

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 63 of 2017

STATE

V

VILIAME MARTIN GABRIEL

Counsel : Mr. S. Babitu for the State.
: Ms. K. Vulimainadave for the Accused.

Dates of Hearing : 11 July, 2019
Closing Speeches : 12 July, 2019
Date of Summing Up : 15 July, 2019

SUMMING UP

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. 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.
6. 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

7. 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.

8. 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 person'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.
9. 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 court room.
10. You must decide the facts without prejudice or sympathy for either the accused or the complainant. Your duty is to find the facts based on the evidence without fear, favour or ill will.
11. 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

12. The accused is charged with the following offences: (a copy of the information is with you).

COUNT ONE

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (a) of the Crimes Act 2009.

Particulars of Offence

VILIAME MARTIN GABRIEL, on the 16th day of October, 2015 at Lautoka in the Western Division, unlawfully and indecently assaulted **KULAE MARAMARUA**.

COUNT TWO
Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

VILIAME MARTIN GABRIEL, on the 16th day of October, 2015 at Lautoka in the Western Division penetrated the anus of **KULAE MARAMARUA** with his penis, without her consent.

13. The accused was initially charged with both counts, as mentioned, however, after the prosecution closed its case on 11th July, 2019, this court ruled that the accused had a case to answer for the offence of sexual assault and for the lesser offence of attempt to commit rape instead of the offence of rape.
14. To prove count one the prosecution must prove the following elements of the offence of sexual assault beyond reasonable doubt:
 - (a) The accused;
 - (b) Unlawfully and indecently;
 - (c) Assaulted the complainant **KULAE MARAMARUA** by licking her vagina.
15. The first element of the offence of sexual assault is concerned with the identity of the person who allegedly committed the offence.
16. The words “unlawfully” and “indecently” in respect of the second element of the offence of sexual assault means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such conduct indecent.

17. The final element of assault is the unlawful use of force on the complainant by the act of licking her vagina.

You should ask yourself:

- (a) whether you consider the force which was used in licking the vagina of the complainant was sexual in nature; and
 - (b) if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, was in fact sexual in nature.
18. If you are satisfied beyond reasonable doubt that the prosecution has proved all the elements of sexual assault as explained above, then you must find the accused guilty of sexual assault. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then you must find the accused not guilty.
 19. In this trial, the accused has denied committing the offence of sexual assault he has been charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently licked the vagina of the complainant on 16th of October, 2015.
 20. To prove the offence of attempt to commit rape the prosecution must prove the following elements of the offence beyond reasonable doubt:
 - (a) The accused;
 - (b) Attempted to penetrate the anus of the complainant with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
 21. In this trial the accused has denied committing the offence of attempt to commit rape. It is for the prosecution to prove beyond reasonable doubt

that it was the accused who had attempted to penetrate the anus of the complainant with his penis without her consent and the accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

22. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
23. The second element is the attempt to penetrate the complainant's anus by the penis. This element relates to the conduct of the accused. To engage in a conduct is to do an act which is the product of the will of the accused and it was not accidental. The prosecution has to prove beyond reasonable doubt that the conduct of the accused was deliberate and not accidental. For the accused to be guilty of attempted rape, the accused's conduct must be more than merely preparatory to the commission of the offence. The question whether a conduct is more than merely preparatory to the commission of the offence is one of fact.
24. This leaves you to consider the third element of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.
25. In this case the complainant told the court that she was really drunk at the time the accused took her into the room at the Apartment, since she was sleepy she laid on the bed. The prosecution submits the complainant was so intoxicated that she had no capacity to agree with what the accused did to her hence she did not consent.

26. It is for you to decide considering the circumstances of the complainant whether she did not have the capacity to consent freely and voluntarily and out of her own freewill to what was being done to her considering her state of intoxication.
27. If you are satisfied that the accused had attempted to penetrate the anus of the complainant with his penis and she had not consented, you are then required to consider whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
28. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
29. Before you can find the accused guilty you must be satisfied beyond reasonable doubt of two things:-
 - (a) Firstly that the accused intended to penetrate the anus of the complainant with his penis.
 - (b) Secondly with that intention the accused did something which was more than mere preparation for committing that offence.
30. In this case the prosecution is alleging that the accused intended to penetrate the anus of the complainant with his penis without her consent.
31. Intention is not something that can be easily proved it is something that has to be judged by the acts or words of a person or of the circumstances that surrounds what he or she does. The law says a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary cause of events. You decide intention by considering what the accused did, you should look at his actions before, at the time of, and after the act.

32. The accused has denied committing the offence of attempted rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had intended to penetrate the complainant's anus and with that intention he did something which was more than merely preparatory.
33. The prosecution says when the accused saw the complainant sleeping on the bed, he removed her under garments and licked her vagina then turned her over and tried to insert his penis into the complainant's anus. As a result of the pain the complainant woke up and pushed the accused away.
34. If you accept the accused did this, then it is for you to decide whether what he did went beyond mere preparation. In other words, did he actually intend to commit the offence of rape, in which case he is guilty of attempting to commit rape, or that he only got ready, or put himself in a position, or equipped himself, to do so, then he is not guilty.
35. If you are satisfied that the prosecution has proved all the above elements beyond reasonable doubt then you must find the accused guilty of attempt to commit rape.
36. If on the other hand, you find that the prosecution has failed to prove any of these elements beyond reasonable doubt then you must find the accused not guilty of attempt to commit rape.
37. As a matter of law, I have to direct you that an offence of sexual nature as in this case does 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.

38. In this case, the accused is charged with one count of sexual assault and has a case to answer for the offence of attempt to commit rape, 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 of one count that he must be guilty of the other as well.

ADMITTED FACTS

39. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as final amended admitted facts.
40. 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.
41. 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

42. The prosecution called three (3) witnesses to prove the charges against the accused.

43. The complainant Kulae Maramarua informed the court that on 15th October, 2015 after work she received a call from her husband Kitone to meet him at the Bowling Club. At the Bowling Club Kitone was drinking with two of his friends.
44. The complainant joined her husband and his friends in drinking, she drank 5 bottles of Tribe beer, from the Bowling Club all went to Hunters Inn, at the Hunters Inn she drank 5 more bottles of Tribe. At around 10 or 11 pm the accused joined them in drinking. After the Hunters Inn closed at about 1am the next day all went to the FSC ground after buying one carton of beer. At the FSC ground the complainant drank another 4 bottles of beer by 6am the beer had finished by this time it was only the complainant, her husband and the accused who were left.
45. From the FSC ground they all went to the seawall after buying another carton of beer. By this time it was 7.30am the complainant was really drunk so she stopped drinking. At this time the accused suggested that they go to a nearby Apartment to check the price of the rooms so all three walked to the Apartment. After inquiring about the price of a room the complainant's husband said it was too expensive since the complainant was feeling sleepy she sat down while her husband went looking for a taxi to take her home.
46. After a while the accused came held her hand and took her to a room, in the room she saw a bed since she was sleepy she laid on the bed. The complainant then felt someone was turning her over since she was lying face down. After the complainant was turned over she felt her under garment was removed and her vagina being licked for about 2 minutes.
47. The complainant did not do anything since she thought it was her husband so she did not open her eyes after this she was turned over again, this person was trying to penetrate his penis into her anus. The complainant

felt a lot of pain as a result of what was being done to her, she woke up and saw the accused so she pushed him away. The complainant did not consent to the accused to penetrate her anus with his penis or to lick her vagina.

48. The complainant saw the accused naked, standing in the room, she was angry and in tears so she asked him where her husband was. The complainant started looking for her undergarment the accused told her it was under the bed, whilst the complainant was telling off the accused, he wore his pants and went to the reception. The complainant told the accused that whatever he had done to her was a degrading act.
49. The complainant left the room to look for her husband. Shortly after, her husband came in a taxi upon seeing her he started asking questions and he was very angry since he was told by the receptionist that she had already left with the accused. At this time the complainant did not tell her husband what the accused had done to her.
50. The incident happened on Friday and on Sunday she told her husband what the accused had done to her a report was lodged with the police on Monday.
51. The complainant was affected by the incident which has become a burden to her. The complainant identified the accused in court.
52. In cross examination the complainant agreed the accused had carried with him some left over bottles of beer in a carton. She maintained the accused had held her hand and took her to the room in the Apartment. The complainant disagreed that when the accused entered the room and while she was on the bed the accused started pouring beer into a small glass for her to drink.

53. The complainant maintained the accused had licked her vagina inside the room and she also agreed the accused was trying to insert his penis inside her anus when she felt pain she pushed him away.
54. In respect of the allegation the complainant disagreed she had dreamt about it she stated it was a reality when she met her husband at the Apartment she told him the accused had locked her inside the room and that they were to talk more about it at home.
55. When it was suggested to the complainant that the licking of the vagina did not happen because she had fallen asleep and was dreaming the complainant maintained it had happened. The complainant denied she had brought a false complaint against the accused because her husband was angry with her since she was missing that morning.
56. In re-examination the complainant stated the accused was trying to insert his penis into her anus but did not penetrate it.
57. The second prosecution witness Kitone Tabacere the husband of the complainant informed the court that on 15th October, 2015 the witness and the complainant and some of his friends including the accused were drinking beer at various places.
58. From the seawall upon the suggestion of the accused the witness and the complainant walked to an Apartment nearby since the complainant was drunk he assisted her to walk. At the Apartment the price for the room was expensive, so he told the accused to stay at the Apartment with the complainant while he looked for a cab for them to go home.
59. When the witness came back in the cab he was surprised to see the complainant and the accused were not there. He asked the receptionist and he was told both had left in a cab. The witness went looking for the

complainant and the accused after sometime he received a call on his mobile it was the complainant, she was crying and asking him why he had left her. When he went to the Apartment he saw the complainant crying and when he asked her why she was crying the complainant did not say anything.

60. At this time he asked the receptionist why she had lied to him that the accused and the complainant had already left. He wanted to speak to the accused in the room but the receptionist did not allow him access to the room.
61. From this day the witness noticed the complainant was not her usual self as if something was bothering her, she was not cheerful as before so he started to ask her what was wrong. On Sunday the complainant told the witness she thought she had gone with him into the room she was lying half naked on the bed it was when the accused was calling her that she realized it was not the witness. The witness was unable to recall any other thing the complainant may have told him. The complainant was ashamed of what had happened to her the matter was reported to the police.
62. In cross examination the witness agreed the accused had carried the left over bottles of beer in a carton from the seawall to the Apartment he was holding the complainant because she was drunk.
63. The witness also stated at the Apartment he had asked the accused to look after the complainant while he goes to look for a taxi. At home he had asked the complainant what had happened to her but she did not say anything. It was on Sunday the complainant told him what had happened to her and at no time had he forced her to tell him what had happened.

Ladies and Gentleman Assessors

64. 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. A victim's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
65. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to the fact that the complainant did not tell her husband at the Apartment about what the accused had done to her, but after a few days on Sunday she told him that she thought she had gone with him into the room and was lying half naked on the bed. It was when the accused was calling her that she realized it was not the witness both then decided to report the matter to the police.
66. This is commonly known as recent complaint evidence. The evidence given by Kitone is not evidence of what actually happened between the complainant and the accused since Kitone was not present and did not see what had happened between the complainant and the accused.
67. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant told her husband at home that she had mistaken the accused to be her husband when she realized this she was half naked on the bed and therefore she is more likely to be truthful.
68. On the other hand, the defence says the complainant made up a false complaint against the accused because her husband was angry with her

since she was missing when he had come to pick her at the Apartment so she should not be believed.

69. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.
70. The final prosecution witness Valerie Galu did not take the prosecution case any further, this witness informed the court that in October, 2015 she was working as an office assistant at a private accommodation three people had come to book a room in the morning of 16th October, 2015.
71. One was a female and the other two were male, they were all drunk. One female and one male went into a room.
72. In cross examination the witness stated that the man was carrying a carton he was not holding the hand of the female one was taking the lead and the other was following.
73. This was the prosecution case.

DEFENCE CASE

Ladies and Gentleman Assessors

74. 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.

75. 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 evidence of the complainant since the accused did not do anything to the complainant that early morning. The complainant was so drunk that she dreamt that the accused had licked her vagina and tried to penetrate her anus. The complainant made a false complaint against the accused after she was confronted by her husband outside the Apartment since she was missing when he had come earlier to pick her.
76. This was the defence case.

ANALYSIS

77. The prosecution alleges on 15th October, 2015 the complainant, her husband and the accused had drunk alcohol at various locations. The complainant got drunk so she stopped drinking for some time. At the seawall the accused suggested that they go to a nearby Apartment to check the price of the rooms, after inquiring about the price the complainant's husband said it was too expensive and for them to go home. Since the complainant was feeling sleepy she sat down with the accused to wait for her husband to come and take her home in a taxi.
78. After a while the accused came held her hand and took her to a room, in the room she went and laid on the bed. The complainant then felt someone was turning her over since she was lying face down after she was turned

over she felt her under garment was removed and her vagina being licked for about 2 minutes.

79. The complainant did not do anything since she thought it was her husband so she did not open her eyes after this she was turned over again and this person was trying to penetrate his penis into her anus. The complainant felt a lot of pain as a result of what was being done to her, she woke up and saw it was the accused so she pushed him away. The complainant did not consent to the accused to penetrate her anus with his penis or to lick her vagina.
80. The incident happened on Friday and on Sunday she told her husband what the accused had done to her a report was lodged with the police on Monday.
81. The defence takes up the position that the accused did not commit the offences as alleged by the complainant. The accused did not do anything to the complainant that early morning she was so drunk that she dreamt that the accused had licked her vagina and tried to penetrate her anus. She made a false complaint against the accused to avoid any confrontation with her husband who was a short tempered person since she was missing when he had come in a taxi to pick her.

Ladies and Gentleman Assessors

82. 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 give 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.

83. 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.
84. 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.
85. 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.
86. 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.

87. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.

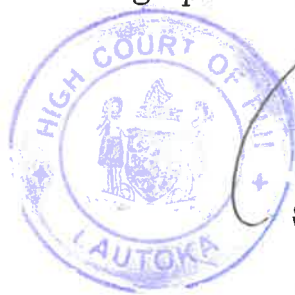
88. Your possible opinions are:-

1. **SEXUAL ASSAULT**: GUILTY OR NOT GUILTY.
2. **ATTEMPT TO COMMIT RAPE**: GUILTY OR NOT GUILTY.

Ladies and Gentleman Assessors

89. 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 my staff so that the court can be reconvened.

90. 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

15 July, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.