabbed her from behind and forcefully pushed her in that same vehicle that he was in. She screamed and was trying to free herself but there was no one to help her. Only the driver was in the vehicle.
28. He took her to Navutu where his mother was. No one else was there in the house at that time. He pushed her inside the house and he locked the door. She was already in fear and it gave her some more. He asked her to sleep with him and have sex with him. She was scared. She didn't want to but had to give in so that he wouldn't hurt her.
29. She had sexual intercourse with Osea. She described sexual intercourse as the act of man putting his penis into woman's vagina. She consented to have sex with him because she was scared. She was scared because she knew of his capabilities. He would just do anything, anytime. Whenever he feels like torturing her he would do it, especially when no one is

around. She was kept in the house for a few hours. She kept saying for him to drop her back home because she had to go to work. He kept telling her that she shouldn't tell anyone what happened or report him once she gets back home. He dropped her home late in the afternoon.

30. She said that Osea knew that a Domestic Violence Restraining Order was in place when the incident happened. After this incident in the year 2016, she had to go back to him because of the kids and stayed with him till April 2018. A few months after he started going back to being abusive like he was before. She couldn't stand being tortured anymore and she left him and went to Suva. She did not report him to police this time because she was scared to report about him again.
31. Under Cross-examination, Kite admitted that after the DVRO was issued she used to meet Osea to exchange the eldest son but during this period he did not portray any harmful behaviours towards her.
32. She admitted that she was drinking alcohol with her friends and went clubbing at around 10 pm. the day before the incident (13 February 2016) and returned home a little bit drunk at around 5 am. on the 14th. She said that her daughter was already with her aunty in Navua and she can't recall the whereabouts of her daughter on that particular day.
33. She said that she screamed and told the driver to stop the car and even pulled opened the door but could not jump out of the vehicle because he was grabbing her. But no assaults or arguments took place on the way.
34. She admitted that when she had reached the house in Navutu, she had got out of the vehicle by herself and walked from the vehicle to the house on her own free will. She could have shouted for help but she was scared of him. It was her own assumption that he would do something to her and based on this assumption she didn't bother to call for help.
35. She admitted that a conversation took place calmly just before the incident to sort the things out. She admitted that Osea had asked if they both could have sex and she replied 'yes'. She said 'yes' because she was scared that he might do something else to her. The day of the in-

cident Osea did not assault or torture. He just forcefully grabbed her and pushed her into the vehicle.

36. Kite admitted that she did not inform Osea that the only reason why she was agreeing to have sex because she was scared of him. While having sexual intercourse, she did not resist but denied having enjoyed sex. She admitted that, after having sexual intercourse, they slept together in the same bed and had lunch together and that she did not make attempts to get out of that house.
37. Kite admitted that when she returned home her mother was very angry at her and Osea, and even confronted her as to why she went and stayed with Osea. She admitted that she did not inform her mother at the same time as to what actually happened. She informed only on the following day. When it was suggested that the only reason why she did not tell her mother promptly was because she had gone with Osea voluntarily and also had sexual intercourse with him voluntarily, she replied in the affirmative. She admitted that she did not go to the police on her own free will. It was her mother that took her to the Police Station. She also admitted that she was forced by her mother to make a report with police and it was her mother that told her what to say in her statement.
38. Kite admitted that her mother did not approve of her relationship with Osea from the very beginning and also blamed her because, after being separated, her mother had to leave her job in Samoa and look after the children.
39. Under re-examination, Kite said that she submitted to Osea's demands only because she was scared that if she did not obey him he will do something to her. She still had that fear of what he was going to do if she didn't give in.
40. She said that she didn't tell her mother on that same day because she was rushing for work and also her mother was very disappointed with her. She waited for her to calm down.
41. That is the case for the Prosecution.
42. At the close of the Prosecution's case, you heard me explain to the Accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved

the case against him to the requisite standard or he could give evidence in which case he would be cross-examined.

43. The accused elected to remain silent. Now I must tell you that the fact that the accused elected to exercise his right to remain silent does not give rise to an inference that he was guilty. In other words, you must not assume that he remained silent because he was guilty. Burden of proof remains with the Prosecution throughout.

Analysis

44. Ladies and gentleman assessor, the accused is charged with one count of Abducting with Intent to Confine Person one count of Rape and one count of Breach of Domestic Violence Restraining Order. There are three counts hence you are supposed to consider evidence against each count separately.
45. There is no dispute as to the identity of the accused.
46. To find the accused guilty on the first count, you must be satisfied beyond a reasonable doubt that the accused Osea Tuikoro abducted the complainant and that the abduction was done with the intent to confine the complainant.
47. The complainant said that she was grabbed from the back and forcefully pushed her in to the vehicle while she was screaming for help. She said that the accused locked the door and kept her inside the house in Navutu for nearly 3 hours. The Defence does not deny taking the complainant to the house in Navutu on the 14th February 2016. The Defence argues that the complainant walked free to the house in Navutu and she did not attempt to escape although she had the opportunity to do so.
48. What you have to be satisfied with is that whether the accused forcibly took the complainant away against her will and the accused at the time of abduction intended the complainant to be confined. If you are satisfied that these elements have been proved, you may find the accused guilty on the 1st count.

49. In order to prove the 2nd count (Rape) the Prosecution must established that the accused Osea Tuikoro penetrated complainant's vagina with his penis without her consent.
50. When the complainant was subjected to cross-examination, you would have appreciated that there was no dispute that the accused had penetrated the vagina of the complainant with his penis. The only issue is consent. Consent means consent freely and voluntarily given.
51. Accused's defence is that he had consensual sexual intercourse with the complainant. So the issues before you are that, (1) did the sexual intercourse take place without the consent of the complainant? (2) Was the accused aware that the complainant was not consenting to the sexual intercourse?
52. The complainant agreed that except for the forcible grabbing and taking her in a car, no physical harm was done to her immediately before the sexual intercourse. She also admitted that no resistance was offered and no alarm was raised immediately before or at the time of the sexual intercourse. The Prosecution says that the consent was not given freely and voluntarily and that the complainant gave into the accused only because she was scared that the accused will do some harm to her.
53. You heard what had transpired between the two before the incident. There was a DVRO is with a non-molestation order issued against the accused and you heard evidence of mental and physical torture. You decide if it was reasonable for the complainant to be scared of the accused and the assumptions she made were reasonable in the circumstances of this case. You decide if the complainant had given the consent freely and voluntarily.
54. On the issue of consent, the Prosecution must prove that the accused either knew that the complainant was not consenting or was reckless as to whether she consented. The complainant admitted that the accused had asked her immediately before the sexual intercourse if he could have sex with her and she replied 'yes'. She explained and said that she said 'yes' because she was scared of him that he will do something to her. She however agreed that she did not inform the accused that she was consenting only because she was scared of him. You heard what had transpired between the two prior to the sexual intercourse. You decide, in the circumstances known to the accused, if it was reasonable for him to believe that she was consenting freely and voluntarily.

55. The Third Count concerns the breach of a Domestic Violence Restraining Order. There is no dispute that a non- molestation domestic violence restraining Order under Section 27 of the Domestic Violence Act was made against the accused in 2015. The Prosecution must prove beyond reasonable doubt that the accused had breached that order. If you believe that the accused had abducted and raped the complainant when the DVRO was in force, you may find the accused guilty on the 3rd count.
56. You observed complainant's demeanor in court. You decide if she is an honest and credible witness and what weight should be attached to her evidence.
57. If you believe the complainant is telling you the truth, you may express an opinion that the accused is guilty on each count. But if you do not believe the complainant's evidence regarding the alleged offences, or if you have a reasonable doubt about the guilt of the accused, then you must find the accused not guilty.
58. Your possible opinion is either guilty or not guilty on each count.
59. You may now retire to deliberate on your opinions. Once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.
60. Any re-directions?



At Lautoka

11 December 2019

Aruna Aluthge

Judge

Solicitors:

Office of the Director of Public Prosecution for State

Legal Aid Commission for Defence