

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 107 of 2016

STATE

V

SEMESA SACERE

Counsel : Mr. S. Babitu for the State.
: Ms. E. Radrole for the Accused.

Dates of Hearing : 05 and 06 August, 2019
Closing Speeches : 07 August, 2019
Date of Summing Up : 07 August, 2019

SUMMING UP

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

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 representative count of rape and one count of Indecent Assault. (A copy of the information is with you).

COUNT ONE

REPRESENTATIVE COUNT

Statement of Offence

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

Particulars of Offence

SEMESA SACERE, between the 1st day of January, 2012 and 31st day of December, 2012 at Sigatoka in the Western Division, penetrated the vagina of “**MN**” with his penis without her consent.

COUNT TWO

Statement of Offence

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

Particulars of Offence

SEMESA SACERE, on the 8th of March, 2015 at Sigatoka in the Western Division, unlawfully and indecently assaulted “**MN**” by kissing her stomach.

REPRESENTATIVE COUNT

Ladies and Gentleman Assessors

14. You will note that count one is a representative count, which cover a period between the 1st of January, 2012 and the 31st of December, 2012. By a representative count the prosecution alleges that more than one offence as described in the information was committed during the period specified in the count. The law says that it shall be sufficient for the prosecution to prove that between the specified dates in the count 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 “**MN**” 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.
16. In this trial the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis without her consent.
 17. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
 18. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
 19. The second element is the act of penetration of the complainant's vagina by the penis.
 20. The third element is that 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.
 21. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
 22. 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.

23. You must be satisfied that the prosecution has proved all the elements of the offence of rape beyond reasonable doubt in order for you to find the accused guilty of the offence of rape. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence, then you must find the accused not guilty.

29. To prove count two 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 “MN” by kissing her stomach.

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 “MN” by the act of kissing her stomach.

33. In respect of the 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 “MN” by kissing her stomach.

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.

40. 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.
41. In this case, the accused is charged with one representative count of rape and one count of indecent assault, 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

42. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as admitted facts.
43. 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.
44. 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

45. The prosecution called two witnesses to prove its case against the accused.
46. The complainant who was 16 years of age in 2012 informed the court that she was staying with her grandparents, in 2015 her parents started living with her and her grandparents. The accused is the complainant's grandfather from her mother's side and they lived in the same village.
47. On 3rd May, 2012 the complainant was alone at home when the accused came and asked for her grandparents the accused used to come home regularly and chat with her grandfather. The complainant told the accused that she was alone and that her grandfather was at the farm. Upon hearing this, the accused said *"just lock the door I want to give you some money"* the accused showed her some money and told her to take off her clothes. He said he wanted to touch her body so he told her to lie down and then started touching, and kissing her and her stomach. After a while the accused went over the complainant and penetrated her vagina with his penis. It was painful to the complainant, the accused had sexual intercourse with her for about half an hour. The complainant told the accused not to do this to her since it was painful. The accused responded by saying *"you don't want money"* and he continued.
48. The complainant did not consent to the accused to penetrate her vagina. The accused had sexual intercourse with the complainant on three occasions in 2012. On all occasions the complainant had told the accused not to do it since it was painful but the accused did not listen. He kept forcing her, and he scared her by his words. The complainant did not consent to what the accused was doing to her on all three occasions.
49. According to the complainant if she did not have sexual intercourse with the accused, he may beat her, force her and not give her money, and also the

complainant was frightened of the accused who would give her \$3.00 or \$4.00 after he had sexual intercourse with her.

50. The accused would tell her not to tell anyone about what he had done to her as a result she did not tell anyone. In the year 2015, the complainant told her mother about what the accused had done to her she also said in 2015 the accused did not do anything to her. Furthermore, the accused kept on coming home because of her grandparents. In a week he would come home 4 or 5 times.
51. The reason why she delayed informing her mother was because when she met the accused he kept on telling her not to tell anyone about what he had done to her.
52. Furthermore, in 2015 her mother was at home when her mother saw the accused in her bedroom. Her mother was so surprised to see the accused so she called him and asked him to sit down and also called the complainant and her grandfather. Her mother then questioned the accused why he was in the bedroom with the complainant her mother said she will report the matter to the police. At this time, the complainant told her what the accused had done to her.
53. On this day the accused had entered her house while she was in her bedroom and the other family members were in the kitchen. It was after her bath the complainant had gone into her bedroom to change. The accused came and told the complainant not to wear anything and to lie down and then he started touching and kissing her. The complainant started to cry she identified the accused in court.
54. In cross examination the complainant disagreed that she used to call the accused to come and massage her grandfather or to come to her house. The complainant also disagreed there would be people passing by and living close by her house. The complainant did not tell anyone about what the

accused was doing to her since he kept growling and also made faces at her. When the accused came into her house she was alone he came into the sitting room and locked the door. She was surprised to see him come into the bedroom.

55. The complainant denied she had let the accused into her bedroom and had asked him to come and lay beside her so that they can be together. She did not remove her clothes on her own the complainant maintained the accused had sexual intercourse with her on three occasions.
56. The complainant was a form 4 student in 2012 and the matter was reported on 9th March, 2015. She agreed her mother had approached her and asked her about her relationship with the accused.
57. The complainant denied she did not tell anyone because she had consented to have sexual intercourse with the accused but agreed this matter only came to light and was reported to police because of her mother and that her mother did not approve her of seeing the accused. The complainant did not remove her clothes or lie on the mattress or ask the accused to come on top of her or that she had laid on top of the accused. The complainant agreed the accused did not do anything to her in 2015.
58. The complainant agreed the only reason this allegation came about was after her mother had reported the matter.
59. The final prosecution witness was the mother of the complainant Suliana Saumia the complainant is her eldest daughter born on 23rd October, 1996. On the 8th March, 2015 the witness was at her uncle's house where the complainant used to live. At about 6pm before the witness had her dinner she saw the accused lying in the house after a while when she looked around she did not see the accused.

60. At this time she heard the complainant's voice coming from the bedroom the witness went to see what was happening when she entered the bedroom she saw the complainant lying down and the accused kissing the complainant's stomach. The witness was really upset by what she saw, the accused got a shock and he started apologizing to her for what he had done.
61. When the complainant was lying down her t-shirt was lifted up she noticed the complainant was afraid. The witness asked the accused to come into the living room so that she could question him about the degrading act he had done to her daughter. When she spoke to the accused she noticed the accused was ashamed. The accused sought forgiveness from the witness after she informed him that she will report the matter to the police.
62. When the witness asked the complainant if this incident had happened previously, the complainant told her that the accused usually touched her breast and even had sexual intercourse with her. The accused would come during day time or at night time and have sexual intercourse with the complainant. When these incidents were happening the witness was not living with the complainant.
63. At this time the witness went and reported the matter to the police. After this incident the witness noticed that the complainant forgot things, she would sit and stare she also failed her form 6 examination since her performance at school had been affected.

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 had told her mother after about three years in March, 2015 after she was asked by her mother if the accused had done anything to her previously, and the complainant told her that the accused usually touched her breast and even had sexual intercourse with her.
66. This is commonly known as recent complaint evidence. The evidence given by Suliana is not evidence of what actually happened between the complainant and the accused since she was not present and she 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 mother about what the accused had done to her she did not complain earlier because she was afraid of the accused who used to visit her house about 4 or 5 times in a week and was her grandfather's cousin and also the accused had threatened her not to tell anyone and therefore she is more likely to be truthful.
68. On the other hand, the defence says the complainant did not tell anyone until she was questioned by her mother in March, 2015 that is about three years later since the complainant and the accused were having a sexual relationship. The complainant's mother did not approve that she was seeing the accused and also her mother had approached the complainant and asked her about her relationship with the accused so the complainant 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. In cross examination the witness stated that she reported the matter on 8th March, 2015 but gave her police statement on the 9th. When the witness was referred to her police statement she agreed it was not in her police statement that the accused was at Levani's house on 8th March, 2015. When it was put to the witness that it was not in her police statement that she had told the police that she saw the accused in the complainant's bedroom the witness stated that she had told the police everything.
71. The witness also agreed it was also not in her police statement that she saw the accused kissing the complainant's stomach. The witness maintained that she had told the police everything that she had seen. She also agreed that it was not recorded in her police statement that the accused had apologized to her but she had told this to the police.
72. The witness maintained that she had seen what the accused was doing to the complainant that is why she had spoken to the complainant and the accused.
73. The witness agreed it was not in her police statement that the accused had told the complainant not to tell anyone and that he will give the complainant money. When it was suggested that the omissions were due to the fact that she had not witnessed anything the witness again maintained that she had witnessed everything she told the court that is why she reported the matter to the police.
74. The witness was referred to her police statement line 4 which was read out as:

“when my eldest daughter came to me and told me that Tai Semesa wants to give her money in exchange for him to sexually touch [her] private part.”

75. The witness stated that some of the things she had told the police were noted in her police statement and some were missing. The witness also agreed it was not recorded in her statement that the complainant had told her that she was forced by the accused.

Ladies and Gentleman Assessors

76. The learned counsel for the accused in this regard was cross examining this witness about some inconsistencies in the statement she gave to the police immediately after the incidents when facts were fresh in her mind with her evidence in court. I will now explain to you the purpose of considering the previously made statement of his witness with her evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witness is believable and credible. However, the police statement itself is not evidence of the truth of its contents.
77. It is obvious that passage of time can affect one’s accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
78. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you’re considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment about the reliability of the witness.

79. This was the prosecution case.

DEFENCE CASE

Ladies and Gentleman Assessors

80. 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.
81. From the line of cross examination the defence takes the position that the accused did not commit the offences as alleged by the complainant. The defence is saying that the accused and the complainant were in a sexual relationship that is the reason why the complainant did not tell anyone until 2015 when the complainant's mother questioned the complainant about her relationship with the accused.
82. The complainant had consented to have sexual intercourse with the accused on all the occasions. In respect of the second count of indecent assault the defence says this incident did not happen since the complainant did not say the accused had done anything to her in 2015. The defence further submits the mother of the complainant should not be believed since her evidence was inconsistent with her police statement which she had given to the police when the facts were fresh in her mind.
83. This was the defence case.

ANALYSIS

84. The prosecution alleges that between the 1st of January, 2012 and the 31st of December, 2012 the complainant was alone at home the accused who was the grandfather of the complainant had forceful sexual intercourse with the complainant on three occasions.
85. On all occasions the complainant had told the accused not to do it since it was painful but the accused did not listen. He kept forcing her, and he scared her by his words. The complainant did not consent to what the accused was doing to her on all three occasions.
86. The complainant had sexual intercourse with the accused because she was frightened he may beat her, force her and not give her money, the accused would give her \$3.00 or \$4.00 after he had sexual intercourse with her.
87. In the year 2015, the complainant told her mother about what the accused had done to her the reason why she delayed informing her mother was because when she met the accused he kept telling her not to tell anyone about what he had done to her.
88. The mother of the complainant Suliana Saumia told the court on the 8th March, 2015 she was at her uncle's house where the complainant used to live. At about 6pm before the witness had her dinner she saw the accused lying in the house after a while when she looked around she did not see the accused.
89. At this time she heard the complainant's voice coming from the bedroom the witness went to see what was happening when she entered the bedroom she saw the complainant lying down and the accused kissing the complainant's stomach. The witness was really upset by what she saw, the accused got a shock and he started apologizing to her for what he had done.

90. When the complainant was lying down her t-shirt was lifted up she noticed the complainant was afraid. The witness asked the accused to come into the living room so that she could question him about the degrading act he had done to her daughter. When she spoke to the accused she noticed the accused was ashamed. The accused sought forgiveness from the witness after she informed him that she will report the matter to the police.
91. When the witness asked the complainant if this incident had happened previously, the complainant told her that the accused usually touched her breast and even had sexual intercourse with her.
92. The accused denies all the allegations leveled against him by the complainant the defence takes the position that the accused was in a relationship with the complainant and that he had sexual intercourse with the complainant with her consent.
93. Since the accused and the complainant were in a sexual relationship the complainant did not tell anyone until 2015 when the complainant's mother questioned the complainant about her relationship with the accused. In respect of the second count of indecent assault the defence says this did not happen since the complainant did not say the accused had done anything to her in 2015.

Ladies and Gentleman Assessors

94. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
95. 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.

96. 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.
97. 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.
98. 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.
99. 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.

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

101. In this case, the accused is charged with one representative count of rape and one count of indecent assault and 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.

102. Your possible opinions are:-

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

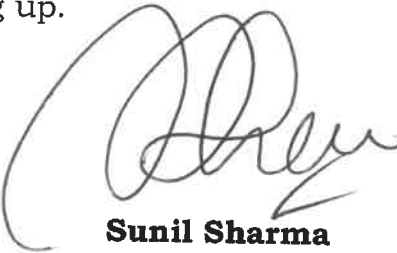
Count Two: **INDECENT ASSAULT**: GUILTY OR NOT GUILTY

Ladies and Gentleman Assessors

103. 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.

104. 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
07 August, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.