

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 59 of 2017

STATE

V

ISHWAR CHAND

Counsel : Ms. L. Latu and Mr. A. Kumar for the State.
: Mr. S. Luvena for the Accused.

Dates of Hearing : 02, 03, September, 2020
Closing Speeches : 04 September, 2020
Date of Summing Up : 08 September, 2020

SUMMING UP

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

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.
7. During the closing speeches the defence counsel told you that the prosecution did not exhibit the DNA test results to show if semen was present and whose semen it was. Further, counsel also said that the prosecution should have produced Angeline in court to give evidence about what she had seen that early morning. Counsel asked you to draw an inference from the absence of the above.

8. I direct you to disregard the above submissions completely since it is not for anyone including the defence to tell the prosecution about what they have to adduce as evidence in court and who they have to call as a witness. It is the prerogative of the prosecution to exhibit and call witnesses they think is relevant to their case. You are not to speculate why the DNA test results were not exhibited in court and why Angeline was not called as a witness. You are to decide the matter on the evidence adduced and nothing else.

BURDEN OF PROOF AND STANDARD OF PROOF

9. 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.
10. 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.
11. 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.
12. 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.
13. 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

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

Statement of Offence

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

Particulars of Offence

ISHWAR CHAND, on the 1st day of January, 2016 at Sigatoka in the Western Division, had carnal knowledge with “**M.S**”, without her consent.

15. To prove the above count the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
- (a) The accused;
 - (b) Had carnal knowledge with “M.S”;
 - (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. Carnal knowledge means to have sexual intercourse by penetrating the vagina with the penis. 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.
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. If you are satisfied that the prosecution has proven beyond reasonable doubt that the accused had penetrated his penis into the complainant's vagina without her consent then you must find the accused guilty as charged.
24. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence of rape, then you must find the accused not guilty of the offence.

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

ADMITTED FACTS

26. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as amended admitted facts.
27. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
28. 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

29. The prosecution called three witnesses to prove the charge against the accused.
30. The complainant informed the court, in 2015 she was residing with her husband, sister in law Anita and Anita's daughter Angeline in Nakasi.

31. On 31st December, 2015 the complainant with Anita and Angeline travelled to Sigatoka to work on the farm where the accused was working. The wife of the accused namely Shareen had arranged for the complainant to work on the farm.
32. Upon reaching Sigatoka the accused and his wife were waiting for them they paid their minivan fare and then all went for shopping. The accused bought six bottles of beer by the time they reached the house of the accused it was getting dark.
33. At the house of the accused Anita was cooking while the accused and his wife with the complainant started drinking beer. After the 6 bottles of beer had finished they drank one bottle of wine. The accused and his wife wanted to drink more, but the complainant did not want to, however, the accused and his wife insisted that she accompany them as well.
34. After buying four bottles of beer all came back the accused and his wife started to drink. The complainant drank only 2 glasses and before the beer finished she went to sleep, by this time it was early hours of 1st January 2016.
35. Before going to sleep the complainant told Anita that she should look after her since she was uncomfortable with the accused particularly the way he was talking to her and while doing shopping he wanted to be with her and not his wife.
36. When the complainant went to sleep the accused and his wife were drinking, she was tired of travelling and was drunk. The sleeping arrangement began with Anita beside her was her daughter Angeline and then the complainant with a curtain in between then the accused wife and finally the accused towards the wall. According to the complainant this was how they were supposed to sleep.

37. While the complainant was sleeping she felt somebody on top of her having sex. Her mouth was pressed which stopped her from saying anything, but she was able to make a sound (as demonstrated by her) with her mouth closed. At this time the complainant pinched her niece Angeline to wake her who then hit the accused with a book.

39. At this time, the accused pulled the complainant to the other side of the curtain, by this time Anita woke up and shouted and also swore at the accused and then pushed the curtain aside. The accused jumped over his wife and went outside. The complainant stated the accused had inserted his penis in her vagina while with one hand he was pressing her mouth.

40. The reason why the complainant was certain the accused had inserted his penis into her vagina was when he had come on top of her, she woke up but couldn't shout because the accused was pressing her mouth with his hand and having sex with her.

41. After a while the complainant went to the nearest Police Post to report the matter. The complainant did not give permission to the accused to have sex with her she identified the accused in court. The complainant was taken to Sigatoka Hospital for medical examination.

42. In cross examination the complainant denied that she told the accused and Shareen that she was planning to go back to Suva the next morning or that she had asked for an advance of \$100.00.

43. In respect of the sleeping arrangement the complainant said they were told about it and that is what she said in her evidence. The complainant clarified when the accused came over her he was having sex with her and when she woke up his hand was on her mouth which stopped her from shouting, however, she managed to pinch Angeline.

44. The complainant stated that at no time the accused called her sister or had given her or Anita \$100.00 each. She also denied that after the bottle of wine had finished she wanted to drink more beer, it was the accused and his wife who wanted to drink more and she had offered to give \$50.00 from her ATM account.
45. The complainant denied asking for \$100.00 advance payment or that she will be going home the next day. Furthermore, she was not nagging the accused for more money since she had her bank card with her.
46. The complainant said it was a lie that when she alleged the accused was having sex with her he was beside his wife. The complainant maintained the accused had sex with her that morning and that she did not make this allegation to get back at the accused for refusing to ask for more money from his landlord. The complainant also denied that she had made up the allegation with Anita to put the accused in trouble.
47. The second witness Dr. Tracy Shackley informed the court that she graduated with an MBBS degree from the Fiji School of Medicine in the year 2012. She is a Medical Practitioner for the last 6 years.
48. On 1st January 2016 the witness had examined the complainant at the Sigatoka Hospital. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no.1.
49. The specific medical findings were:
 - a) Right and left shoulders were tender on palpation which meant upon touching the patient's shoulders she complained of pain. There was no bruising;
 - b) Abdomen tender on palpation the suprapubic area above the pelvic bone on the lower abdomen in the tummy below the umbilical cord;

- c) Abrasions were seen on either side of labia majora which is outside lip of the vagina and also abrasions were seen on the perineum which is the area between the vagina and the anus;
 - d) Use of speculum showed that the cervix was bleeding slightly due to slight abrasions in the cervix.
50. The witness explained abrasions meant removal of skin in that area caused by forceful contact. In the professional opinion of the witness the injuries were consistent with forceful trauma.
51. In cross examination the witness said she did not see any injuries on the complainant's face. She had taken a high vaginal swab (H.V.S) from the complainant to check for illness and for the presence of any fluid which was sent to the laboratory for testing. The high vaginal swab will be able to tell if there was semen upon testing by the lab if the perpetrator also undergoes DNA swab.

Ladies and Gentleman Assessors

52. You have heard the evidence of Dr. Shackley who was called as an expert witness on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called. The police medical examination form of the complainant is before you and what the doctor said in her evidence as a whole is to assist you.
53. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor.

54. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the doctor.
55. You should remember that the evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your opinions, you must reach your opinion having considered the whole of the evidence.
56. The final witness Anita Devi informed the court that the complainant is her sister in law, on the 31st December 2015 the witness with her daughter and the complainant went to Sigatoka. This witness told us more or less what the complainant had told us so there is no need for me to repeat the same. The witness was not drinking but the complainant, the accused and his wife were.
57. At around 1am on the New Year's Day the complainant, accused and his wife went to buy more beer and they came back at about 3.30am. After having 2 glasses of beer the complainant came over to sleep and told the witness not to sleep but to be awake.
58. After the complainant slept the witness also slept but she does not know when the accused and Shareen came and slept. When sleeping Angeline hit her on her leg and she woke her up, at this time Angeline hit the accused with the book the witness had used to fan herself. The witness heard the complainant make a sound with her mouth and the complainant was on the other side of the curtain and not where she was sleeping when she went to bed. The witness saw the accused trying to block the complainant's mouth she quickly got up and pushed the curtain. She saw the accused on

top of the complainant, both were naked and having sex. The witness yelled and screamed at the accused who then jumped off and ran outside.

59. The witness had said *“you should not do this, if you want to have sex you should have sex with your wife who was sleeping beside you.”* The complainant was crying and she wanted to go home.
60. In cross examination the witness denied they were paid \$100 each upon arrival in Sigatoka. When they came to Sigatoka the witness did not have any money but the complainant had money. The witness does not know the reason why the complainant had asked her to stay awake. She agreed she could not see the other side through the curtain, however, there was a gap after the curtain had moved.
61. When it was suggested that she was mistaken and lying when she said she saw the accused having sex with the complainant the witness stated that she was not lying and she was only telling what she had seen.
62. When she had woken up the complainant was on the other side of the curtain towards the wall and it was not correct that the accused wife was sleeping beside the complainant. The accused and Shareen were sleeping away from the complainant. When it was put to the witness that she was misleading the court in terms of the sleeping arrangement the witness agreed.
63. The witness maintained she had seen the accused having sex with the complainant and she denied making up a story to get at the accused she also denied asking for money from the accused. The witness said they had not worked on the farm so how would they be paid.
64. In re - examination the witness stated when she woke up the complainant was not where she had slept. She saw the complainant on the other side

because the curtain was open so there was a gap and therefore the witness was able to see through. The accused was having sex and he was blocking the complainant's mouth. The witness had slept before the accused and Shareen and she would not know in which position the accused and Shareen had slept. The witness also stated that she did not understand what it meant by misleading the court in terms of the sleeping arrangement.

65. This was the prosecution case.

DEFENCE CASE

Ladies and Gentleman Assessors

66. At the end of the prosecution case you heard me explain to the accused his options. He has these options because he does not have to prove anything. The burden to prove his guilt beyond reasonable doubt remains with the prosecution at all times.

67. The accused could have remained silent but he chose to give sworn evidence and be subjected to cross examination and also called one witness. You must consider their evidence and give such weight as you think fit.

68. The accused informed the court, on 31st December 2015 he met the complainant, Anita and Angeline for the first time at Sigatoka town with his defacto partner Shareen.

69. The accused further stated that his employer had only agreed to employ Anita but it was Anita who mentioned that the complainant also wanted to work.

70. Since the complainant and Anita did not have any money the accused paid \$100 each to the complainant and Anita out of which their fare was also paid. The amount of \$200 was obtained by the accused as a loan from the owner on the condition that the complainant and Anita will work and the money will be deducted from their wages.
71. All of them contributed towards shopping and then 6 bottles of beer was purchased. After 6pm they all arrived at their home Anita started to cook while the complainant, Shareen and the accused drank 6 bottles of beer and one bottle of wine. Since the complainant wanted to drink more the three of them went to buy more beer. After buying 4 bottles of beer they came back home.
72. At the time they were drinking the 4 bottles of beer the complainant said that she will go back home tomorrow and that she will not work. The complainant asked the accused to ask his employer for another \$100 and that Anita will be paying \$300 by working in the farm.
73. The accused told the complainant that the employer has already given \$200 and will not be giving any more money. It was around 4.30am the 4 bottles of beer had finished.
74. When everyone went to sleep the accused and Shareen did not sleep after about 15 minutes the complainant started to cry. At this time, the accused and Shareen were lying down on the bed and talking when they heard the complainant cry.
75. The sleeping arrangement was that the accused was sleeping beside Shareen who was beside the complainant then Angeline and Anita. When Shareen asked the complainant why she was crying the complainant did not say anything it was Anita who said that the accused had raped the complainant.

76. When the accused heard this he jumped out of the bed and stood up, he did not say anything but went and told his employer about the allegation made against him.
77. The accused also stated that when the complainant was crying he was not near the complainant he denied the allegation he maintained that he did not do anything to the complainant as alleged.
78. In cross examination by the state counsel the accused agreed that he was a labourer working for one Ganesh Chand and at that time Shareen was his defacto partner. According to the accused the complainant did not give any reason why she wanted to go back home but she had asked for \$100.
79. The accused denied committing the offence as alleged by the complainant he stated that he was questioned by the police and during his interview he had told the police that he had given \$100 to Anita and the complainant when they had arrived and also that the complainant was asking for another \$100.
80. Also the accused did not know the complainant very well and he does not know the reason why the complainant is making this allegation against him this was the first time he had met the complainant. The accused maintained he did not commit the offence as alleged.
81. The final defence witness Shareen Monika Prasad informed the court that in 2015 she was living with the accused in a defacto relationship. On 31st December, 2015 the witness had gone to Sigatoka town with the accused to meet the complainant, Anita and her daughter Angeline.
82. This witness basically narrated to court what the accused had said. According to the witness when they were drinking the 4 bottles of beer the

complainant was asking for \$100 and saying that she will leave for Suva the next day.

83. The complainant also said that Anita will stay back and work in the farm when they said that they did not have the money the complainant was forcing them to ask their landlord to give \$100. After the drinks finished the complainant went to bed, however, the accused and the witness were not sleeping they were lying down on the bed talking more or less whispering.
84. The accused was lying towards the corner and the witness was beside him with the complainant next to her. After about 15 to 20 minutes the complainant started crying. At this time the witness woke up and sat on the bed and then went to the complainant.
85. The complainant held the witness tightly when she asked what happened the complainant said the accused had raped her. At this time Anita stood up and said that she had seen what the accused had done to the complainant, Angeline was also awake.
86. The witness could not believe what Anita had told her and she told Anita to stop lying because the accused was beside her and both were awake. The witness maintained that nothing happened as alleged by the complainant and it was a lie.
87. In cross examination the witness agreed in 2015 and 2016 she was in a defacto relationship with the accused and after the drinks had finished all three went to bed and that the complainant was a bit drunk.
88. The witness did not know the reason why the complainant was crying and also she did not know the reason why the complainant wanted to return

home but the complainant had asked for \$100 saying that Anita will pay the amount back.

89. The witness maintained that she told the police about the additional \$100 the complainant was asking for. When her police statement dated 1st January 2016 was shown the witness agreed this was not written in her police statement.

Ladies and Gentleman Assessors

90. The learned state counsel in this regard was cross examining the defence witness about an inconsistency in the statement she gave to the police 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 this witness with her evidence given in court. You are allowed to take into consideration the inconsistency 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.
91. 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.
92. 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.

93. The witness also stated that she was not lying to save the accused she told the court what had happened in fact she was no longer with the accused and she had told everything to the police.
94. In re-examination the witness stated that she told everything to the police but some things were missing.
95. This was the defence case.

ANALYSIS

96. The prosecution alleges that the accused during the early hours of 1st January, 2016 went on top of the complainant, and was having sexual intercourse with her. The complainant woke up and saw what the accused was doing. To prevent her from raising an alarm he had pressed her mouth with his hand, however, she was able to make a sound with her mouth closed and also pinched her niece Angeline who woke up and hit the accused with a book.
97. Thereafter, Anita woke up and heard the complainant make a sound with her mouth who was on the other side of the curtain and not where she was sleeping when she went to bed. Anita quickly got up and pushed the curtain and saw the accused on top of the complainant, both were naked and they were having sex. The witness yelled and screamed at the accused who then jumped over his wife and went outside.
98. The incident was immediately reported to the police and the complainant was medically examined. The examining doctor had observed injuries on both sides of the labia majora (outside lips of the vagina) and the inside of the cervix of the complainant including slight bleeding as a result of force

or trauma. The complainant did not consent for the accused to have sexual intercourse with her.

99. On the other hand, the defence says the complainant made up a story against the accused because he had refused to submit to the demands of the complainant who wanted additional \$100.00 after the accused had given \$100.00 each to the complainant and Anita when they had arrived in the afternoon of 31st December.
100. The accused had loaned the money from the owner of the farm where the complainant and Anita had to work which was to be deducted from their wages. The complainant was forcing the accused and his defacto partner to ask the owner to give the money which will be paid by Anita from her wages.
101. Since the accused had refused to ask the owner to give the complainant additional \$100.00 the complainant made an allegation against him. The allegation is not true since the accused was talking with his defacto partner at the time of the alleged incident and his position on the bed made it impossible for the accused to have sex with the complainant since he was sleeping towards the wall with Shareen beside him and then the complainant.
102. Anita and the complainant have together made this allegation to put the accused in trouble. The allegation narrated by the complainant and her sister in law did not happen and the complainant should not be believed.

Ladies and Gentleman Assessors

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

104. 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.
105. 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.
106. You will have to evaluate all the evidence and apply the law as I explained to you when you consider whether the charge 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 his or her previous statement 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.
107. 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.

108. 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.
109. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
110. Your possible opinions are:-

ONE COUNT OF **RAPE** - ACCUSED - GUILTY OR NOT GUILTY

Ladies and Gentleman Assessors

111. 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.
112. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.



Sunil Sharma
Judge

At Lautoka
08 September, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs Howell and Associates, Tavua for the Accused.