

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

High Court Criminal Case No. HAC 94 of 2014

BETWEEN : STATE

AND : ALIPATE LUMELUME

Counsel : Ms Uce for the State
Ms Bilivalu for the Accused

Dates of Hearing : 02 and 03 October 2019

Closing Speeches : 03 October 2019

Date of Summing up: 03 October 2019

SUMMING UP

Madam and gentleman assessors,

1. I must now sum up the case to you. You must then retire to consider your opinion. I will direct you on the law that applies. You must accept those directions I give you on matters of law. You are to decide the facts of the case, based on the evidence that has been led before this court. You will then apply

those directions to the facts and give me your opinions as to whether the Accused person is guilty or not guilty.

2. You are bound by the directions I give you as to the law. But you are not obliged to accept any opinion I may express or appear to have expressed while going through evidence. If you do not agree with that opinion you will ignore it and form your own opinion with that evidence.
3. You must base your opinion only and only on the evidence given by the witnesses. But a few things that you heard in this court are not evidence. Opening submission, closing submissions, statements, arguments and comments made by the counsel and this summing up are not evidence. A suggestion by a counsel during cross examination is not evidence unless it is admitted by the witness. I must say that the purpose of the closing speech is to outline the evidence that each party rely on to fall in line with their respective arguments. It is not an exercise to introduce new evidence or to give evidence from bar table. If you heard any new information which you did not hear in the evidence given by any witness, you must disregard such information.
4. You may act only upon the evidence given by the witnesses in this case and nothing else. But you may consider those submissions and arguments only as a guidance to understand the case put forward by each party when you evaluate evidence and the extent to which you do so is entirely a matter for you.
5. If you have acquired any knowledge about the facts of this case outside this court room, you must exclude that information from your consideration. Make sure that external influences play no part in forming your opinion. You will also not let any sympathy or prejudice sway your opinions. Emotions has no role to play in this process and do not let anger, sympathy, prejudice or any other emotion shroud the evidence presented in this court room. You only have to consider the evidence adduced in respect of each element of the offence. You

must not form your opinion based on the emotions, sympathies, prejudices, speculations and morality. As I said before you only have to consider the evidence given by the complainant in this case and nothing else to form your opinions.

6. I will give you only a summary of evidence. I will not go through every word uttered by the complainant in this case, and if I leave out something that seems to be important, nothing stops you from taking that into account. Because you decide the facts.
7. After this summing up, you may give your individual opinions as the representatives of the community. You may reject or accept any evidence in forming your opinion. Your opinions need not be unanimous. And you need not give reasons for your opinions.
8. Your opinions will assist me in giving my judgement. I will give the greatest weight to your opinions in my judgement. However, I am not bound to conform to your opinions.

Madam and gentleman assessors,

9. I will now mention some considerations that may assist you in evaluating evidence. In this case only the complainant gave evidence. As I said before you may reject the whole evidence of the complainant, accept the entirety or even accept only a part of the complainant's evidence and may reject the rest. You have to decide whether the complainant has spoken the truth or correctly recalled the facts and narrated them.
10. You have seen the demeanour of the complainant and how she gave evidence in court. You have seen whether she was forthright or evasive in giving evidence. But you may also bear in mind that some witnesses have good memory, some may not remember every detail and it is also likely that some

may perceive the same incident differently and narrate differently. You have to use your common sense in assessing the reliability and credibility of the complainant. Remember, that many witnesses are not comfortable in giving evidence in a court room, they may act in anxiety and get distracted in this environment.

11. Generally, complainants of sexual offences react differently when they got to narrate the traumatic experience they have gone through. Some may display obvious signs of distress, anxiety and restlessness, but some may not. Every witness has their own way of expressions when they give evidence about an experience, specially a traumatic one. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in court is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
12. Subsequent conduct of complainants of sexual offences can vary from person to person. Some, in distress, shame or anger, may complain to the first person they see. Some may react instantly and report because of their education level, social status, financial independency and for other similar reasons. Some may not complain at once due to immaturity, lack of education, social status and financial dependency. There could be others, who react with shame, fear, shock or confusion, may not complain at once. A complainant's reluctance to report an incident could be due to many reasons. It could be social stigma which follows such incidents or cultural taboos in her society. Some may not even complain at all due to the fear that it may damage family ties. A complainant may not be comfortable to report a matter to close family members due to the respect, fear, or due to the reluctance to openly discuss matters relating to sex with elders.
13. A late complaint does not necessarily signify a false complaint. Similarly, an immediate complaint does not necessarily demonstrate a true complaint. It is a

matter for you to decide what weight should be attached to the promptness or the lateness of the complaint.

14. It must be noted that according to the law sexual offences do not require other evidence to corroborate the evidence of the complainant. Which means you can even solely rely on the evidence of the complainant without any other evidence to support it.
15. Another consideration may be; has the witness said something different at an earlier time or whether he or she is consistent in his or her evidence? In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue.
16. This is how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. For example, might it result from an innocent error such as faulty recollection; or else could there be an intentional falsehood. Be aware of such discrepancies or inconsistencies and, where you find them, carefully evaluate the testimony in the light of other evidence. Memory is fallible, and you might not expect every detail to be the same from one account to the next. A witness may be honest enough but have a poor memory or otherwise be mistaken. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.
17. As a matter of law, I must direct you that what a witness said on oath is only considered as evidence. What a witness said in her or his statement to police, that is out of Court and therefore is not evidence. However, previous

statements are often used to challenge a particular witness's credibility and reliability because a previous inconsistent statement may indicate that a witness said a different story then, and as a result her evidence might not be reliable. It is for you to decide the extent and importance of this inconsistency.

18. I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.

19. When you have decided the truthfulness and reliability of evidence, then you can use that credible evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the Accused is guilty or not. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as assessors, in determining a question of fact, should utilise your common sense and wide experience which you have acquired living in this society.

20. It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offences charged.

21. According to the law the prosecution must prove its case beyond reasonable doubt. For the prosecution to discharge its burden of proving the guilt of the Accused, it is required to prove beyond reasonable doubt that he is guilty. The burden of proof remains on the prosecution throughout the trial. For this purpose, the prosecution must prove every element of the offence beyond reasonable doubt.

22. The Accused need not prove his innocence. The fact that the Accused did not give evidence does not imply that he is guilty. You must not assume that he is guilty because he did not give evidence. It is not his task to prove his innocence.

The burden is on the Prosecution to prove the guilt of the Accused. That means you must be satisfied that the state has proved every element of the offence beyond reasonable doubt. That doubt should be a reasonable one and if you are left with a reasonable doubt you must find the Accused not guilty. If you are not left with any such doubt and if you are sure that the prosecution proved every element of the offence you must find him guilty.

Madam and gentleman assessors,

23. We will now look at the offence that the Accused is indicted for. The Accused is indicted for one representative count of rape contrary to section 207(1) and (2)(a) of the Crimes Act. The particulars of offence are as follows;

“Alipate Lumelume between the 1st day of February 2011 and 28th day of February 2011 at Nadi in the Western Division penetrated the vagina of Ivamere Nadroi with his penis without the consent of the said Ivamere Nadroi.”

24. You would have observed that on top of the offence stated in the Information, a phrase is noted as “representative count”. A representative count is a count by which the prosecution alleges that several offences as described in the statement of offence were committed during the time period specified in the count. To prove a representative count, the law only requires the prosecution to prove that at least one such offence was committed between the dates specified in the count. It simply means that if you are sure that at least once the Accused has entered his penis into the vagina of the complainant you must find the Accused guilty to the representative count of rape.

25. Now I will explain what matters you must take into consideration to determine whether the offence of rape is proved by the prosecution. The prosecution must prove the following elements beyond reasonable doubt;

- a. the Accused;
- b. penetrated the vagina of the complainant with his penis;
- c. without the consent of the complainant; and
- d. the Accused knew or believed that the complainant was not consenting; or the Accused was reckless as to whether or not she was consenting.

26. The first element is concerned with the identity of the person who committed the offence. The identity of the Accused is an agreed fact and it is not in dispute in this case.

27. The second element involves the penetration of the complainant's vagina with his penis. The law states that even the slightest penetration of the vagina is sufficient to constitute the offence of rape. Therefore, it is not necessary to have evidence of full penetration or ejaculation. The prosecution must prove beyond reasonable doubt that the Accused penetrated the vagina of the complainant with his penis to any extent. The element of penetration is also not a disputed fact in this case. The Accused admits that he had sexual intercourse between 01 February 2011 to 28 February 2011 as per the amended admitted facts.

28. The third and the fourth elements are based on the issue of consent. That's the only contested issue in this case. To prove the third element of the offence of rape, the prosecution should prove that the Accused penetrated the complainant's vagina without her consent.

29. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. For 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. Consent obtained through force, threat or intimidation, fear of bodily harm, or by use of authority is not considered as consent given freely

and voluntarily. Submission without physical resistance by the complainant alone, to the act of the other person will not constitute consent.

30. The complainant must have the freedom to make the choice. It means she must not have pressured or forced to make that choice. The complainant must have mental and physical capacity to make that choice. Further, the consent given by the complainant may have been limited to a particular sexual activity and not for another sexual activity. Also, the consent can be withdrawn at any time. It is an ongoing state of mind and its revocable once given. Consent of a person for sexual intercourse cannot be assumed.
31. In addition to proving that the complainant did not consent to the Accused to insert his penis into her vagina, the prosecution should also prove that, either the Accused knew or believed that the complainant was not consenting; or the Accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.
32. The Accused was reckless, if the Accused realised there was a risk that she was not consenting and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the vagina, you may find that the Accused was reckless as to whether or not the complainant was consenting. In other words, you have to see whether the Accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.
33. If you believe that the prosecution proved all the elements of the offence of rape you must find the Accused guilty. If not, you must find the Accused not guilty.
34. At the beginning of the trial each of you were given a copy of the amended admitted facts. Those are the facts that the prosecution and the defence have agreed to accept as evidence proved beyond reasonable doubt. You can rely on these facts as evidence without looking for any proof.

Madam and gentleman assessors,

35. Now I will refresh your memory and give a brief outline of the evidence adduced in this case. However, you should consider the entirety of the evidence adduced in this case when forming your opinions. Only the complainant was called to give evidence in this case.
36. The complainant, Ivamere Nadroi gave evidence that she was residing in Malakua with her father in law, mother in law, sister in laws, and their children. The complainant said in the month of February 2011 she was washing dishes at the sink. She said that the Accused came from behind and hugged her. She said that the Accused told her for them to go inside the room. According to the complainant she had been alone at home and she had run outside to inform her father in law about what the Accused did to her. The complainant said that she did not complain it to her husband as she was scared.
37. The complainant gave evidence about another incident which allegedly happened during the same month. She said that she was digging the ground to find bait to go fishing. She said suddenly someone came and hugged her. The complainant said that it was the Accused and he closed her mouth with his hand and made her lie down. According to her evidence the Accused was covering her mouth with one hand and with the other hand he had removed her skirt and the underwear. The Accused had used the same hand to remove his pants as well. She said that the Accused came on top of her and inserted his penis into her vagina. The complainant said that she tried to push him away, but she could not as he was heavy. However, the complainant gave evidence that at one point of time she was able to push him away. She said that she stood up and he ran away. She had then worn her skirt and had gone home. She said that she did not wear her underwear and it was in her hand. The complainant said that her husband was not at home for a few days. She said that she was waiting for her in laws to come home for her to complain about the incident. However, she said that later she thought not to complain as it could become a bigger issue. She said that she was scared, and she did not complain to anyone.

38. The third incident had also occurred in the same month according to the complainant's evidence. The complainant said that when she went to the cassava patch the Accused suddenly came and closed her mouth and forced her down to the ground. She said that the Accused took off her sulu and the underwear. She said that the Accused was covering her mouth with one hand and therefore she could not call out for help. The Accused had used the other hand to remove his pants. The complainant said that she could not push him away as he is heavy. She gave evidence that the Accused inserted his penis into her vagina. She said that he ejaculated inside her vagina. The Accused had only pulled his pants down up to his knee level and after the sexual intercourse he had stood up and had left the place. The complainant had then gone back home. She said that her husband had still not returned home, and she waited for him to come back to complain about the incident. She said that when she told her husband about it, they decided not to stay with the in laws anymore and to go to her village.
39. The complainant said that her husband felt sorry about his brother and did not complain to the police. After about one year the complainant had come back to her in laws once again, when she was pregnant. The complainant said that the Accused was living elsewhere by that time and he had been married by then.
40. She gave evidence about another incident which happened after she gave birth to the child. The complainant gave evidence that one day at around 3 am to 4 am she felt someone lifted her up and when she woke up she realized that she was lying down on the floor. The complainant said that the Accused hugged her and pushed her down to make her lie down. She said that the Accused called her Daku meaning sister in law. She said that then she knew it was the Accused. She said that he tried to remove her sulu and underwear. She said that the Accused was covering her mouth with his hand. According to her evidence then her nephew had called her. The Accused had then stood up and had left. The complainant said that she saw someone running towards the door. She said it was dark inside the house.

41. The complainant said that she informed about the incident to her sister in law. She said that her husband was not at home and she was scared to stay with her in laws. She said that she took her child and went back to her village. She said that two days later she informed her mother and then reported to the Police.
42. Under cross examination the complainant admitted that she had known the Accused before she got married. During the cross examination the complainant said that she reported the matter to the Police on 12 April 2012. The complainant said that the Accused hugged her from behind when she was digging for bait and put one hand on her mouth and put her down on the ground. She said that it happened so fast. The complainant said that when she said "hey" the Accused covered her mouth with his hand. When it was put to her that it was impossible for the Accused to lie on top of her and cover her mouth while trying to remove her skirt and underwear with the other hand, she denied the suggestion. Under cross examination the complainant said that the Accused used his lips to cover her mouth when he inserted his penis into her vagina. She said that the Accused used his hand again to cover her mouth while having sexual intercourse. However, she said that she did not state that in her police statement.
43. The complainant denied that she is making up a story. She further denied that it was she who took off her clothes. It was suggested to the complainant that she was having an affair with the Accused and they had consensual sexual intercourse. The complainant denied the suggestions and reiterated that she did not consent to what had happened to her.
44. The complainant was asked as to why she reported the matter after the incident which happened in 2012. The complainant said that she had a child by then and that is why she reported the matter.

45. The complainant admitted that she assumed that it was the Accused who came to her early in the morning. However, she denied that she made up a story and said that she knows that it was the Accused who came to her that morning.

46. During cross examination the complainant admitted that her sister in law saw the Accused hugging her when she was washing dishes. However, she said that she forgot to say that in court. The complainant admitted that it was the sister in law who first went and complained about it to her in laws.

47. It was suggested to the complainant that she complained against the Accused in 2012 because her husband and the family found out that she was having an affair with the Accused. However, the complainant denied the suggestion. She was further cross examined as follows;

Q: I put it to you Ivamere that the reason why you had not mentioned in your statement to the police that you are afraid is because your mother in law and your father in law dd not want you to report correct?

A: They did tell me not to report the matter to the Police, they just told me not to tell my husband.

48. During the cross examination the complainant admitted that she did not receive any injuries during the two incidents that she was forced to the ground. But she said that she felt pain.

49. That was the case for the Prosecution.

50. After the closure of the prosecution case the Accused was explained his rights. You must bear in mind that although those options were given, still the burden is on the prosecution to prove the guilt of the Accused and he need not prove his innocence. The Accused decided not to give evidence. No defence witnesses were also called. I must remind you that you must not draw any adverse inference from the fact that the Accused remained silent. It is his right.

Madam and gentleman assessors,

51. It should be noted that in our law no corroboration is needed to prove a sexual offence. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters. In other words, the prosecution can solely rely on the evidence of the complainant only without any supporting evidence whatsoever in sexual offences. It is for you to decide how credible and consistent is the evidence of the complainant.
52. You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by the complainant is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or not reliable then you must find the Accused not guilty. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether the prosecution has proved the elements of the offence beyond reasonable doubt with that truthful and reliable evidence.
53. The prosecution case was that in two occasions in the month of February 2011 the Accused inserted his penis into the complainant's vagina without her consent. As per the line of cross examination it appears that the defence case is that the Accused had consensual sexual intercourse with the complainant.
54. As it was said before, it is the duty of the prosecution to prove the elements of the offence against the Accused. The Accused need not prove his innocence.
55. I have now given you the directions of law and summarized the evidence adduced in this case. Before I conclude my summing up let me remind you some points again.
56. If you believe that the prosecution has proved beyond reasonable doubt the elements of rape at least in respect of one of the incidents, you may find the Accused guilty to the representative count of rape.

57. If not, you must find the Accused not guilty.

58. You may now retire and consider your opinions. Before you do so, may I ask the counsel of both parties whether you wish to request any redirections?

59. When you are ready with your opinions, the Court will reconvene for you to inform your opinions to court.



Rangajeeva Wimalasena
Acting Judge

At Lautoka
03 October 2019



Solicitors

Solicitors for the State : Office of the Director of Public Prosecutions

Solicitors for the Accused: Legal Aid Commission