

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 160 OF 2016

BETWEEN : STATE

AND : RAJIV KUMAR

Counsel : Mr. J. Niudamu for State
Ms. K. Vulimainadave for the Accused

Date of Hearing : 28th and 29th of May, 2019

Date of Closing Submissions : 29th of May, 2019

Date of Summing Up : 30th 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 opening address of the prosecution is not evidence. The closing addresses of the counsel of the prosecution and the defence 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) (a) of the Crimes Act. The particulars of the offence are before you, therefore, I do not wish to reproduce it in the summing up.

11. The main elements of the offence of Rape 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.

Admitted Facts

12. I now take your attention to the admitted facts, which are before you. They are the facts that the prosecution and the defence have agreed without any dispute. Hence, you are allowed to take them into consideration as proven facts beyond reasonable doubt.
13. According to the admitted facts, the accused had admitted that the complainant and himself had consumed alcohol at a party which they both attended on the evening of 6th of August 2016. He had further admitted that he had sexual intercourse with the complainant at the early hours of the 7th of August 2016 at the official quarters of the accused. Hence, the elements of the identity of the accused and the penetration of the penis of the accused into the vagina of the complainant are not disputed. Accordingly, you are allowed to take those facts into consideration as the facts proved beyond reasonable doubt. In view of the admitted fact, the main issue in this matter is whether the complainant had given her consent or was in a position to

make a choice freely and voluntarily to give her consent to the accused to insert his penis into her vagina.

Consent

14. Let me take 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 penis into her vagina.
15. 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.
16. The complainant must have the freedom to make the choice. It means that she must not be 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.
17. If you are satisfied, that the accused had inserted 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 intercourse. I must advise 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 took place.

Corroboration

18. 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.
19. 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.
20. 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.
21. 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. Demeanours 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

22. 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.
23. The complainant had joined the Wananavu Beach Resort as a trainee chef in the early August 2016. On the 6th of August 2016, a week after she joined the Resort as a trainee chef, the accused, who was the head chef, had invited her to go to an engagement party at one Shivanjani, who is also a coworker at the Resort. The accused had invited her around 10 p.m. just before she completed her shift for the day. The complainant had answered to the invitation, saying that she would call her cousin and inform him. The accused had then told her that he had already informed the wife of her cousin. The complainant came to Rakiraki for the first time to attend this employment and was staying with her cousin brother.
24. Once the complainant completed the work, she came to main gate with the accused and got into a taxi. The taxi first came near to main road, where the house of her cousin is located. The complainant had asked the accused to drop her there, but he had told her that "you don't trust me and I am your boss". The accused had then taken the complainant to the house of Binesh. On their way to the location, the accused bought six bottles of beer. She found another employee of the Resort and they started to drink beer. Binesh first gave her the glass of beer. After the first glass

of beer, she had told the accused that she does not drink beer. The accused had shouted at her, saying "if you are not drinking there is no use of bringing you here". The accused had forced her to drink. They have brought a bottle of red label whisky and mixed it with beer and drank. The complainant could not recall how many glass of beer mixed with whisky she had consumed. The wife of her cousin had then called her and found out that she was there. The wife of her cousin got angry as she had not informed them about her whereabouts. The complainant then asked the accused whether he had actually informed the wife of her cousin. The accused shouted and told her to switch off the mobile phone.

25. After a while, the accused went outside and called the complainant to come outside with him. The accused then said that if you want to work and you want to get promoted, you have to love me and I should be your partner. The complainant had then gone inside without telling anything. The complainant they tried to get a call to her cousin to come and pick her, but the accused had shouted her for using the mobile phone and chased her out of the house. The complainant took her bag and walked alone the road, in a while a car came and accused asked her to get in as he would go and drop her. When she got into the car, she wanted to vomit. She got down from the car and vomited. Once she got back into the car, she felt nothing and blackout. She did not feel or knew anything until she woke up in the following morning. When she woke up, she found the accused was on top of her and having sexual intercourse with her. She felt his penis was inside her vagina. The complainant found that she was on the bed in the quarters of the accused and naked. The accused then tried to put his penis into her mouth, which she tried to avoid. At the same time, someone knocked at the door of the house. The accused went out and found that it was Ma, the wife of her cousin. Ma was really angry with the complainant and told her to pack her bags and go back to her home. The complainant found that the mobile phone and bag were missing.

26. When she went to her cousin's house, she found one of her nieces was there. The complainant had asked the niece to give a call to her mobile phone. Then they found the mobile phone was with the police. The police came to their home and handed it over to the complainant. The complainant said that she wanted to tell her cousin about this incident, but was scared of him as he was still angry with her. Moreover, she said that she felt ashamed and embarrassed to tell that to the police officers. The complainant had gone to the town with the police. Then went to Suva. When she was in Suva, she called her mother. Her mother was surprised to hear that she was back in Suva. The complainant then told her about this incident. The complainant said that she is confident to tell that to her mother as she is very close to her and share all her secrets with her mother.
27. During the cross examination, the complaint denies the proposition of the defence that she willing participated in the sexual intercourse with the accused. The complainant said that she did no consent to the accused to have sexual intercourse with her.
28. The mother of the complainant in her evidence said that she was surprised that the complainant had gone back to Suva on the 8th of August 2016. When she received the call of the complainant, stating that she was in Suva, the mother of the complainant was at Balekinaga village in Ra. The complainant had told her that the chef of the resort had taken her to the party and then took her to his quarters. The complainant was unconscious as she was drunk. When she woke up and found the accused was having sexual intercourse with her.
29. The last witness of the prosecution is Setareki Raiyawa. He was sharing the same quarters with the accused at the Resort. He worked at the Resort as the Event and Wedding Planner in 2016. He could recall that on the early hours of the 7th of August

2016, the accused came and knock on the door, while he was in his room. He had asked the accused where was his key, for which the accused replied that he does not know. After that Setareki went and opened the door for the accused. He then stood beside the door to the accused to enter in. There was a young girl with the accused. She fell down on the floor when she entered in. She was drunk and lifeless. The accused pulled and dragged her into his room. Setareki then went back into his room. In a while he heard a sound like a shoe was thrown at the wall. Then he heard the sound of moan from the room of the accused. It was like someone was having sexual intercourse.

Evidence of the Defence

30. At the conclusion of the prosecution case, the accused was explained about his rights in defence. The accused opted to give evidence on oath.
31. The accused in his evidence denies the allegation and said that he had sexual intercourse with the complainant with her consent. On the 6th of August 2016, the accused was invited by Binesh to visit his house. He had then invited the complainant to go with him. The accused went to Binesh's house before the complainant complete her evening shift at the Repost. Around 10.30 pm. he received a call from the complainant, informing him that she finished her work and the accused to come and pick her. The accused then went back to the Resort. Having met the complainant at the resort, they both had gone to Binesh's place. At the Binesh place, they have consumed beer and wine. Once they done, the accused had looked for a same taxi that he used to come to Binesh place. However, the driver of the taxi did not respond to him. The son of the Binesh then dropped the accused and the complainant back to the Resort. The complainant said that she does not want to go back to her cousin's place and came with him to his quarters.

32. When they came to the quarters, he found that he had left the key inside the house. He had to knock on the door and get his roommate up. His roommate then opened the door. The complainant did not fall down, but she tripped backward but she held his back. Once they have gone into his room, the accused had asked the complainant to go and have a shower as her clothes were stained with the vomit. While she was having shower, the accused went to the kitchen and got some food. Once she is back after the shower, they ate the food. Then they had sexual intercourse with the consent of the complainant. While having the sexual intercourse, they both fell into sleep. He woke up with the sound of someone was knocking on the door. When he woke up, he found that he had fallen into sleep on the top of the complainant. He hurriedly got dress up and went to open the door. He found Makelesi was at the door, looking for the complainant.
33. I have summarized 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

34. The prosecution alleges that the accused had taken the complainant to the house of Binesh and forced her to drink beer mixed with whisky. He had forced the complainant to come with him saying that he is the boss of her. Once the complainant got drunk and lost her conscious, he had taken her into his quarters and has sexual intercourse with her by inserting his penis into her vagina. According to the agreed facts and the evidence presented by the defence, the accused admits that he and the complainant consumed alcohol at the house of Binesh and then came to his quarters.

They then had sexual intercourse with her consent as she was also actively participated in the sexual intercourse. Accordingly, the main dispute that you have to determine is whether the complainant gave her consent to the accused to insert his penis into her vagina or whether she was in a position to feebly and voluntarily give her consent to have sexual intercourse with the accused. If you are satisfied that she has not given or was not in a position to make that choice freely and voluntarily, then you have to determine whether the accused knew or believed or reckless that the complainant was not consenting for him to insert his penis in that manner.

35. The prosecution and the defence do not dispute that the complainant had consumed alcohol at the house of Binesh. Accordingly, you have to determine whether she was drunk to the extent where she was not in a mental capacity to freely and voluntarily give her consent to the accused to insert his penis into her vagina. You should not make any inference or an opinion that the complainant had given her consent to have sexual intercourse merely on the ground that she had gone and consumed alcohol with the accused. Just because she had consumed alcohol with the accused does not mean that she has automatically given her consent to the accused to have sexual intercourse with her.
36. As I explained above, if you are satisfied, that the accused had inserted 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 intercourse. In order to do that, you have to consider the whole of the evidence adduced during the hearing and determine 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 intercourse. 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 were prevailed at the time of the alleged incident.

Delay

37. It has been suggested to you by the learned counsel for the defence in her closing address that the fact the complainant did not report what had happened to her as soon as possible makes it less likely that the complaint she eventually made was true. It is a matter for you to consider and resolve. The complainant did not tell the wife of her cousin when she came to the accused's place, looking for the complainant. She has not informed her cousin when she went back to her cousin's place. Moreover, she has not informed the police when she received her mobile phone from the police. Furthermore, you heard that the complainant did not tell the police when she traveled with them to the town.
38. 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 court is that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. It takes a while for self- confidence to reassert itself. There is, in other words, no classic or typical response. A late complaint does not necessarily signify a false complaint, likewise an immediate complaint does not necessarily demonstrate a true complaint.
39. You have heard the evidence of the complainant, where she said that she was afraid of her cousin when she went back to his place after this incident took place. She was ashamed and embarrassed to tell this to the police and decided to tell it to her mother

when her mother called her on her mobile phone. The complainant said that she shares everything with her mother.

40. As I said before, it is a matter that you have to decide. When you do, you should not assume that there is any classic or typical response to an unwelcome demand for sexual intercourse. The experience of the courts is that people who are being subjected to non-consensual sexual activity may respond in a variety of different ways.

Evidence of Defence

41. I now kindly draw your attention to the evidence adduced by the accused. The accused elected to give evidence on oath. The accused is not obliged to give evidence. He does not have to prove his innocence. However, the accused decided to give evidence. Therefore, you have to take into consideration the evidence adduced by him when determining the issues of fact of this case.
42. Accordingly, it is for you to decide whether you accept or not the evidence given by the accused. If you consider that the account given by the accused is or may be true, then you must find accused not guilty.
43. If you neither believe nor disbelieve the version of the accused, yet, it creates a reasonable doubt in your mind about the prosecution's case. You must then find the accused not guilty.
44. Even if you reject the version of the accused that does not mean that the prosecution has established that the accused guilty for this offence. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the accused has committed this offence as charged in the information.

Brown's Rule

45. You have heard the evidence of accused, where he said that the complainant did not actually fall down when she entered into the house, but she tripped off when she climbed the steps but managed to hold him from his back. However, you may recall that the learned counsel for the defence did not put that version of events to Setareki, when he gave evidence about the falling down of the complainant when she entered into the house.

46. It is a rule of evidence in criminal trials that if one party is going to present a different version of events from the other, witnesses for the opposing party who are in a position to comment on that version should be given an opportunity to comment on them. The failure to such questions could be used to draw an inference that the accused did not give that account of events to his counsel. That in turn, may have a bearing on whether you accept what the accused said on that particular point or event. However, before you draw such an inference you should consider other possible explanations for the failure of counsel to put questions about such different versions.

47. In preparation of the trial, usually the counsel would be given instructions by his client, that is, what his client has to say about the matter in written form or in oral form or both. The counsel then uses that information to ask questions from the witnesses of the opposing side. However, communication between individuals is seldom perfect; misunderstandings may occur. The counsel may miss something that his/her client has told him. Amidst the pressures of a trial, counsel may simply forget to put questions on an important matter. You should consider whether there are other reasonable explanations for the failure to ask the above stated witness of the prosecution about such different versions. You should not draw any adverse

inference against the accused's credibility unless there is no other reasonable explanation for such failure.

Evaluation of Evidence

48. As I said before, it is your duty to determine whether the prosecution has established beyond reasonable doubt that the accused inserted his penis into the vagina of the complainant without her consent. In order to do that you have to evaluate the evidence presented by the prosecution and the defence and determine the reliability and credibility of evidence given by the witnesses.

Reliability of Evidence

49. You must be satisfied that you can rely on the evidence as 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

50. 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/her motivations, his/her relationship to and the reaction to the particular situation.
51. 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 judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.

52. 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/her own evidence but also with other evidence presented in the case.
53. 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. In doing that you have to keep in your mind that some witnesses are not used to giving evidence in court and may find the different environment in the court house distracting.
54. Moreover, you must bear in your mind that a witness may tell the truth about one matter and lie about another; he may be accurate in saying one thing and not accurate in another thing.

Final Direction

55. 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, you can find the accused guilty to the said offence.

56. 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

57. 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.

58. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



At Lautoka

30th May, 2019

R. D. R. Thushara Rajasinghe

Judge

Solicitors : Office of Director of Public Prosecution
Office of the Legal Aid Commission