

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 57 OF 2017

BETWEEN : STATE

AND : LAWRENCE PRASAD

Counsel : Ms. S. Naibe for State
: Ms. K. Vulimainadave for Accused

Date of Hearing : 17th – 19th July, 2019

Date of Summing Up : 20th July, 2019

SUMMING UP

- [1] Ladies and Gentleman Assessors, it is now my duty to sum up the case to you. We have differing roles in this trial. I have to give you directions on the law and you must accept those directions. You are to decide the facts applying those directions and to give me your opinions as to the Accused's guilt or innocence.
- [2] In going through the evidence I may express an opinion. If you do not agree with that opinion, you are free to ignore it and to form another view of that piece of evidence. I may omit some evidence which you think significant. Nonetheless you may give that evidence such weight as you consider appropriate. You are free to form your own opinions.
- [3] At the end of this summing up, and after you have given your individual opinions, the final decision on the facts rests with me. I am not bound to conform to your opinions. However in arriving at my judgment I shall place much reliance upon your opinions.
- [4] The burden of proof rests throughout the trial upon the prosecution. In our system of justice there is a presumption of innocence in favour of an Accused. The prosecution brings the charge against the Accused. Therefore it is for the prosecution to prove the

charge against the Accused. Each element of the charge must be proved, but not every fact of the story. This burden never changes, never shifts to the Accused.

- [5] The prosecution must prove its case beyond reasonable doubt. That means that before you express an opinion that the Accused is guilty of the charge you must be satisfied so that you are sure of his guilt beyond reasonable doubt. If you consider him innocent of the charge you must give your opinion that he is not guilty. If you entertain a reasonable doubt of guilt, you must also give your opinion that the Accused is not guilty of that charge.
- [6] The Accused elected not to give evidence. That is perfectly his right. You must not assume that he is guilty because he has not given evidence. The fact the he has not given evidence proves nothing, one way or the other. You will have to decide whether, on the prosecution's evidence, you are sure of his guilt.
- [7] You must decide this case upon the evidence presented to you. If a witness was not called you must not speculate the reasons why the witness was not called. You must only consider evidence which were led in the trial. It will be your task to discover which witnesses have given honest and accurate evidence and which may not.
- [8] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate amongst yourselves so as to arrive at your opinions. Upon your return to court, when you are ready, each one of you will be required to state his or her individual opinions orally on the charge against the Accused, which opinions will be recorded. Your opinions need not be unanimous. You will not be asked for reasons for your opinions.
- [9] However it will be helpful to you beforehand in arriving at sound and rational opinions if you ask yourselves why you have come to those opinions.
- [10] Those opinions must be based solely upon the evidence. Evidence consists of sworn testimony of the witnesses, what each witness has told the court in the witness box.
- [11] Neither speculation nor theories of one's own constitute evidence. Media coverage, idle talk, or gossip, are similarly not evidence. Put out of your mind when considering your opinions, anything you may have heard about this case outside the courtroom. Focus solely on the evidence which you have seen, heard, or examined in this court.

- [12] This summing up is not evidence either, nor are counsel's opening or closing addresses. Naturally we hope all of these are of assistance to you, but they do not constitute evidence.
- [13] If a witness is asked a question in cross-examination and agrees with what counsel is suggesting, the witness's answer is evidence. If he or she rejects the suggestion, neither the question nor the answer can become evidence for the proposition put.
- [14] In arriving at your opinions, use the common sense you bring to bear in your daily lives, at home and at work. Observe and assess the witnesses' evidence and demeanour together with all of the evidence in the case. You can accept part of a witness's testimony 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 be wide of the mark about another.
- [15] If you have formed a moral opinion on the conduct alleged in this case, put that to one side. Consistent with your oath, you should put away both prejudice and sympathy. Approach your assessment of the evidence dispassionately. Bring a cool detachment to your task of examining whether the case against the Accused has been proved before you, proved with evidence led by the prosecution.
- [16] The Accused is charged with six counts. You must consider each count separately, when you examine the case in your deliberations. You are not obliged to find the Accused guilty either on all six counts or not guilty on all six counts. Look at the evidence as it affects each count separately. Your opinions about the charges could differ from one to the other, depending on the view you took on each count and the evidence available on each count.
- [17] I turn now to deal with what the prosecution must prove. On count one, the Accused is charged with indecent assault. The prosecution alleges that the Accused indecently assaulted the complainant by touching her breasts and private part.
- [18] For the Accused to be guilty of indecent assault, the prosecution must prove beyond reasonable that the Accused unlawfully and indecently assaulted the complainant. The word "unlawfully" simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. As to whether the act of touching breasts or private parts meaning the genital area of an adolescent girl, you must ask

yourselves what right-minded persons would think of this act. Was the act so offensive to current standards of modesty and privacy as to be indecent? In considering these questions you may consider the general nature of the relationship between the Accused and the complainant and the age gap between them to decide whether or not the act was indecent. If you are satisfied beyond reasonable doubt that the Accused without lawful excuse touched the complainant's breasts or genital area and that the act was such that right-minded persons would consider being indecent, then you may find the Accused guilty of indecent assault. If you are not so satisfied then you must find him not guilty of indecent assault.

[19] On counts two to six, the Accused is charged with rape. To prove rape as charged on counts two to six, the prosecution must prove the following elements beyond reasonable doubt:

1. That at the time and place alleged, the Accused had sexual intercourse with the complainant.
2. That at the time of sexual intercourse the complainant did not consent to it.
3. That the Accused knew that the complainant did not consent.

[20] I will explain each of these three elements of the charge in turn.

[21] Sexual intercourse is penetration by a man's penis into a woman's vagina. The slightest degree of penetration is enough, and it is not necessary to prove that ejaculation took place.

[22] The term consent means consent freely and voluntarily given by the complainant to engage in the physical acts of sexual intercourse. Consent can be given verbally, or expressed by actions. On the same note, absence of consent does not have to be in words; it also may be communicated in other ways. Consent obtained after persuasion is still consent. However, the law specifically provides that a person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse. A person who submits to sexual intercourse with another person as a result of threats or violence is, by law, not to be regarded as consenting to the sexual intercourse.

[23] To decide on the third element, you must apply a subjective test, that is, whether the Accused knew that the complainant was not consenting. You might ask how, in the

absence of an admission by the accused, the prosecution can prove that the accused was aware that the complainant did not consent. The prosecution asks you to infer from other facts which it has set out to prove, that the Accused must have known and that he did indeed know that the complainant did not consent to sexual intercourse.

[24] All three elements of rape are in dispute. For the five rape counts, the issues for you to decide are:

Whether the Accused penetrated the complainant's vagina with his penis?

Whether the complainant did not consent to sexual intercourse?

Whether the Accused knew the complainant did not consent?

[25] I turn now to summarize the evidence. In doing this it would be tedious and impractical for me to go through the evidence in detail and repeat every submission made by counsel. I will summarize the salient features. If I do not mention a particular piece of evidence or a particular submission of counsel that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case.

[26] The first prosecution witness was the complainant. The relationship between the complainant and the Accused is not in dispute. He is her stepfather. At the material time, he was in *a de facto* relationship with the complainant's mother. They resided at Naikabula, Lautoka. The Accused was 24 years old. The complainant was 16 years old and a Form 4 of student in 2016.

[27] The complainant's biological parents separated when she was 4 years old. After separation the complainant's paternal grandmother looked after her. But when the complainant's grandmother passed away, the complainant came to live with her biological mother at Naikabula, Lautoka. They were renting a one bedroom house. The complainant's mother and the Accused occupied the bedroom while she slept in the living room.

[28] The complainant gave evidence that she did not like the way the Accused used to talk to her and touch her. She said in September 2016, one day before her last exam paper, the Accused touched her breasts. Now Ladies and Gentleman Assessors, the incidents of

touching and in particular the incident of touching the breasts in September 2016 are not subject of the charges contained in the Information. It is important that I explain to you the relevance of this evidence of other acts. It was admitted solely for the purpose of placing the evidence of the particular acts relied upon by the prosecution, to prove the charges in the Information, into a true and realistic context. It is confined, in other words, to making the circumstances of the particular offences charged more intelligible. Otherwise, you may wonder about the likelihood of apparently isolated acts occurring suddenly without any apparent reason.

- [29] Thus, it is open to the prosecution to lead evidence of other acts of sexual nature between the accused and the complainant and the circumstances under which the acts took place. However, I must give you certain important warnings with regard to this evidence of other acts, which we can refer to as context evidence. You must not use this evidence of other acts as establishing a tendency on the part of the accused to commit offences of the type charged, and, therefore, it cannot be used as an element in the chain of proof of the offences charged. You must not substitute the evidence of the other acts for the evidence of the specific offences charged. You must not reason that, because the Accused may have done something wrong to the complainant on another occasion, he must have done so on the occasion charged. The only use you can make of this evidence if you accept it to be true is to place the charged acts into a realistic context.
- [30] Now let me return to the evidence of the complainant as far as the charged acts are concerned.
- [31] On the first count of indecent assault, the complainant said in October 2016, she was sleeping in the living room when the Accused touched her breasts and private part. She referred to her vagina as her private part. She said the incident occurred in the early hours of the morning. She felt bad because the Accused was her 'papa' meaning father. She did not raise alarm because by the time she saw him he was leaving and she was scared. She complained to her mother in the morning but the mother did not believe her and blamed her for creating tension or rift between the couple.
- [32] The complainant said after she finished her final exam paper, she went to Ba Police Station to lodge a complaint. Her mother was called at the station and that she had to accompany her mother back to their home. When she returned home, her mum beat her up for complaining to police. The complainant said she tried to harm herself by trying to

cut her hand with a shaving gear and that she also drank kerosene. She did that because her mother was victimising her for reporting the sexual abuse.

- [33] In relating to the incident alleged on count two, the complainant said on 6 December 2016, she was at home looking after her younger brother and watching television in the living room when the Accused came and sat beside her. He tried to touch her but she told him not to do it. He touched her breasts and private places. When she told him again not to do it, he pushed her to the ground, pulled her skirt up, and pulled down her underwear. When she started screaming, he pressed her mouth and slapped her. He threatened to beat her up if she screamed. He inserted his penis inside her vagina for about 4 to 5 minutes. She told him to stop. He did not listen. He continued. She described the incident as a painful experience. She said her vagina was painful.
- [34] After the incident, he went to his bedroom. She remained on the floor for 5 to 10 minutes. Her condition was really bad. She put on her clothes and went to the washroom. When she was in the washroom, she noticed blood in her underwear. She said she was not having her menstruation on that day.
- [35] When her mother returned home, she did not complain to her. She said the Accused was at home. The next morning, the complainant said she complained to her mother after the Accused left home for work. Her mother did not believe her and accused her for framing her husband to create family problems. The complainant said she waited until the next morning to complain because the Accused had threatened her of consequences if she complained. The complainant said that when her mother did not believe her, she felt she was not being heard.
- [36] In relating to the incident alleged on count three, the complainant said that on 9 December 2016, she was in the kitchen when the Accused came and dragged her to the living room. On this day she was wearing a dress. He pulled down her underwear and inserted his penis into her vagina for 5 to 6 minutes. She tried to push him away but he threatened her. She said he was angry and shouting at her that he will beat her up. She said she was scared. She described the incident as painful but not as painful as the first incident. She said she was crying and told him not to do it. While she was crying, he slapped her. She said she did not complain to anyone about this incident because she felt helpless after her earlier complaints were not heard by her mother and police.

- [37] In relating to the incident alleged on count four, the complainant said that she was folding clothes in her mother's bedroom when the Accused came in and pushed her on the bed. He touched her breasts and then inserted his penis into her vagina. She heard her younger brother crying but she couldn't do anything. She did not resist. She felt helpless as no one was doing anything when she complained. He penetrated her for 2 to 3 minutes. He threatened her not to complain so she didn't complain. She felt there was no use in complaining.
- [38] In relating to the incident alleged on count five, the complainant said that on 12 January 2017, the Accused was at home on leave. She said that she was trying to put her younger brother to sleep. When the Accused entered the bedroom he forcefully pulled down her tights and inserted his penis into her vagina. He penetrated her for 5 minutes. She did not resist or complain. She felt helpless.
- [39] In relating to the incident alleged on count six, the complainant said that on 15 January 2017, the Accused took her to the living room and inserted his penis into her vagina on a rug. He penetrated her for 5 minutes. She did not resist or complain because she felt helpless.
- [40] After this incident, the complainant said her mother took her to one Doctor Michael's surgery. While at the surgery after a urine test the complainant discovered she was pregnant. The complainant said that she underwent a non-intrusive procedure using tablets to abort the child. The complainant said that she was impregnated by the Accused and her mother got her to abort the child to save the Accused, her husband. A day after the procedure, the complainant said she started having her menstruation but it was not heavy.
- [41] The complainant said eventually she managed to contact her mama and her mami, meaning uncle and aunty to take her away to their home in Vaivai. She knew them. She went to their house for the first time on 24 December 2016 for a visit. After the first trip she went back to her home in Naikabula. The complainant said she left Naikabula in February 2017 for good. Her uncle and aunty Shanti picked her up from her home and took her to the police station. The complainant said she told her aunty Shanti that the Accused had raped her.

- [42] In cross-examination the complainant denied the proposition put to her by counsel for the Accused that she was having an intimate relationship with Shanti's son Divnesh and that she fabricated the allegation against the Accused to justify leaving her home in Naikabula and moving to live with Divnesh in Vaivai.
- [43] Shanti Devi gave evidence confirming the complaint of rape made to her by the complainant. She gave evidence of the circumstances under which the complaint was made to her by the complainant. There is a further direction that I wish to give you regarding the complaint evidence. In a case of sexual offence, recent complaint evidence is led to show consistency on the part of the complainant, which may help you to decide whether or not the complainant has told you the truth. It is for you to decide whether the evidence of this complaint given to an aunty helps you to reach a decision, but it is important that you should understand that the complaint is not independent evidence of what happened between the complainant and the Accused, and it therefore cannot itself prove that the complaint is true. You must consider these matters if you decide to rely upon the complaint evidence to assess whether the complainant's evidence is consistent and therefore believable.
- [44] Ms Devi said that the raped complaint is the reason she took the complainant back to the police station so that the complainant could lodge her report. Ms Devi denied that the complainant was in a loving relationship with her son, Divnesh. Ms Devi said that when the complainant eventually moved out of her Naikabula home, the Accused and the complainant's mother made a big scene by throwing the complainant's clothes outside and assaulting the complainant in Ms Devi's presence. Ms Devi's evidence is that the Accused and the complainant's mother appeared to be upset that the complainant was leaving Naikabula and moving to live with Shanti Devi's family in Vaivai.
- [45] Ms Devi also gave evidence that on an earlier occasion the complainant's mother had borrowed \$470.00 from her, which she gave it to her at Dr. Michael's surgery. While Ms Devi was at Dr. Michael's surgery, she learnt that the complainant was pregnant. She said that she was so shocked that she left the surgery immediately. Ms. Devi said she is not an educated person but an ordinary farmer and so she did not know how to react to such situation.

- [46] Both prosecution witnesses were crossed examined by the defence on their previous police statements to show omissions or inconsistencies in the evidence in court. I must give you a further direction regarding the police statements.
- [47] Evidence is what the witnesses told us in court on oath. Police statements are not evidence. So what use you can make of police statements. You may take into account the inconsistencies or omissions in the police statement when you consider whether a witness is believable as a witness. In examining the omissions or inconsistencies, you will wish to decide, first, whether there is in fact an omission or an inconsistency and if you decide there is one whether it is a material and relevant omission or inconsistency. If there is an omission or an inconsistency, it might lead to conclude that the witness is generally not to be relied upon, or that a part of the witness's evidence is inaccurate or you may accept the reason the witness has provided for the inconsistency and consider the witness to be reliable. That is a matter for you to consider.
- [48] That brings me to the end of the prosecution case.
- [49] The defence called one witness, Christina Prasad. She is a younger sister of the complainant. She is 13 years old. Christina told the court that when she accompanied the complainant to her aunty and uncle's place in Vaivai in December 2016, she witnessed the complainant and Divnesh kissing. She also witnessed her aunty making strong tea and making the complainant drink it.
- [50] The defence led this evidence to show the complainant's motive to fabricate the allegations of sexual abuse against the Accused. The defence says that all the allegations against the Accused are not true. The defence says the allegations were fabricated by the complainant so that she can leave her house in Naikabula and return to her lover, Divnesh.
- [51] Whether you believe Christina and accept her evidence to decide whether the complainant had a motive to fabricate or make up a false story of indecent assault and rape against the Accused is a matter for you. You may consider Christina's age and her current relationship or ties with the Accused to determine whether she is a credible and reliable witness. If you reach a conclusion the allegations against the Accused were fabricated by the complainant, then you must express opinions of not guilty.

[52] The prosecution's case wholly rests on the complainant's evidence. If you believe the complainant is telling you the truth that the Accused had touched her breasts and private part as alleged on count one and that he penetrated her vagina with his penis without her consent and knowing she did not consent on the five occasions alleged on counts two to six, then you may express an opinion that the Accused is guilty of the charges. But if you do not believe the complainant's evidence that the Accused sexually abused her as alleged or if you have reasonable doubt about the guilt of the Accused, then you must find the Accused not guilty of that charge.

[53] On each count, your opinions would be either guilty or not guilty. When you are ready with your opinions, please advise my clerk and the court will reconvene to receive them. Please now retire to deliberate on your opinions.



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Hon. Mr Justice Daniel Goundar

Solicitors:

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