

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 58 of 2018

BETWEEN: STATE

PROSECUTION

AND: PETARIKI LESUMA

ACCUSED PERSON

Counsel: Ms. L. Bogitini for State
Ms. K. Boseiwaqa for Accused

Date of Hearing: 17 June 2019

Date of Closing Submission: 17 June 2019

Summing Up: 18 June 2019

SUMMING UP

The complainant's name is suppressed.

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. However, 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 witness 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 a conversation with the complainant in the sitting room on the night of 11th of June 2018. He had then took the complainant to the bedroom and asked the complainant if he could hug her. He then hugged her and the complainant started to cry. The accused had asked the reason for her cry, for which the complainant did not answer. He then kissed her lips and then sucked her breast. He had then kissed her vagina and pressed his penis on her vagina over the short that she was wearing at that time.
14. According to the admitted fact, the main dispute in this matter is whether the accused inserted his penis into the vagina of the complainant and the complainant did not consent to the accused to insert his penis into her vagina.

Identity of the Accused

15. In view of the admitted facts, there is not dispute between the parties regarding the identity of the accused.

Penetration

16. Evidence of slightest penetration of the penis 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

17. 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.
18. 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.
19. 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 recklessly 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.

Alternative Count I

20. If you find the accused did not penetrate the vagina of the Complainant with his penis as charged, you are then allowed to consider a lesser alternative count of “Attempt to Commit Rape, though it is not formally charged in the information. The main elements of the offence of “Attempt to Commit Rape” are that:
- i) The accused,
 - ii) Attempt to penetrate 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.
21. In respect of the element of attempt, you have to consider two things. First is whether he intended to penetrate the vagina of the complainant with his penis without her consent. The second is, with that intention, whether he did something which was more than mere preparation for committing that offence. It is for you to decide what he did was more than mere preparation.
22. Accordingly, you have to be satisfied that the accused had an intention to penetrate the vagina of the complainant with his penis without her consent and with that intention he attempted to penetrate the vagina of the complainant with his penis.

Alternative Count II

23. If you find that the accused neither guilty of the offence of Rape nor the offence of Attempt to Commit Rape, you are still allowed to consider another alternative count, that is Sexual Assault though it is not formally charged in the information. The main elements of the offence of Sexual Assault are that:
- i) The accused,
 - ii) Unlawfully and Indecently,
 - iii) Assault the Complainant.
24. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act as indecent. It is your duty as Assessors to consider and decide whether the acts of rubbing of the penis of the accused over the vagina of the Complainant, sucking the breast of the complainant, kissing lips and kissing her vagina over her short, are indecent acts, making it a sexual assault.

Corroboration

25. 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.
26. 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

27. 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.
28. 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

29. Let me now remind you briefly the summary of the evidence presented by the prosecution during the course of the hearing. I trust that you can properly and correctly recall all of the evidence adduced during the hearing.
30. The complainant was staying at her grandparents place in the year 2018 as her father was transferred to another location, where she couldn't find a secondary school. Hence, she had been staying with her grandparents together with her younger brother. The accused is the younger brother of her father. She used to call him as father as well.
31. On the 11th of June 2018, the complainant made the dinner for the accused and two others after the accused brought fish. After the dinner she had gone back to her room. The grandfather was sleeping on the bed, which was at the sitting room. The location of the bed of the grandfather was partitioned with a curtain. Her younger brother was also laying on the floor beside the grandfather's bed. While she was laying on the bed, the accused called her to the sitting room, saying that he knows that the complainant cannot get sleep. The accused was sitting on the settee. The complainant was seated on the other settee. The accused asked about her boyfriend and also the status of their relationship. He

then told her to come and sit closer to him. The complainant was shy and was answering while smiling and looking downwards. The complainant thought that he is her father and wanted to ask such things as he was going to advice her about such things. The accused then went to the bed room and called her into the room. While in the room, the accused asked her if she allows him to hug her. She did not say anything as she was afraid and shocked as she did not expect such a request from the accused. The complainant started to cry. The accused then hugged her and then kissed her forehead. The accused then kissed her lips and sucked her breast. Afterward, the accused rubbed his penis over the vagina of the complainant on the top of her short. The complainant said that she was afraid and shocked and did not want to shout and alarm anyone as she feared that the accused might have a knife or something. She kept on pushing the accused and cried. He then put his hands into her short and touched her vagina over her undergarment. She then pushed away the hand of the accused. The accused then removed her short and undergarment. The complainant tried to cover her body, but the accused removed her hands. She then covered her face from her hands and cried.

32. The accused then tried to insert his penis into the vagina of the complainant. You have heard that the complainant said that he was pushing his penis around her vagina but found it difficult to insert it as her vagina was small. However, the accused managed to insert his penis into her vagina and it took about three minutes. The complainant said that it was painful and she tried to push the accused away when he was inserting his penis into her vagina. After doing that, the accused got up and dressed the complainant with her undergarment and short. He too put up his short back and went back to the sitting room. The complainant was tired and just laid on the bed as she could not sleep thereafter. She woke up in the following morning and found the blood strains on the bed sheet. She took the bed sheet and went to the kitchen, where she made her lunch. She then went to school. Once she came back from the school, she met one of her aunts and related this matter to her. You may recall that the complainant said that she did not try to go out of the room and tell her grandfather after this incident as she knew the accused was still in the sitting room. Moreover, she explained the reason for not shouting or alarming for help as she feared the accused might do something to her. The complainant said that there

were no boys sitting under the nearby mango tree when the accused committed this crime to her.

Right to Remain Silence

33. 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.

Analysis and Directions

34. The prosecution alleges that the accused in the pretext of discussing about the relationship of the complainant and her boyfriend started a conversation with the complainant on the night of 11th of June 2018. He then hugged her. Thereafter, the accused kissed the lips of the complainant and sucked her breast. He had pressed his penis on the vagina of the complainant on the top of her short. He had then removed the short and undergarment of the complainant and inserted his penis into her vagina without her consent.
35. The accused has admitted every events that have taken place up to the allegation of insertion of his penis into the vagina of the complainant in the admitted fact, but denies that he penetrated into the vagina of the complainant with his penis. As I told you before, it is for you to decide whether 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 of the complainant presented in the hearing.

Evaluation of Evidence

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

Reliability of Evidence

37. 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

38. 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, his/her motivations, his/her relationship to and the reaction to the particular situation.
39. 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 he or she has testified.
40. 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.
41. 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.

42. 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.

Evidence of The Young Complainant

43. The most important part of your task is to determine whether the complainant has told the truth, and has given a reliable and credible account of the events that she was describing. Some of you may have children, grandchildren, nieces or relatives who are of a similar age to the complainant. If so, I think you will recognize the sense of the advice that I am going to offer you about your opinion of the evidence of the complainant, but remember that I am speaking only about an approach to consider the evidence. Still the evaluation of the evidence is your responsibility. You do not have to accept my advice, if you do not agree with it.
44. Young children as of the age of the complainant do not have the same life experience as adults. They do not have the same standards of logic and consistency. Their ability to understand certain events may be severely limited for a number of reasons such as their age and immaturity. Life viewed through the eyes and mind of young adolescent may seem very different from life viewed by an experienced adult.
45. Remember how you normally talk to young adolescent of this age. You should bear those difficulties in mind when you consider the answers given by the complainant. All decisions about the evidence are for you to make.

Delay

46. You have heard the closing address of the learned counsel for the defence, where she invited you to take into consideration the fact that the complainant did not shout or alarm her grandfather or the neighbours when this alleged incident took place. She further suggested you that due to those facts, the complaint eventually made by the complainant is not true. It is a matter that you have to determine. In doing that you can take into

consideration the explanation given by the complainant for not shouting and alarming the others when this incident took place.

47. As I already explained, you have to remember that there is no stereotype of reaction to such unwelcome sexual assault. Victims of such sexual assaults, react to such situation in different ways. Moreover, 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.

Final Directions


48. 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 of Rape.
49. 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 of Rape.
50. If you find him not guilty of Rape, you are then allowed to consider the alternative count of Attempt to Commit Rape. If you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Attempt to Commit Rape, you can find him guilty of Attempt to Commit Rape.

51. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Attempt to Commit Rape, you must find the accused not guilty of Attempt to Commit Rape.
52. If you find him not guilty of Rape and Attempt to Commit Rape, you are then allowed to consider the second alternative count of Sexual Assault. If you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault, you can find him guilty of Sexual Assault.
53. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault, you must find the accused not guilty of Sexual Assault.

Conclusion

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




R.D.R.T. Rajasinghe
Judge

At Labasa
18 June 2019

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