

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 34 of 2015

STATE

V

NIKOLA ROKOCIKA

Counsel : Mr. S. Seruvatu with Ms. P. Lata for the State.
: Ms. J. Singh with Mr. T. Varinava [LAC] for the
Accused.

Dates of Hearing : 30 and 31 January, 2019
Closing Speeches : 1 February, 2019
Date of Summing Up : 1 February, 2019

SUMMING UP

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

Madam and Gentleman 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.

BURDEN OF PROOF AND STANDARD OF PROOF

8. 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.

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

INFORMATION

13. The accused is charged with one count of rape. (A copy of the information is with you).

COUNT ONE

REPRESENTATIVE COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009.

Particulars of Offence

NIKOLA ROKOCIKA between the 1st day of May, 2014 and the 31st day of August, 2014 at Nadi, in the Western Division, penetrated the vagina of “**VR**” with his penis, without her consent.

14. You will note this count is a representative count which covers a period between the 1st day of May, 2014 and the 31st day of August, 2014. By a representative count the prosecution alleges that several offences as described in the information were committed during the period specified in the count. The law says that it shall be sufficient for the prosecution to prove that between the specified dates in the count at least one offence was committed.
15. To prove count one, 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 “**VR**” with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant “**VR**” was not consenting or didn’t care if she was not consenting at the time.
16. In this trial the accused has denied committing the offence of rape. 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 between the 1st day of May, 2014 and the 31st day of August, 2014.
17. The first element of the offence of rape is concerned with the identity of the person who allegedly committed the offence. There is no dispute that it was

not the accused as alleged. You are to consider this element of the offence as proven beyond reasonable doubt.

18. The second element is the act of penetration of the complainant's vagina by the accused with his penis. Like the first element there is no dispute about this element of the offence you are to also consider this element of the offence as proven beyond reasonable doubt.
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. 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.

24. As a matter of law, I have to direct you that offences of sexual nature as in this case do 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.

AMENDED ADMITTED FACTS

25. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as amended admitted facts.
26. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
27. 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 mind. 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

28. The prosecution called one witness, the complainant to prove the charge against the accused.
29. The complainant who was 14 years of age in 2014 informed the court that in 2014 she lived with her stepfather the accused, her mother and three step siblings. The complainant recalled three Saturdays between 1st May, 2014 and 31st August, 2014. On the first occasion she was at

home with the accused, after lunch she went to wash the dishes after which she went to rest in the bedroom.

30. As she was reading the Bible the accused came into the bedroom and locked the door. The accused then removed the complainant's yellow skirt and panty with one hand and with the other he removed his pants. The complainant tried to push the accused away, however, the accused inserted his penis on her vagina at this time the complainant felt pain. The complainant also felt wetness in her vagina. The accused then left the bedroom.
31. After the accused left the bedroom the complainant saw blood stains on the mat and her clothes, the blood came out of her vagina. The complainant further stated that she did not consent the accused to have sexual intercourse with her.
32. In the afternoon the complainant told her mother about what the accused had done to her.
33. On the second occasion again on a Saturday the complainant's mother had gone to catch mussels from the river, she was at home with the accused and her 4 year old step sister. The complainant was in the bedroom trying to make her step sister sleep. The accused came into the room removed her skirt and panty and inserted his penis into her vagina, she felt the accused penis in her vagina.
34. The complainant could not push the accused since he was strong she did not consent the accused to do what he had done. The accused told the complainant not to tell anyone otherwise he will beat her but she told her mother about what the accused had done to her. Her mother told her not to lie and not to be cheeky.

35. Every Saturday the complainant's mother would not be at home and she would be left with the accused and her 4 year old step sister.
36. On the third occasion on a Saturday the complainant was making her step father and mother's bed when the accused came inside the room and locked the door she tried to leave the room but couldn't since the accused had the key. The accused made her lie on the bed removed her clothes and his $\frac{3}{4}$ pants and inserted his penis into her vagina. It was painful and she did not agree to have sexual intercourse with the accused. In the afternoon the complainant told her mother about what the accused had done to her, her mother beat her with a hose pipe.
37. As a result of what the accused had been doing the complainant got pregnant.
38. In cross examination the complainant stated that she did not yell when the accused came into the room but when he removed her clothes she was very shy.
39. When the accused was taking off his $\frac{3}{4}$ shorts she tried to leave the room but the door was locked. The complainant denied having consensual sex with the accused on all the three occasions. She maintained that she was raped by the accused and that she was not making up a story against the accused because she got pregnant.
40. The complainant agreed she had shown her mother the blood stains on the mat but disagreed she never told her mother anything about the blood stains.
41. The complainant was referred to her police statement to the first paragraph of the second page which was read as follows:

"After one week it was also a Saturday from the first time my stepfather had sexual intercourse with me I was at home with my stepfather and my step sister, Litia while my mother went to town with my sister, Adi Kaveni and my step brother, Samuela to do some shopping"

42. The complainant agreed she had informed the court that on the second occasion when the accused had raped her, her mother had gone to catch fresh water mussels. In respect of the statement given to the police the complainant stated that her mother had told her to say that she had gone to town.

Madam and Gentleman Assessors

43. The learned counsel for the accused in this regard was cross examining the witness about some inconsistency in the statement she gave to the police immediately after the incident when facts were fresh in her mind with her evidence in court. I will 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 the inconsistency in such a statement when you consider whether the witness is believable and credible as a witness. However, the police statement itself is not evidence of the truth of its contents.
44. 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.
45. 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.

46. In re-examination the complainant stated that her mother had beaten her after she had told her about the accused raping her.
47. This was the prosecution case.

DEFENCE CASE

Madam and Gentleman Assessors

48. 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 that is his right and you should not draw any adverse inference from the fact that the accused decided to remain silent. However, the accused called one witness for the defence which you should consider.
49. I now draw your attention to the evidence adduced by the defence during the course of the hearing. You must therefore take into account what the defence adduced in evidence when considering the issues of fact which you are determining.
50. Adi Laite Tuirewa the wife of the accused informed the court that she has been married to the accused for the past 15 years. In 2014 they were residing at Vuniyasi, Nadi, the witness has 3 children from the accused. The complainant is her daughter from her previous relationship.
51. According to the witness the complainant got pregnant in 2014 when she asked the complainant whether she was pregnant the complainant did not

answer upon asking who the father was the complainant said no one. When the witness asked the complainant whether the father of the child was the accused the complainant said no. The witness had a good relationship with the complainant but sometimes the complainant did not listen to her.

52. The witness also stated that the complainant did not tell her at any time about the accused having sexual intercourse with her or show any blood stains. The witness denied assaulting the complainant with a hose pipe or beating her at all.
53. In cross examination by State Counsel the witness agreed she cared about the accused and that she was financially and emotionally dependent on the accused for support. The witness agreed that she told the complainant to tell the Hospital the name of one Peni to be the father of her child.
54. The witness denied on 18 February, 2015 the accused had told her not to tell his name at the Police Station for impregnating the complainant.
55. The witness also denied the accused had told her to take Peni's name for raping her. The witness was referred to her police statement in particular to the 2nd last paragraph which was read as:

"On 18th February, 2015 the police came home and took [VR] and I to the station but before that Nikola took [VR] and I to the bedroom and told us not to take his name to the police station for him impregnating [VR] and say a boy by the name Peni raped her. I suspected that Nikola did something to [VR] so I asked [VR] at Nadi Police Station if Nikola raped her and she said yes."

56. The witness denied giving the above statement to the police but agreed signing the statement. Upon further questioning the witness said the Police Statement was not read back to her.

Madam and Gentleman Assessors

57. The learned State Counsel in this regard was cross examining the witness about some inconsistencies in the statement she gave to the police immediately after the incident when facts were fresh in her mind with her evidence in court. I will now explain to you the purpose of considering the previously made statement of the witness with her evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witness is believable and credible as a witness. However, the police statement itself is not evidence of the truth of its contents.
58. 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.
59. 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.
60. The witness denied she knew from the beginning that the accused had raped the complainant and that she did not report the matter to the police. The witness maintained the complainant did not tell her that the accused had raped her and also that she did not beat the complainant with a hose pipe.

61. The witness agreed she had asked the complainant whether the accused might have done something to her since she was suspicious because he was her stepfather. Furthermore, the witness stated that she was not trying to protect the accused since the complainant was her daughter but what she had done was that she had lied to the witness and was dishonest with her but at no point in time she had asked the complainant if the accused had raped her.
62. This was the defence case.

ANALYSIS

63. The prosecution alleges that between 1st May, 2014 and 31st August, 2014 the accused who was the stepfather of the complainant on three occasions had forcefully penetrated the vagina of the complainant without her consent.
64. The complainant had informed her mother about what the accused was doing to her but her mother did not believe her and in turn had assaulted her.
65. As a result of the forceful sexual intercourse the complainant got pregnant. The complainant did not consent to the sexual intercourse of the accused on all the three occasions.
66. The complainant had suffered pain during the forceful sexual intercourse which resulted in blood coming out of her vagina on one occasion which had stained her clothes and the mat spread on the floor.
67. The prosecution also states that the accused committed the acts of rape while the complainant's mother was not at home.

68. The accused on the other hand denies having sexual intercourse with the complainant without her consent.
69. The defence position is that the accused had consensual sexual intercourse with the complainant on all the occasions. The allegation of rape only emerged after the complainant found out that she was pregnant.
70. The defence is also saying that the complainant did not complain to her mother about what the accused was doing to her and had not shown her mother any blood stains on the mat as mentioned by the complainant. The defence maintains the complainant only cried rape after she became pregnant.

Madam and Gentleman Assessors

71. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
72. 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 forthright 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.
73. 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

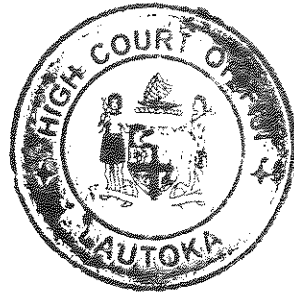
about another, he or she may be accurate in saying one thing and not be accurate in another.


74. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge 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. 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.
75. 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.
76. 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.
77. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
78. Your possible opinions are:-

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

Madam and Gentleman Assessors

79. 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.
80. 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

1 February, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.