

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 51 OF 2017

BETWEEN : STATE

AND : ETUATE VILIMONI SAUKURU

Counsel : Ms. P. Lata for State
Ms. Bilivalu with Ms. Reddy for the Accused

Date of Hearing : 11th and 12th of June, 2019

Date of Closing Submissions : 12th of June, 2019

Date of Summing Up : 13th of June, 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 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 Indecently Annoying a Person,

contrary to Section 213 (1) (b) of the Crimes Act and one count of Rape, contrary to Section 207 (1) and (2) (b) 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 Indecently Annoying a Person are that;

- i) The accused,
- ii) With intend to insult the modesty of the complainant,
- iii) Intrude into the privacy of the complainant by poking her back with a stick

12. In this regard, you have to satisfy beyond reasonable doubt that the accused had used a stick to pork her backside. You must then determine whether the accused had intruded into her privacy and intended to insult the modesty of the complainant by doing that.

13. 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 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.

Admitted Facts

14. 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.
15. According to the admitted facts, the accused had admitted that he was waiting outside the toilet when the complainant went into the toilet to relieve herself around 1.00 pm on the 21st of March 2015. Accordingly, the identity of the accused and his presence at the scene of this alleged incident have not been disputed by the defence.

Accused

16. As I explained in respect of the first and second count, it is the onus of the prosecution to prove beyond reasonable doubt that it was the accused who committed these offences to the complainant. In doing that you have to take into consideration that the accused has admitted that he was present during the drinking session and also was waiting outside the toilet when the complainant went into the toilet.

Penetration

17. Evidence of slightest penetration of the fingers of the accused into the vagina of the Complainant is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

Consent

18. 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.
19. 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.
20. If you are satisfied, that the accused had inserted his fingers 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 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.

Separate Consideration

21. 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

22. 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.
23. 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.
24. 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.

25. 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 complainant in the court while giving evidence is not necessarily a clue to the truth of the complainant's account.

Evidence of the Prosecution

26. Let me now remind you briefly the summary of the evidence presented by the prosecution. This is a very short hearing where the prosecution presented evidence of only two witnesses. I trust that you can properly and correctly recall all of the evidence adduced during the hearing.
27. The complainant had gone to her uncle's place to see her cousins and drink grog on the evening of 20th of March 2015. The accused, Emily, Laite, Senigiagia, uncle Meli, aunty Ili, and Susana were at the drinking session. When she joined the drinking party, the accused had already joined and started to drink. They have continued the drinking session till the next morning as it finished around 6.30 a.m. The complainant and the girls then just sit around and talked until 10 a.m. She then went to sleep in a room with Senigiagia.
28. During the grog session, the accused had praised her hair style and typical look. All of them had made jokes and the complainant laughed with them, though she did not make any jokes. She was not concerning about the accused and was listening to the

talks and enjoyed the session. The accused once came and sat next to her, and then she greeted him saying "bula Eddie". You may recall that the complainant denies that she was joking and talking to the accused during the drinking session. Moreover, the complainant and Senigiagia said that they were not joking about the complainant and the accused during the session.

29. While the complainant was sleeping, she felt that someone was touching her thighs. She opened her eyes and looked around and found the accused was standing close to the door of the kitchen. She had not actually seen who had touched her thighs. The accused was calling her to come and have a shower with him. The complainant then lied flat on her body, while looking at the accused. You have seen that the complainant demonstrated the way she was laying on the floor. The accused then took a long stick and poked it on her backside and kept on calling her to come and have shower with him. The complainant told the accused that she will not join him for shower. The complainant had woken up her friend Senigiagia and told her what the accused was doing. Senigiagia then gave her hugged and comforted her and then both went back to sleep. Senigiagia said that when she was told by the complainant about this incident, the accused was not to be seen there. She had thought that the accused would stop doing this to the complainant after that.
30. The complainant had then got up around 1 pm and went to the toilet. Senigiagia then went to the kitchen after the complainant went to the toilet. Senigiagia had seen the complainant was entering into the toilet. Once she relived herself, the complainant tried to step out of the toilet. At that point of time, she found the accused was standing at the door of the toilet. He pushed her into the toilet and held her back to the wall. He then closed the door and tried to kiss her. The accused then inserted his middle and index fingers into her vagina. He twisted his fingers and then took them

out. The complainant saw the blood in his fingers. He then said that it was good. The complainant said in her evidence that the accused was tough and masculine. She further said that he really inserted his fingers in to her vagina and it was hard. The complainant was wearing a boxer type undergarment and a sulu-vakatoga when she was sitting at the drinking session. She could not recall whether she was in a same clothes when she went in to the toilet. However, she could recall that she was wearing her sulu-vakatoga when she went to the toilet. The accused inserted his fingers through the bottom of her sulu-vakatoga. Meanwhile, the complainant was struggling to get herself released and also tried to get close to the door. She told the accused what are u doing and don't do it, when the accused tried to push her into the toilet. She had then shouted calling her friend's name. You have seen the complainant demonstrated the way she shouted the name of her friend. She managed to get herself released and opened the door and came out. Senigiagia heard the complainant shouting her name three times. She had gone near to the door of the sitting room facing the toilet and was waiting. She then saw the complainant was coming out. When Senigiagia came to the door, she saw Susana also had been sitting there. The complainant was shocked and shaking. The complainant said that her knees got weaken when she came out. The complainant had told Senigiagia about what the accused did to her inside the toilet. When the complainant related the incident to Senigiagia, Susana was also sitting at the left side. At that time, the uncle and the aunty of the complainant were not at home. The complainant had waited until her aunt came and related this incident to her. The aunty had not responded to it, the way the complainant expected. The complainant later reported this matter to the police.

Right to Remain Silent

31. At the conclusion of the prosecution case, the accused was explained about his rights in defence. The accused opted not to give evidence on oath and exercised his right to remain silent. The accused does not have to give evidence. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing. It does nothing to establish his guilt.
32. 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 the evidence of this hearing. 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

33. According to the evidence presented by the prosecution, the accused had poked the back side of the complainant with a stick while she was sleeping in the room. He had called the complainant to come and have a shower with him, which the complainant had refused. The complainant then went to sleep again. When she woke up, she had gone to the toilet to relieve herself. While she was stepping out of the toilet, the accused came and pushed her into the toilet and forcefully inserted his fingers into her vagina. The learned counsel for the defence suggested to the complainant that the accused never inserted his fingers into her vagina as claimed. The complainant refused the said suggestion of the defence.

Evaluation of Evidence

34. I now take your attention to the directions of the evaluation of evidence.

Reliability of Evidence

35. 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

36. The assessment of credibility of evidence 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, her motivations, her relationship to and the reaction to the particular situation.
37. 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 determine whether a witness is telling the truth and is correctly recalling the facts about which she has testified.
38. 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 her own evidence but also with other evidence presented in the case.

39. 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.
40. Moreover, you must bear in your mind that a witness may tell the truth about one matter and lie about another; she may be accurate in saying one thing and not accurate in another thing.
41. You have heard the learned counsel for the defence in her closing address, suggested you to take into consideration of the evidence of the complainant in order to decided what she said in evidence is probable or improbable. The learned counsel suggested you that it is not possible for the accused to insert his fingers through the undergarment of the complainant as she was wearing an undergarment like a boxer shape. Moreover the learned counsel pointed out that if he inserted his fingers into the vagina of the complainant with the undergarment, could it be possible to have blood on his fingers. These are the matters you have to determine when you make your opinion. You have to mindful that a slightest penetration of the fingers into the vagina of the complainant is sufficient to complete the element of penetration. Furthermore, you do not need to necessarily remove the undergarment to insert the fingers into the vagina.. What you have to determine is whether the fingers of the accused had inserted into the vagina of the complainant.
42. The following facts were highlighted by the learned counsel for the defence that;
 - i) The complainant did not shout when she was pushed into the toilet,

- ii) Senigiagia was waiting at the door until the complainant came out,
 - iii) The complainant did not take any action when the accused poked on her backside with the stick,
 - iv) The complainant took four days to report this matter to the police,
43. Having pointed out the above facts, the learned counsel for the defence suggested to you to take those facts into consideration to determine whether it less likely that the complaint the complainant eventually made was true. It is a matter for you to consider and resolve. In doing that you could take into consideration that the complainant in her evidence said that she said “What are you doing, don’t do it” to the accused when he pushed her into the toilet and then she shouted calling Senigiagia. The complaint said that she did not leave the house after the accused poked on her backside because she wanted to wait and complainant it to her uncle. Moreover, you may recall that Senigiagia said that she hugged the complainant and then went to sleep thinking that the accused would not do it again. In respect of the delay of reporting this matter, the complainant said that when she told her aunty, who is a police officer, did not react the way she expected. She then went to her grandmother’s place and she went to the police station and reported the matter.
44. 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.

Evidence of Recent Complaint

45. You have heard that the complainant had told Senigiagia that the accused inserted his fingers into her vagina. She told it to Senigiagia soon after she came out of the toilet. Senigiagia in her evidence said that the complainant related the incident to her. This form of evidence is known as evidence of recent complaint. It is not an evidence as to what actually happened between the complainant and the accused. Senigiagia was not present and witnessed what happened between the complainant and the accused.
46. You are entitled to consider the evidence of recent complaint in order to decide whether or not the complainant has told the truth. It is for you to decide whether the evidence of recent complaint helps you to reach a decision, but it is important that you must understand that the evidence of recent complaint is not independent evidence of what happened between the accused and the complainant. It therefore cannot of itself prove that the complaint made by the complainant is true.

Inconsistencies and omissions with the previously made statement

47. Madam and Gentleman, you have heard that the learned counsel for the accused cross examined Senigiagia about the omissions and inconsistencies in the statement that she made to the police and the evidence given in the court. It has not been recorded in the statement that the complainant had told Senigiagia that the accused had asked the complainant to suck him. Senigiagia said that she told them to the police, but does not know why it has not been recorded. You are allowed to take into

consideration about the inconsistencies and the omissions between such statements and the evidence given in court, when you consider whether Senigiagia is believable and credible as a witness. However, the statement itself is not evidence of the truth of its contents. It only assists you to determine the credibility and reliability of the witnesses.

48. It is 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. If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to 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 such witness.

Final Directions

49. 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 Indecently Annoying a Person as charged under the count one, 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 Indecently Annoying a Person as charged, you must find the accused not guilty to the said count.

51. 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.
52. 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

53. 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.
54. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



At Lautoka

13th June, 2019

R. D. R. Thushara Rajasinghe

Judge

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