

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

High Court Criminal Case No. HAC 174 of 2015

BETWEEN : STATE

AND : ALTHAEUS WILSON TOMASI

Counsel : Mr Niudamu for the State
Ms Vulimanadave for the Accused

Dates of Hearing : 22 July 2019

Closing Speeches : 23 July 2019

Date of Summing up: 23 July 2019

(The complainant's name is suppressed and will be referred to as HS)

SUMMING UP

Madam and gentlemen assessors,

1. I must now sum up the case to you. You must then retire to consider your opinions. I will direct you on the law that applies. You must accept those directions I give you on matters of law. You are to decide the facts of the case based on the evidence that has been led before this court. You will then apply

those directions to the facts and give me your opinions as to whether the Accused person is guilty or not guilty.

2. You are bound by the directions I give you as to the law. But you are not obliged to accept any opinion I may express or appear to have expressed while going through evidence. If you do not agree with that opinion you will ignore it and form your own opinion with that evidence.
3. In this case only the complainant gave evidence. So, you must base your opinions only on the evidence of the complainant. But a few things that you heard in this court are not evidence. Opening submission, closing submissions, statements, arguments and comments made by the counsel and this summing up are not evidence. A suggestion put to a witness by a counsel is also not evidence.
4. You may act only upon the evidence given by the complainant in this case and nothing else. But you may consider those submissions and arguments only as a guidance to understand the case put forward by each party when you evaluate evidence and the extent to which you do so is entirely a matter for you.
5. If you have acquired any knowledge about the facts of this case outside this court room, you must exclude that information from your consideration. Make sure that external influences play no part in forming your opinion. You will also not let any sympathy or prejudice sway your opinions. Emotions has no role to play in this process and do not let anger, sympathy, prejudice or any other emotion shroud the evidence presented in this court room. You only have to consider the evidence adduced in respect of the elements of the offence of rape.
6. I will give you only a summary of evidence. I will not go through every word uttered by the complainant in this case, and if I leave out something that seems

to be important, nothing stops you from taking that into account. Because you decide the facts.

7. After this summing up, you may give your individual opinions as the representatives of the community. Your opinions need not be unanimous. And you need not give reasons for your opinions.
8. Your opinions will assist me in giving my judgement. I will give the greatest weight to your opinions in my judgement. However, I am not bound to conform to your opinions.

Madam and gentlemen assessors,

9. I will now mention some considerations that may assist you in evaluating evidence. In this case only the complainant gave evidence. As I said before you may accept the entirety or even accept only a part of the complainant's evidence and may reject the rest. You have to decide whether the complainant has spoken the truth or correctly recalled the facts and narrated them.
10. You have seen the demeanour of the complainant and how she gave evidence in court. You have seen whether she was forthright or evasive in giving evidence. But you may also bear in mind that some witnesses have good memory, some may not remember every detail. Due to lapse of time many witnesses tend to forget details. You have to use your common sense in assessing the reliability and credibility of a witness. Remember, that many witnesses are not comfortable in giving evidence in a court room, they may act in anxiety and get distracted in this environment.
11. Complainants of sexual offences react differently when they got to narrate the traumatic experiences they have gone through. Some may display obvious signs of distress, anxiety and restlessness, but some may not. Every witness has his or her own way of expressions when they give evidence about an

experience, specially a traumatic one. Conversely, it does not follow that signs of distress by a witness confirms the truth and accuracy of the evidence given.

12. Subsequent conduct of complainants of sexual offences can vary from person to person. Some, in distress, shame or anger, may complain to the first person they see. Some may react instantly and report because of their maturity, education level, social status and for other similar reasons. Some may not complain at once due to immaturity, lack of education, social status and etc. A complainant's reluctance to report an incident could be due to many reasons. Some may not even complain at all due to the fear that it may damage family ties. A complainant may not be comfortable to report a matter to close family members due to the respect, fear, or due to the reluctance to openly discuss matters relating to sex with elders.
13. A late complaint does not necessarily signify a false complaint. Similarly, an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to decide what weight should be attached to the promptness or the lateness of a complaint.
14. When you evaluate evidence, you should see whether the version of the complainant is probable or improbable. You must see whether the complainant has relayed a consistent story.
15. It must be noted that according to the law sexual offences do not require other evidence to corroborate the evidence of the complainant. Which means you can solely rely on the evidence of the complainant without any other evidence to support it.
16. According to the law the prosecution must prove its case beyond reasonable doubt. For the prosecution to discharge its burden of proving the guilt of the Accused, it is required to prove beyond reasonable doubt that he is guilty. The burden of proof remains on the prosecution throughout the trial. For this

purpose, the prosecution must prove every element of the offence beyond reasonable doubt.

17. The Accused need not prove his innocence. The fact that the Accused did not give evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence. The burden is on the prosecution to prove the guilt of the Accused. That means you must be satisfied that the state has proved every element of the offence beyond reasonable doubt. That doubt should be a reasonable one and if you are left with a reasonable doubt you must find the Accused not guilty. If you are not left with any such doubt and if you are sure that the prosecution proved every element of the offence, you must find him guilty.

18. You would have observed that on top of the offence of rape stated in the Information a phrase is noted as "representative count". A representative count is a count by which the prosecution alleges that several offences as described in the statement of offence were committed during the time period specified in the count. To prove a representative count, the law only requires the prosecution to prove that at least one such offence was committed between the dates specified in the count. It simply means that if you are sure that at least once the Accused has entered his penis into the vagina of the complainant you must find the Accused guilty to the representative count of rape.

Madam and gentlemen assessors,

19. We will now look at the offence that the Accused is indicted for. You may see that there is one representative count of rape in the Information filed by the Director of Public Prosecutions as follows;

Representative count

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.

Particulars of Offence

Althaeus Wilson Tomasi between the 1st day of October 2014 and 30th day of November 2014 at Lautoka in the Western Division penetrated the vagina of HS aged 10 years with his penis.

20. The prosecution and the defence agreed to certain facts. Those facts are with you in a document titled as amended admitted facts. Those facts need not be proved again by the prosecution and you can use those facts to make your opinions without any further proof. Among those facts it is agreed that;

- I. the complainant in this matter is HS, 11 years, class 6 student of Jasper William Primary School and resides in Namoli Avenue in Lautoka.
- II. the Accused is Althaeus Wilson Tomasi, 27 years, Sales person and he also resides at Namoli Avenue in Lautoka.
- III. the Accused is the step father of the complainant.

21. Now I will explain what matters you must take into consideration to determine whether the offence of rape is proved by the prosecution. The prosecution must prove the following elements beyond reasonable doubt;

- a. the Accused;
- b. penetrated the vagina of the complainant with his penis;
- c. without the consent of the complainant; and
- d. the Accused knew or believed that the complainant was not consenting; or the Accused was reckless as to whether or not she was consenting.

22. The first element is concerned with the identity of the person who committed the offence. The identity of the Accused is an agreed fact and it is not in dispute in this case as mentioned before.

23. The second element involves the penetration of the complainant's vagina with his penis. The law states that even the slightest penetration of the vagina is

sufficient to constitute the offence of rape. Therefore, it is not necessary to have evidence of full penetration or ejaculation. The prosecution must prove beyond reasonable doubt that the Accused penetrated the vagina of the complainant with his penis to any extent.

24. The third and the fourth elements are based on the issue of consent. However, the law says that a child under the age of 13 years is incapable of giving consent. You will see in the Amended Admitted Facts that the parties have admitted that the complainant was 11 years old at the time of the alleged offence. Therefore, the Prosecution does not have to prove whether the complainant consented or not, because consent is not relevant to the charge of rape in this case. So, you don't have to consider the issue of consent in the third and fourth elements that I just mentioned to you.

25. If you believe that the prosecution proved the relevant elements of rape you may find the Accused guilty for the offence of rape. Likewise, if you believe that the prosecution failed to prove the relevant elements of rape you must find the Accused not guilty.

Madam and gentlemen assessors,

26. Now I will refresh your memory and give a brief outline of the evidence adduced in this case. However, you should consider the entirety of the complainant's evidence when forming your opinions.

27. The complainant gave evidence that in 2014 she was residing at Vomo Street with her mother, stepfather and two younger brothers. She said that her stepfather is Althaeus Tomasi. She gave evidence in respect of three incidents alleged to have taken place between October and November in 2014.

28. The complainant said that the first incident took place on a Saturday when her mother was not at home. She said that the Accused had not gone to work, and he called her into his room. She said that the Accused closed the door and told

her to lie next to him. Then the Accused had removed her pants and underwear with his toes. She further said that the Accused was not wearing anything, and he inserted his penis into her vagina. The complainant had shouted as it was painful. She said then he took the penis out and again inserted it two more times into her vagina.

29. According to the complainant the second incident had taken place on the following Saturday. She said that the Accused told her to come and lie next to him. The Accused had covered them with a blanket and had removed her pants. The complainant said that the Accused then inserted his penis into her vagina. She said that the Accused was not wearing anything, and he was lying on top of her.

30. The complainant said that the third incident also happened in the same month and it was a Saturday too. She said that the Accused called her into his room and asked her to lie down next to him. The Accused had removed her underwear and had inserted his penis into her vagina. However, she said that the Accused did not insert his penis fully and then he started rubbing his penis on her vagina.

31. She said that she did not complain about the incidents to her mother as she was afraid that her mother will be angry with her. The complainant said that in 2015 her grandmother, Celina Penjueli started living with them when they moved into a new house. The complainant had informed about the incidents to her grandmother.

32. Under cross examination the complainant said that after the second or the third incident the Accused told her not to tell about the incidents to anybody. When it was suggested to her that no such incidents took place and that she is lying, the complainant denied the suggestion and reiterated that she is telling the truth about what has happened to her.

33. That was the case for the prosecution.

34. After the closure of the prosecution case the Accused was explained his rights to address the court, to give evidence or to call witnesses. You must bear in mind that although those options were given, still the burden is on the prosecution to prove the guilt of the Accused and he need not prove his innocence. The Accused chose to remain silent and no witnesses were called for the defence. I must remind you that you must not draw any adverse inference from the fact that the Accused remained silent. It is his right.

Madam and gentlemen assessors,

35. It should be noted that in our law no corroboration is needed to prove sexual offences. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters. In other words, in sexual offences the prosecution can solely rely on the evidence of the complainant, without any supporting evidence whatsoever. It is for you to decide how credible and consistent is the evidence of the complainant. Further it should also be noted again that the issue of consent for sexual intercourse is not relevant for children under the age of 13.

36. The prosecution case was that the Accused penetrated the vagina of the complainant with his penis in three occasions.

37. As per the line of cross examination it appears that the Accused denies all the allegations.

38. As it was said before, it is the duty of the prosecution to prove the elements of rape. The Accused need not prove his innocence.

39. I have now given you the directions of law and summarized the evidence adduced in this case. Before I conclude my summing up let me remind you some points again.

40. If you believe that the prosecution has proved beyond reasonable doubt the elements of rape at least in respect of one of the incidents, you may find the Accused guilty to the representative count of rape.

41. If not, you must find the Accused not guilty.

42. You may now retire and consider your opinions. Before you do so, may I ask the counsel of both parties whether you wish to request any redirections?

43. When you are ready with your opinions, the Court will reconvene for you to inform your opinions to court.



Rangajeeva Wimalasena
Acting Judge

Solicitors

Solicitors for the State: Office of the Director of Public Prosecutions

Solicitors for the Accused: Office of the Legal Aid Commission