

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 196 of 2015

STATE

V

LAISIASA KURINAQAU

Counsel : Ms. R. Uce for the State.
: Ms. E. Radrole with Ms. S. Ali for the Accused.

Dates of Hearing : 03 and 04 July, 2019
Closing Speeches : 08 July, 2019
Date of Summing Up : 08 July, 2019

SUMMING UP

(The name of the complainant is suppressed she will be referred to as "KL").

Ladies and Gentleman Assessors

1. It is now my duty to sum up this case to you.

ROLE OF JUDGE AND ASSESSORS

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable,

what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused is guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case.
6. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
7. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

BURDEN OF PROOF AND STANDARD OF PROOF

8. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.

9. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
10. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
11. You must decide the facts without prejudice or sympathy to either the accused or the complainant. Your duty is to find the facts based on the evidence without fear, favour or ill will.
12. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

INFORMATION

13. The accused is charged with one count of rape, one representative count of rape and one representative count of indecent assault. (A copy of the information is with you).

COUNT ONE

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) and (3) of the Crimes Act No. 44 of 2009.

Particulars of Offence

LAIASIA KURINAQAU, on the 13th of November, 2015, at Sigatoka in the Western Division penetrated the vagina of "**KL**" an 8 year old child with his penis.

COUNT TWO

REPRESENTATIVE COUNT

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act No. 44 of 2009.

Particulars of Offence

LAISIASA KURINAQAU, between the 1st day of September and the 13th day of November, 2015, at Sigatoka in the Western Division penetrated the vagina of “**KL**” an 8 year old child with his tongue.

COUNT THREE

REPRESENTATIVE COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to section 212 (1) of the Crimes Act No. 44 of 2009.

Particulars of Offence

LAISIASA KURINAQAU, between the 1st day of September and the 13th of November, 2015, at Sigatoka in the Western Division unlawfully and indecently assaulted “**KL**” an 8 year old child by touching her vagina.

REPRESENTATIVE COUNTS

Ladies and Gentleman Assessors

14. You will note that counts two and three are representative counts, which covers a period between the 1st day of September and the 13th day of November, 2015. By a representative count the prosecution alleges that more than one offence as described in the information were committed during the period specified in the counts. The law says that it shall be

sufficient for the prosecution to prove that between the specified dates in the counts at least one offence was committed.

15. To prove count one the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant “KL” with his penis;
 - (c) “KL” was below the age of 13 years.
16. The slightest of penetration of the complainant’s vagina by the penis is sufficient to satisfy the act of penetration. As a matter of law a person under the age of 13 years does not have the capacity to consent. In this case it is an agreed fact that the complainant was 8 years at the time of the alleged offending. I therefore direct you that the consent of the complainant is not an issue in this trial.
17. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
18. The second element is the act of penetrating the vagina of the complainant with the penis.
19. The final element of the offence is the age of the complainant. It is an agreed fact that the complainant was 8 years at the time of the alleged offending which establishes that she was below the age of 13 years at the time of the alleged incident.
20. In respect of this count of rape the accused has denied all the elements of the offence. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant “KL” with his penis.

21. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis then you must find the accused guilty of rape. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of rape then you must find the accused not guilty of the offence of rape.
22. To prove representative count two the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant "KL" with his tongue;
 - (c) "KL" was below the age of 13 years.
23. The slightest of penetration of the complainant's vagina by the tongue is sufficient to satisfy the act of penetration. As mentioned earlier the complainant was under the age of 13 years. I therefore direct you that the consent of the complainant is not an issue in this trial.
24. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
25. The second element is the act of penetrating the vagina of the complainant with the tongue.
26. The final element of the offence is the age of the complainant. It is an agreed fact that the complainant was 8 years at the time of the alleged offending which establishes that she was below the age of 13 years at the time of the alleged incident.
27. In respect of this representative count of rape the accused has denied all the elements of the offence. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant "KL" with his tongue.

28. If you are satisfied that the accused had penetrated the vagina of the complainant with his tongue then you must find the accused guilty of rape. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of rape then you must find the accused not guilty of the offence of rape.
29. To prove representative count three the prosecution must prove the following elements of the offence of indecent assault beyond reasonable doubt:
 - (a) The accused;
 - (b) Unlawfully and indecently;
 - (c) Assaulted the complainant “KL” by touching her vagina.
30. The first element of the offence of indecent assault is concerned with the identity of the person who allegedly committed the offence.
31. The words “unlawfully” and “indecently” in respect of the second element of the offence simply means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such act indecent.
32. Assault is the unlawful use of force on the complainant “KL” by the act of touching her vagina.
33. In respect of the representative count of indecent assault the accused has denied all the elements of the offence. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently assaulted the complainant “KL” by touching her vagina.
34. If you are satisfied that the prosecution has proved all the elements of the offence of indecent assault beyond reasonable doubt, then you must find the accused guilty of the offence of indecent assault. However, if you have a reasonable doubt in respect of any elements of the offence of indecent assault then you must find the accused not guilty.

35. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.

ADMITTED FACTS

36. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as amended admitted facts.
37. From the admitted facts you will have no problems in accepting those facts as proven beyond reasonable doubt and you can rely on it. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
38. In this case, the accused is charged with one count of rape, one representative count of rape and one representative count of indecent assault, you should bear in mind that you are to consider the evidence in each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.
39. I will now remind you of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is not important. You should consider and evaluate all the evidence in coming to your opinion in this case.

PROSECUTION CASE

40. The prosecution called four (4) witnesses to prove the charges against the accused.
41. The complainant who was 8 years of age in 2015 (now 12 years) informed the court that on a Friday in 2015 she was playing with her friends, namely Totovo, Josh and Milika at Totovo's house. The complainant knows the accused as Tai Hahau he showed her a \$5 note.
42. The complainant refused to accept the money and then joined her friends to play, at this time the accused came and grabbed her and took her to his house. When inside the house the accused did bad things to her. The accused cello taped her mouth and then tied her hands with a rope. The accused then removed the complainant's clothes that is her skirt, top, tights and panty. After this, the accused inserted his private part to her private part and also started to touch her private part.
43. The complainant does not know the name of the accused private part, but said it was located in front she pointed to her vagina as her private part. As a result of what the accused did to her she was scared, felt lonely and started feeling pain, both were lying on the floor at the time.
44. Afterwards, the accused clothed her, removed the cello tape from her mouth and the rope from her hands opened the door and let her go. The complainant went home and did not tell anyone about what had happened because the accused told her if she told anyone he will do it again.
45. According to the complainant on Monday thereafter the accused had sucked her private part in his house. She was playing with her friends, namely Joey, Bola and Totovo when the accused showed her a \$10 note. The complainant refused to accept the same.

46. The complainant ran and the accused ran after her, he grabbed her and took her into his house. Inside his house the accused placed a cello tape on her mouth and sucked her private part and touched her whole body, at this time she was not wearing her clothes. After a while her friend Totovo knocked on the door and the accused opened the door. Upon seeing Totovo the complainant told Totovo to tell her grandmother that she was at the house of the accused.
47. When the complainant reached home she told her sister Alisi about what the accused had done to her. In November, 2015 the accused had sucked her private part and touched her private part for three days.
48. In cross examination the complainant agreed the incident happened in a village where the houses were close to each other and considering that people were passing by and her friends were around it would have been impossible for someone to grab her.
49. When it was suggested to the complainant that she had gone to the house of the accused with her friends to ask for some money the complainant denied this saying she had her own money.
50. The complainant agreed her sister Alisi had told her mum about what she had told her sister and her mum told the police.
51. The complainant disagreed that the accused had never put his private part into her private part she also stated that the accused had touched her private part. The complainant maintained that something bad had happened to her on that day and that the accused had also sucked her private part that last day.
52. In re-examination the complainant stated the last day of the incident was a Monday.

53. The second witness was Reapi Totovo she recalled on 13th November, 2015 she was playing with her friends Josh and the complainant at her house when her father gave Josh who is also known as Jonacani a \$1.00 coin. Shortly after, all went to the shop to buy ice block unfortunately, the money was not enough to buy the complainant's ice block.
54. The complainant saw the accused sitting at his house so she went to him to ask for some money. When the complainant did not come back for a while, the witness went to look for the complainant. When she arrived at the house of the accused she went to the window, but could not see anything so she went to the door.
55. From the door, the witness saw the complainant's mouth and hands were cello taped and her dress was pulled up to her chest. The accused was kneeling down beside the complainant and doing something bad to her and was about to lie on her. The accused moved his face towards the witness so she ran away. The door was open, both the complainant and the accused were lying on the floor.
56. In cross examination the witness maintained she saw the complainant's mouth and hands were taped and her dress pulled up. The witness agreed she only saw the accused kneeling and about to lie on the complainant.
57. The third prosecution witness Dr. Romika Lata graduated with an MBBS Degree from the University of Fiji in the year 2013. This is her 5th year of practice as a Medical Practitioner.
58. On 17th November, 2015 the witness had examined the complainant at the Sigatoka Hospital. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no. 1.

59. The specific medical findings of the doctor were:
- (a) Vaginal Examination – ½ cm long laceration noted at 3 o'clock at the right side of the vagina;
 - (b) Hymen not visible;
 - (c) No active bleeding.
60. According to the doctor, a laceration was a small cut or tear which can be caused by many things such as sitting on a sharp object, sexual assault, doing tremendous exercise, sprinting or running. In respect of the hymen not being visible meant the hymen was broken and not there. A hymen was a thin layer of tissue, which covered the vaginal opening. The doctor further stated that there can be many reasons why the hymen could be broken or absent, such as sexual intercourse, sitting on sharp objects, lots of exercise, running, horse riding and so on.
61. Since the patient was examined on the 4th day of the alleged incident, there was no active bleeding seen. The professional opinion of the doctor was that the injuries sustained were recent that is fresh but she could not say how long ago it was sustained. The doctor stated the injuries could have been caused by the penetration of the vagina by a penis.
62. In cross examination the doctor stated that active sports can only break the hymen but will not cause a laceration on the vagina which was different from hymen not being intact, and also a sharp object could cause laceration.
63. In re-examination, the doctor clarified that sexual intercourse could also cause a laceration or a tear.

Ladies and Gentlemen Assessors

64. You have heard the evidence of Dr. Lata who had been called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective. The medical report of the complainant is before you and what the doctor said in her evidence as a whole is to assist you.
65. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the doctor.
66. You should remember that this evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your decisions, you must reach your decision having considered the whole of the evidence.
67. The final prosecution witness DC Viliame Uqeue on 19th November, 2015 had interviewed the accused at the police bure of Sigatoka Police Station. The witnessing officer was WDC Meredani, who was present during the interview with the accused. The interview was conducted in the iTaukei language since the accused who was educated up to year 5 wanted to be interviewed in this language. The interview was conducted for two days.
68. The witness had given all the rights to the accused during the caution interview. The accused was cooperative and well before the commencement of the interview and he did not make any complaints before, during and

after the conclusion of the interview. The record of interview of the accused dated 19th November, 2015 in the iTaukei language was marked and tendered as prosecution exhibit no. 2.

69. The witness had translated the record of interview from the iTaukei language into the English language which was marked and tendered as prosecution exhibit no. 3.
70. There was no inducement or promise or intimidation or threat or assault on the accused to make statement, he was treated well. During the interview sufficient breaks were also given to the accused.
71. At the conclusion of the caution interview, it was read to the accused and he was given the opportunity to add or correct anything. The witness identified the accused in court.
72. In cross examination the witness agreed in answer to question 4, the accused had stated that he had chest and back pain but the accused did not want to go to the hospital. When it was put to the witness that he did not ask the accused if he wanted to go to the hospital, the witness said he had asked but this was not recorded in the caution interview.
73. The witness denied the accused had requested to go to the hospital but was not allowed by him, during the interview there was no complaints of chest and back pain by the accused.
74. The witness agreed the interview was conducted in the police bure which was accessible to everybody but at no time did any iTaukei police officer come into the bure and threaten the accused to admit the allegations or put fear in the accused to admit the allegations in the iTaukei language in the words *“admit it or we will do something intense to you like what happened to Soko.”*

75. The witness denied the accused was not properly explained his right to silence, particularly that whatever he stated in his caution interview will be used in a court of law. The witness maintained the accused was given water and washroom breaks, although it was not specifically written in the caution interview. The witness denied the accused was not given the opportunity to alter and add anything in the caution interview but just told to sign the interview.
76. In re-examination the witness clarified that when he had asked the accused whether he wanted to be taken to the hospital, the accused had said he wanted to continue with the interview. The accused had also told the witness that his chest and back pain were his sickness, but when he wanted to take the accused to the hospital the accused stated he did not have any sickness at that time. The interview was held at the bure because the crime office was occupied by other police officers.

Ladies and Gentlemen Assessors

77. The caution interview of the accused is before you, the answers in the caution interview are for you to consider as evidence but before you accept the answers, you must be satisfied that the answers were given by the accused and they are the truth. It is entirely a matter for you to accept or reject the answers given in the caution interview.
78. During the cross examination of the interviewing officer the counsel for the accused had asked questions suggesting that the answers given by the accused were obtained as a result of fear, and threat by an iTaukei police officer who had intervened during the interview as a result the accused did not give his answers voluntarily.
79. The defence counsel also suggested that the interviewing officer did not take the accused to the hospital despite being told that the accused had chest and back pain and that the accused was also not properly explained his

right to silence considering the accused had only year 5 level of education. Defence Counsel also stated the accused was only told to sign the interview which he did.

80. This meant counsel had put to the witness that the admissions made by the accused contained in the caution interview were not given voluntarily by him and therefore you should disregard those admissions.
81. It is for you to decide whether the accused made those admissions and whether those admissions are the truth. If you are not sure whether the accused made those admissions in his caution interview then you should disregard them. If you are sure that those admissions were made by the accused, then you should consider whether those admissions are the truth. What weight you choose to give to those admissions is a matter entirely for you.
82. This was the prosecution case.

DEFENCE CASE

Ladies and Gentleman Assessors

83. At the end of the prosecution case you heard me explain options to the accused. He has those options because he does not have to prove anything. The burden of proving the accused guilty beyond reasonable doubt remains on the prosecution at all times. The accused chose to remain silent and did not call any witness that is his right and you should not draw any adverse inference from the fact that the accused decided to remain silent and not call any witness.
84. From the line of cross examination the defence takes up the position that the accused did not commit the offences as alleged by the complainant. The defence is also asking you to disregard the confession contained in the caution interview since they were obtained by threat and fear and after the

right to remain silence was not properly put to him. The defence also says considering the accused had year 5 level of education he did not understand the right to remain silent in particular whatever he says in his caution interview will be used in a court of law.

83. This was the defence case.

ANALYSIS

84. The prosecution alleges on a Friday in 2015 the complainant was playing with her friends in the village when the accused showed the complainant a \$5 note. She refused to accept the money offered, at this time the accused came and grabbed her and took her to his house. When inside the house the accused cello taped the complainant's mouth and tied her hands with a rope. He then removed her clothes and inserted his penis into the vagina of the complainant and also touched her private part.

85. As a result of what the accused had done the complainant got scared, felt lonely and felt pain. After removing the cello tape from the complainant's mouth and the rope from her hands the accused opened the door and let her go.

86. Thereafter, on Monday the complainant was playing with her friends, this time the accused showed her a \$10 note which she refused to accept and left. The accused ran after the complainant, grabbed her and took her into his house. Inside his house the accused placed a cello tape on her mouth and sucked her private part and touched her whole body, at this time she was not wearing her clothes. After a while her friend Totovo knocked on the door, the accused opened the door. In 2015 the accused had sucked and touched the complainant's vagina for about three days.

87. On 13th November, 2015 Reapi Totovo went to look for the complainant, when she arrived at the house of the accused she went to the window, but

could not see anything so she went to the door. From the door, the witness saw the complainant's mouth and hands were cello taped and her dress was pulled up to her chest. The accused was kneeling down beside the complainant and doing something bad to her and was about to lie on her.

88. On 17th November, 2015 Dr. Romika Lata had examined the complainant at the Sigatoka Hospital. The doctor upon the vaginal examination of the complainant saw a ½ cm long laceration noted at 3 o'clock at the right side of the vagina and also the hymen was not visible. The professional opinion of the doctor was that the injuries sustained were recent, but she could not say how long ago it was sustained.
89. The accused was interviewed by DC Viliame Uqeue on 19th November, 2015 the interview was conducted in the iTaukei language the interview was conducted for two days. There was no inducement or promise or intimidation or threat or assault on the accused to make a statement, he was treated well. During the interview sufficient breaks were given to the accused as well.
90. At the conclusion of the caution interview, it was read to the accused and he was given the opportunity to add or correct anything. The accused confessed to what he had done to the complainant.
91. On the other hand, the accused denies committing the offences alleged he takes the position that he did not do anything as alleged. Furthermore, the accused is asking you to disregard his confession since it was not given by him voluntarily, but by fear and threat and that considering his level of education he was not properly explained his right to silence. The accused also states he was suffering from chest and back pain before the commencement of the interview which he had informed the police officer yet he was not taken to the hospital.

Ladies and Gentleman Assessors

92. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
93. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.
94. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. 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. You can accept part of a witness's evidence and reject other parts. 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 be accurate in another.
95. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.

96. Victims of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all.
97. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
98. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
99. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
100. In this case, the accused is charged with one count of rape, one representative count of rape and one representative count of indecent assault, as mentioned earlier you should bear in mind that you are to consider the evidence in respect of each count separately from the other. You must not assume that because the accused is guilty for one count that he must be guilty of the other as well.
101. Your possible opinions are:-


Count One: **RAPE**: GUILTY OR NOT GUILTY.


Count Two: **RAPE**: GUILTY OR NOT GUILTY

Count Three: **INDECENT ASSAULT**: GUILTY OR NOT GUILTY

Ladies and Gentleman Assessors

102. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of the staff so that the court can be reconvened.
103. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.


Sunil Sharma
Judge



At Lautoka

08 July, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.