

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 48 of 2018

[CRIMINAL JURISDICTION]

STATE

V

1. MOLITONI TARO VUNIVAVALAGI
2. JOSUA BUETA

Counsel : Ms. S. Kiran and Ms. S. Sharma for the State
Mr. L. Qetaki for the 1st Accused
Ms. M. Ratidara for the 2nd Accused

Hearing on : 15 -17 April 2019

Summing up on : 17 April 2019

SUMMING UP

Madam and gentlemen assessors;

1. It is now my duty to sum up the case to you. Please remember that you should accept the directions on law that I will be giving you in this summing up and should apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless you agree with that opinion. You are the judges of facts.

2. As I have told you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.
3. Evidence you should assess in this case is what the witnesses said from the witness box inside this court room, the admitted facts and the exhibit tendered. A few things you heard inside this court room are not evidence. This summing up is not evidence. Arguments raised by the lawyers for the prosecution and the defence during the proceedings, their questions and comments are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only if you agree with them.
4. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or the complainant. No such emotion should influence your decision.
5. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.
6. Experience has shown that victims of sexual offences may react in different ways to what they went through. When you assess the testimony of a witness, you should

bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes when recalling past events.

7. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies when you compare the evidence given by witnesses on the same issue. This is how you should deal with any inconsistency you may come across. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. In this regard, you may perhaps think it 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.
8. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide.
9. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate, or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.

10. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
11. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proven facts and reasonable inferences. However, you should bear in mind that the inference you draw should be the only reasonable inference to draw from the proven facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proven facts, then you should not draw the adverse inference.
12. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
13. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and an accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
14. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offence the accused is tried for and any matters that will enable you to decide whether or not that charge has been proved.

15. Please remember that you will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
16. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offences;

COUNT ONE

Statement of Offence

Assault Causing Actual Bodily Harm: contrary to section 275 of the Crimes Act 2009.

Particulars of Offence

MOLITONI TARO VUNIVAVALAGI on the 14th day of December, 2017 at Lami, in the Central Division assaulted Emali Kudruva thereby causing actual bodily harm.

COUNT TWO

Statement of Offence

Rape: contrary to section 207(1) and (2)(a) of the Crimes Act 2009.

Particulars of Offence

MOLITONI TARO VUNIVAVALAGI on the 14th day of December, 2017 at Lami in the Central Division had carnal knowledge of Emali Kudruva by inserting his penis into the vagina of Emali Kudruva without her consent.

COUNT THREE

Statement of Offence

Rape: contrary to section 207(1) and (2)(a) of the Crimes Act 2009.

Particulars of Offence

JOSUA BUETA on the 14th day of December, 2017 at Lami, in the Central Division had carnal knowledge of Emali Kudruva by inserting his penis into the vagina of Emali Kudruva without her consent.

17. You would remember that the first accused pleaded guilty to the first count and the second accused pleaded guilty to the third count. Therefore, the trial in this case was

conducted only to decide whether the first accused is guilty of the second count. Please remember that you should not assume that the first accused is guilty of the second count simply because he had pleaded guilty to the first count or because the second accused had pleaded guilty to the third count. The case against the first accused in relation to the second count of rape should be considered separately.

18. To prove the offence of rape, the prosecution must prove the following elements beyond reasonable doubt:
 - (i) the accused;
 - (ii) penetrated the vagina of the complainant with his penis;
 - (iii) without the consent of the complainant; and
 - (iv) Either the accused;
 - a) knew or believed that the complainant was not consenting; or
 - b) was reckless as to whether or not she was consenting.

19. The first accused in this case admits that he had sexual intercourse with the complainant. There is no dispute regarding the identity and there is no dispute that the first accused inserted his penis inside the complainant's vagina. The first accused says that the complainant consented for him to have sexual intercourse with her.

20. Therefore, only the third and the fourth elements which are based on 'consent' are in dispute in this case and you are required to decide whether these two elements are proved beyond reasonable doubt by the prosecution. If you find that the prosecution has failed to prove one of those elements, then you must find the first accused not guilty of the second count. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason.

21. 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.

22. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;
- a) by force; or
 - b) by threat or intimidation; or
 - c) by fear of bodily harm; or
 - d) by exercise of authority.
23. Apart from proving that the complainant did not consent for the accused to insert his penis inside 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.
24. It is not difficult to understand what is meant by the words "the accused knew or believed". But you may wonder as to how you could determine whether the accused was reckless. If the accused was aware of the risk that the complainant may not be consenting for him to penetrate her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant's vagina, you may find that the accused was reckless as to whether or not the complainant was consenting. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not.
25. Please remember that no witness can look into an accused's mind and describe what it was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused's state of mind. Knowledge or intention of an accused can only be inferred based on relevant proven facts and circumstances.

26. Now let us look at the evidence. Please remember that I will only refer to evidence which I consider important to explain the case and the applicable legal principles to you. If I do not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.
27. The complainant said in her evidence that:
- a) *She is 25 years old. On 13/12/17, she went to Sand Dunes Nightclub with a friend around 8.00pm and was there till 2.30am. Thereafter they went to Union Nightclub. There she was drinking with her cousin and the cousin's husband until that nightclub was about to close. Then the first and the second accused and another third person who were drinking in the opposite table invited her to drink with them.*
 - b) *First she said they were her friends. Then she said, she does not know them at all and she came to know the names later. She said the second accused asked her to drink with him at the ocean view motel and she went with them. This was around 5.30am.*
 - c) *They went in one black fielder private vehicle. She fell asleep once she got into the car. When she woke up, she was in front of one Chinese Shop. The first accused bought 2 cartons of tribe. When the first accused brought the two cartons of tribe into the car, she fell asleep again. When she woke up she was at the top of a hill under a mango tree.*
 - d) *They started drinking. Then she had consensual sexual intercourse with the first accused. She said the first accused got angry because she was talking to the other two. The other two also wanted to have sexual intercourse but she disagreed.*
 - e) *Then they forced her because she did not allow them to have sexual intercourse with her. The first accused held her hands together and the second accused pulled her trousers down. The third person did not do anything.*
 - f) *She said that all of them then had sexual intercourse with her. She said that she was afraid when "they insert their penis into my vagina". The first accused was the first one to have sexual intercourse with her. She said, when the first accused held her hands, she was kicking, trying to free herself. Then she said, both the first accused and the second accused held her hands. After the first accused had sexual intercourse with her, then herself and the second accused had sexual intercourse. She said, she was feeling afraid because "what they had done to me, it will lead to death"*
 - g) *She said, on the same day the first accused punched her face and her head after they had sexual intercourse for the first time because she was talking to the other two. She received injuries on her mouth and her nose. She said that she was punched twice. She could feel the first punch, but could not feel the second punch and she was on the ground. She said, after she was punched the first accused and the second accused had sexual intercourse with her and she did not agree to have sexual intercourse with either of them.*

- h) *After they had sexual intercourse, they told her to stay and went to get more drinks, but they did not come back. She was just sitting on the roadside. She said she was angry when she was sitting there. Then a police vehicle arrived and she was taken to the police station. She was medically examined on the same day which was 14/12/17.*
 - i) *During the cross-examination she agreed that she had been drinking voluntarily from Friday night around 8.00pm to next morning. She agreed that she was talking to the second accused throughout that night. She said she was kissing the second accused inside the nightclub but denied kissing him inside the car.*
 - j) *She agreed that the first accused punched her out of jealousy as she was talking to the second accused and to the other boy. She also agreed that the first accused sought forgiveness from her after he punched her and that she did forgive him. She agreed that she reconciled with the first accused that morning. She denied the suggestion that she and the first accused had sexual intercourse after they reconciled in order to make up for her being assaulted by the first accused.*
 - k) *She agreed that she came to the town for shopping and by Saturday morning she had no money left. She agreed that when she was sitting by the roadside, she was thinking about stories as to why she did not go home. She also agreed that the first vehicle to stop was the police vehicle.*
28. The second witness for the prosecution was Dr. Shalvin Vishal Kapoor. He said that,
- a) *He had been practicing as a medical doctor since 2012. On 14/12/17 at 11.00am, he medically examined the complainant. He tendered the medical report he prepared as PE1.*
 - b) *He said the complainant was very scared and was bleeding from her nose. Her left eye was swollen and she was in pain. There were lacerations in her vagina and there were particles in her vagina. He said that a laceration is a fresh cut usually arising from trauma. He also noted injuries on the backside of both forearms. There were bruising and blood marks. He said those blood marks could be a result of injuries, punching, being hit by a stick or due to falling down on the arm.*
 - c) *He said that the injury on the left eye could be due to a punch. He said that there was evidence of sexual assault. In his view the lacerations in the vagina and the presence of swell and debris in the vagina were evidence of force penetration.*
 - d) *During cross-examination he agreed that he was informed that the sexual intercourse took place on the grass and he apologized for not documenting it. He agreed that there could be lacerations in the vagina if there was sexual intercourse without any lubricant.*
29. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The

burden of proving an accused's guilt beyond reasonable doubt remains on the prosecution at all times. The first accused chose to give evidence.

30. The first accused said in his evidence that;

- a) *He is 28 years old and is a fisherman. He said that the allegation that on the 2nd occasion, he had forced the complainant to have sex with him is false. He said he did not hold the complainant's hands and she gave herself up voluntarily. He said that when he was having sexual intercourse with the complainant for the second time the other two came to him with a broken beer bottle and told him that they will stab him if he does not move.*
- b) *He said that the complainant was kissing the second accused when they were going in the vehicle. When they stopped to buy the drinks and when the complainant saw him buying the drinks, then she left the second accused and came to him. Then they went and had sexual intercourse. After that when they came back and was sitting down, the complainant saw the second accused and she took the second accused to have sexual intercourse with her. He got jealous when he saw the complainant taking the second accused and he punched the complainant. After punching her, he brought her back and asked for her forgiveness. He said that the complainant accepted his apology.*
- c) *He then asked her to have sexual intercourse for the second time. She told him to chase the second accused and the third person away and he accordingly asked the two to leave. While he was having sexual intercourse for the second time, the two of them came back with a broken beer bottle to stab him.*
- d) *When he was told that they will stab him, he stood up and left. When he caught a vehicle and got in, the other two also came and tried to stop the vehicle. The driver of the vehicle knew all three of them. So he dropped the other two at the main road.*
- e) *During cross-examination on behalf of the second accused he said that it was the third person who had the broken beer bottle and not the second accused.*
- f) *During cross-examination on behalf of the prosecution he said, that he does not know whether the complainant was injured on her eyes and nose when he punched because he was angry and was also drunk. He said he did not see any injuries on the complainant when he was seeking forgiveness from her.*

Analysis

31. The second prosecution witness gave his medical opinion based on what he observed and his experience. You are not bound to accept that evidence. You will

need to evaluate that evidence for its strengths and weaknesses, if any, just as you would with the evidence of any other witness. It is a matter for you to give whatever weight you consider appropriate with regard to the observations made and the opinion given by the second prosecution witness. Evaluating his evidence will therefore include a consideration of his expertise, his findings and the quality of the analysis which supports his opinion.

32. When you consider PE 1, you should also remember that what is written in A(4) and D(10) are not admissible in considering whether the facts stated therein are true because those parts are filled by the respective authors based on the information received. For this reason, the contents of A(4) and D(10) are blotted out.
33. I should also direct you with regard to the relevance of intoxication to the offence of rape. In this case there was evidence that both the complainant and the first accused had been drinking.
34. Drunkenness can affect a complainant of a rape case in two ways. Firstly, a person who is drunk, depending on the degree of intoxication, may do things which he/she would not do or less likely to do if he/she is not drunk. Secondly, again depending on the degree of intoxication, the capacity of a complainant to exercise a choice may be totally removed.
35. When it comes to a rape charge, according to our law, drunkenness or intoxication which is self-induced, is not a defence. You need to look at all the circumstances as they would have appeared to the accused had he been sober. It is not a defence for an accused in a rape case to take up the position that he would not have behaved in the way he did, had he not been drunk. Therefore, considering the circumstances of this case you should bear in mind that intoxication cannot be considered as a defence.

36. The first accused said in his evidence that the second accused and the third person came to the first accused with a broken beer bottle and that the first accused left the place leaving the second accused and the third person with the complainant. When the complainant was cross-examined, the said facts were not suggested to her. The complainant therefore was not given an opportunity to respond in that regard. You may tend to think that the reason for not putting those facts to the complainant is because they were fabricated. However, before you draw any inference on this failure to cross examine the complainant regarding the said matters, you should remember that there may be other explanations for the failure of a counsel to put matters to a witness such as the counsel misunderstanding the accused's instructions or the matter simply being overlooked by the counsel. You should also consider how relevant are these matters that are not put to the complainant to the main issues you are required to decide in this case.
37. In this case, there is no dispute that the accused and the complainant had sexual intercourse on two occasions. The prosecution says that, on the second occasion, the first accused penetrated the complainant's vagina without her consent and the accused either knew or believed she was not consenting or the accused was reckless as to whether or not she was consenting.
38. The first accused says that he had consensual sexual intercourse with the complainant even on the second occasion. He admits that he assaulted the complainant but says that he reconciled with the complainant before he had sexual intercourse with her for the second time. The complainant admitted that she reconciled with the first accused. The defence says that this allegation of rape is fabricated.
39. Considering the facts you may consider to have been proved beyond reasonable doubt based on the evidence led in this case and the reasonable inferences you

would draw from those proven facts, you have to ask yourselves, firstly, whether you are satisfied beyond reasonable doubt that the complainant had given you a truthful and a reliable account. Thereafter, you should decide whether the third and fourth elements of the offence of rape have been proven beyond reasonable doubt given the evidence you would consider to be credible and reliable.

40. You must remember to assess the evidence for the prosecution and the defence using the same yardstick but bearing in mind that always the prosecution should prove the case against the accused beyond reasonable doubt.
41. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case against an accused beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
42. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise:
 - (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject his evidence. But if you disbelieve him, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether the prosecution has proved all the elements beyond reasonable doubt.

If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

43. Any re-directions?
44. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge (second count) against the first accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.



A handwritten signature in blue ink, appearing to read 'Vincent S. Perera'.

Vincent S. Perera

JUDGE

Solicitors;

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