

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 124 OF 2017

BETWEEN : STATE

AND : EPELI LELEAVONO

Counsel : Mr. S. Seruvatu for State
Accused in person

Date of Hearing : 16th of May, 2019

Date of Closing Submissions : 16th of May, 2019

Date of Summing Up : 17th of May, 2019

SUMMING UP

1. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. As I explained you before the commencement of the hearing, we have different functions. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
2. Your function is to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.
3. I may comment on the facts if I think it will assist you when considering the facts. While

you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard any comment I make about the facts of this case, unless it coincides with your own independent opinion.

4. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The purposes of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. Therefore, the opening address of the prosecution is not evidence. The closing addresses of the counsel of the prosecution and the accused are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
5. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. You are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I make my judgment.
6. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

Burden and Standard of Proof

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

Information and elements of the offences

10. The accused is being charged with one count of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act and one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offences are before you, therefore, I do not wish to reproduce it in the summing up.
11. The main elements of the first count of Rape are that;
 - i) The Accused,
 - ii) Penetrated into the vagina of the complainant with his fingers,

- iii) The complainant did not consent to the accused to penetrate into her vagina with his fingers,
 - iv) The Accused knew or believed or reckless that the complainant was not consenting for him to insert his fingers in that manner.
12. The main elements of the second count as charged are that;
- i) The Accused,
 - ii) Penetrated into the vagina of the complainant with his penis,
 - iii) The complainant did not consent to the accused to penetrate into her vagina with his penis,
 - iv) The Accused knew or believed or reckless that the complainant was not consenting for him to insert his penis in that manner.

Accused

13. It is the onus of the prosecution to prove beyond reasonable doubt that it was the accused who committed these offences to the complainant.

Penetration

14. Evidence of slightest penetration of the fingers and/ or the penis of the accused into the vagina of the Complainant are sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

Consent

15. Let me now draw your attention to the issue of consent. It is your duty to decide whether the prosecution has proven beyond reasonable doubt that the complainant did not give her consent to the accused to insert his finger and then his penis into her vagina.

16. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of rape, the complainant consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. A consent obtained through fear, by threat, by exercise of authority, by use of force or by intimidation could not be considered as a consent given freely and voluntarily. A submission without physical resistance by the complainant to an act of another person shall not alone constitute consent.
17. The complainant must have the freedom to make the choice. It means that she must not being pressured or forced to make that choice. Moreover, the complainant must have a mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. It should not be an optional choice. The consent of a person should not be assumed.
18. If you are satisfied, that the accused had inserted his finger and/ or his penis into the vagina of the complainant and she had not given her consent, you are then required to consider the last element of the offence, that is whether the accused honestly believed or knew or reckless that the complainant was freely consenting for this alleged sexual act. I must advice you that belief in consent is not the same thing as a hope or expectation that the complainant was consenting. You must consider whether the accused knew either that the complainant was not in a condition or a position to make a choice freely and voluntarily, or the complainant had made no choice to agree to sexual act. If you conclude that the accused believed or knew that the complainant was consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that was prevailed at the time of the alleged incident.

Separate Consideration

19. The accused is charged with two separate counts. You have to consider them separately. If you find the accused guilty to one count, that does not automatically make the accused guilty to the other count. Likewise, if you find the accused not guilty to one count, that

does not make him not guilty to other count. You have to give separate consideration to each of these two counts.

Corroboration

20. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. It means that if you are satisfied with the evidence given by the complainant and accept it as reliable, credible and truthful; you are not required to look for any other evidence to corroborate the account given by the complainant.
21. One or more of you may have assumptions as to what constitutes rape, what kind of person may be the victim of rape, what kind of person may be the rapist or what a person who is being or has been raped will do or say. Though such assumptions are natural in ordinary life, it is important that you must leave behind such assumptions as there is no stereotype of circumstances for a rape, a rapist or a victim of rape.
22. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety of ways. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgment strictly on the evidence that you have heard from the witnesses during the course of the hearing.
23. You must be mindful that not to bring in to the assessment of the evidence any preconceived views as to how a victim of rape in a trial such as this should react to the experience that the victim had gone through. Every person has his or her own way of coping with such incident. Some may display obvious signs of distress and others may not. Demeanors of the victim in the court while giving evidence is not necessarily a clue to the truth of the victim's account.

Evidence of the Prosecution

24. Let me now remind you briefly the summary of the evidence presented by the prosecution

and the defence during the course of the hearing. I trust that you can properly and correctly recall all of the evidence adduced during the hearing.

25. The complainant was approached by the accused through one of her cousin brothers, Siti, to work at his shop on the 22nd of May 2017. The complainant had agreed to the offer and had gone to the shop on the same day. The accused had promised that he would drop her home when the shop is closed at 10 p.m. She had been working at the shop till 24th of May 2017. After closing the shop in the evening of 24th of May 2017, the complainant had waited for the accused to come and drop her to her home. However, the accused came around 2 a.m. and entered into the shop. He had brought another girl and kept her in the kitchen. The complainant had asked the accused to take her home, which the accused refused to do it. He had asked the complainant to stay in the night and he would drop her on the following morning. She had repeatedly requested the accused, but he had threatened her saying do what he asked her to do.
26. The complainant had then told the accused that he and the girl, whose name is Megi, could use the bedroom and she would use the kitchen. She has then gone into the bedroom to get a pillow, where the accused had pulled her towards him and asked her to sleep beside him. When she refused to do that, the accused had threatened her that he would chop her into pieces and put them into a garbage bag and keep it in the fridge. She was afraid and scared and did what the accused asked her to do. She laid down beside the accused. The accused was laying in between the complainant and Magi. He had then requested the complainant to remove her cloths, but she refused. He then put his hand into her short and tore off her pink colour underwear. He had then inserted his finger into her vagina. She felt that his finger went into her vagina as she felt the pain. Having done that, he had asked Magi to sit on his mouth and the complainant to sit on his penis. The complainant had refused it, but the accused had threatened her again saying that he would chop her into pieces and put them into the fridge. With the fear, the complainant had done what the accused had asked her to do. She had felt the penis of the accused was inserting into her vagina.
27. You have heard that the accused cross examined the complainant, asking who is Ben, that she had been referring in the statement that she made to the police. The complainant said

that the accused is known as Ben that why she had used the name of Ban in the statement. After she made the statement that she found the real name of the accused is not Ben, but Epeli Leleavono. Moreover, the complainant said that she tried to contact her cousin brother after this incident, but he did not pick the phone.

28. You have further heard the complainant explaining another incident of sexual encounter with the accused. The learned counsel for the prosecution in his closing addresses requested you to disregard it as that incident does not come under any of the offences for which the accused is charged for in this matter. You must disregard those evidence pertaining to that particular sexual encounter from your deliberation and must not make any prejudicial conclusion about the accused or the complainant based on those evidence.

Evidence of Defence

29. At the conclusion of the prosecution case, the accused was explained about his rights in defence. The accused opted to give evidence on oath.
30. The accused denies this allegation and said that he was on his way from Suva during the early hours in the morning of 25th of May 2017. He had arrived to his shop around 7 a.m. and gave the complainant a bread to have her breakfast. He had further told her that he would drop her home after having a sleep. However, he was shocked to find that one boy came and tapped on his shoulder to wake him up, asking for cigarette. Then he found the complainant had left the shop and \$300 was missing from the shop. The accused had made a complainant about the missing money either on the 26th or 27th of May 2017. Week after this incident, the police came to his shop, inquiring about this allegation.
31. I have summarised the evidence presented during the course of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence and recall yourselves on all of them. What I did only was to draw your attention to the main items of evidence and help you in recalling yourselves of the evidence.

Analysis and Directions

32. The prosecution alleges that the accused had forcefully inserted his fingers into the vagina of the complainant and then forced her to sit on his penis, whereby the penis of the complainant penetrated into her vagina without her consent. The defence denies the allegation and said that the accused was on his way back from Suva during the early hours of the morning of 25th of May 2017. Accordingly, the two main issues that you have to determine are; firstly whether this alleged incident actually happened. Then you have to determine whether it was done by the accused

Reliability of Evidence

33. In order to do that you have to evaluate the evidence presented by the prosecution and defence and determine the reliability and credibility of evidence given by the witnesses. You must be satisfied that you can rely on the evidence as the true, reliable, and credible evidence. In order to do that, you have to be satisfied that evidence is free from mistakes, errors and inaccuracies. If you find the evidence is free from such mistakes, errors and inaccuracies, you can take the evidence into consideration as reliable evidence.

Credibility of Evidence

34. The assessment of credibility of evidence does not concern with unintended inaccuracy, mistakes or errors. It is focused on the lies or inaccurate facts that are intentional and motivated attempts to deceive. The credibility depends on the individual who gives evidence, his or her motivations, his or her relationship to and the reaction to the particular situation.
35. Evaluation of the reliability and credibility of evidence will assist you to determine what evidence you may accept and what part of the evidence you may refuse. In doing that, you may accept or reject such parts of the evidence as you think fit. It is for you to decide whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.

36. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking in the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with his or her own evidence but also with other evidence presented in the case.
37. It is your duty to consider the demeanour of the witnesses, how they react to being cross examined and re-examined and were they evasive, in order to decide the credibility of the witness and the evidence.
38. Moreover, you must bear in your mind that a witness may tell the truth about one matter and lie about another; he or she may be accurate in saying one thing and not accurate in another thing.

Defence of Alibi

39. Let me now take your attention to the defence of the accused, which is founded on the contention that the accused was not at the shop as he was on his way back from Suva during the time material to this alleged incident.
40. The accused is not obliged to prove his innocence and also not required to present evidence of other witnesses on his behalf. However, in this hearing, the accused elected to give evidence. Therefore, you have to take into consideration the evidence adduced by the defence when you determine the issues of fact of this case.
41. The accused's defence is alibi. The accused claims that he was not present at the scene of the alleged crime as he was on his way from Suva. He further alleges this is a fabrication made by the complainant.
42. Even though the accused have put forward the defence of alibi, the burden of proving the case against the accused still remains on the prosecution. The prosecution must prove so

that you are sure that it was the accused who committed these two offences. In doing that the prosecution has to disprove the alibi defence put forward by the defence. That does not mean, the prosecution is required to provide specific evidence to disprove that the accused was not on his way from Suva. If you believe and accept the evidence of the witnesses of the prosecution as credible, reliable and truthful beyond reasonable doubt, then the prosecution has discharged its duty of disproving the alibi defence of the accused.

43. If you conclude that the alibi of the accused is true or may be true, then the accused cannot participate in this alleged crime and you must find the accused not guilty. If, on the other hand, you are sure, having considered the evidence carefully, that the accused's alibi is false, that is a finding of fact which you are entitled to take into account when judging whether he is guilty. But do not jump to the conclusion that because the alibi put forward is false the accused must be guilty. You should bear in mind that sometimes an alibi is invented because the accused thinks it is easier than telling the truth. The main question for you to answer is: are we sure that this alleged incident involving the accused actually took place as claimed by the prosecution.
44. In respect of the defence of alibi, the accused is not required to prove beyond reasonable doubt his alibi defences. The burden of the accused to prove his alibi is evidential burden. It means that the accused has to adduce or point to evidence that suggests a reasonable possibility that he was at somewhere else when this alleged offence took place.
45. Accordingly, if you believe or may be believe that there is evidence that suggest a reasonable possibility that the accused was not present at the scene of crime and he was on his way from Suva, you can find the accused not guilty.
46. You heard the accused cross examined the complainant asking why she did not try to call police emergency number to get help as she had her mobile phone in her hand. The complainant explained that she actually tried to contact her cousin brother, who is a police officer but he did not respond. Moreover, the accused cross examined the complainant about using of the name Ben and Epeli in the statement that she made to the police. You are allowed take these evidence into consideration when you determine the reliability and

credibility of the evidence given by the complainant. However, it would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible. The experience of the courts is that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the nearest person they see. Others, who react with shame or fear or shock or confusion, or perhaps due to cultural taboos, do not complain or go to authorities for some time. It takes a while for self confidence to reassert itself. A late complaint does not necessarily constitute a false complaint, likewise an immediate complaint does not necessarily constitute a true complaint. It is matter for you to determine whether these issues affect the credibility and reliability of the evidence given by the complainant.

Final Direction


47. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of rape as charged under the count one, you can find the accused guilty to the said offence.
48. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged, you must find the accused not guilty to the said count.
49. Likewise, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under the count two, you can find the accused guilty to the said offence.
50. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged, you must find the accused not guilty to the said count.

Conclusion

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



At Lautoka
17th May, 2019


R. D. R. Thushara Rajasinghe
Judge

Solicitors : Office of Director of Public Prosecution