

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 174 of 2017

STATE

V

LIVAI BATILOTE

Counsel : Mr. T. Tuenuku for the State.
: Ms. K. Vulimainadave for the Accused.

Dates of Hearing : 06 October, 2020
Closing Speeches : 07 October, 2020
Date of Summing Up : 07 October, 2020

SUMMING UP

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

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 person is guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
6. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

BURDEN OF PROOF AND STANDARD OF PROOF

7. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused person. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.

8. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
9. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this court room.
10. You must decide the facts without prejudice or sympathy for either the accused person or the complainant. Your duty is to find the facts based on the evidence without fear, favour or ill will.
11. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

INFORMATION

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

FIRST COUNT

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

LIVAI BATILOTE between the 1st day of January to the 31st December, 2015 at Yasawa Island, in the Western Division, unlawfully and indecently assaulted "L.R" by licking the vagina of the said "L.R".

SECOND COUNT

Statement of Offence

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

Particulars of Offence

LIVAI BATILOTE between the 1st day of January to the 31st day of December, 2015 at Yasawa Island in the Western Division, penetrated the vagina of “L.R”, a 10 year old child with his penis.

Ladies and Gentleman Assessors

13. As you are aware after the prosecution closed its case, this court had ruled that the accused had a case to answer in respect of the second count of rape only. Therefore you are to disregard count one of sexual assault completely.
14. To prove the offence of rape the prosecution must prove the following elements beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the vagina of the complainant “L.R” with his penis;
 - (c) “L.R” was below the age of 13 years.
15. The slightest of penetration of the complainant’s vagina by the accused’s penis is sufficient to satisfy the act of penetration. As a matter of law a person under the age of 13 years does not have the capacity to consent. In this case the complainant was 10 years at the time of the alleged offending. I therefore direct you that consent of the complainant is not an issue in regards to this count.
16. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.

17. The second element is the act of penetration of the complainant's vagina by the accused with his penis.
18. The final element of the offence is the age of the complainant. It is an agreed fact that the complainant was 10 years in 2015 which establishes that she was below the age of 13 years at the time of the alleged incident.
19. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis then you must find the accused guilty of rape. 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.
20. In this trial the accused has denied committing the offence of rape he is charged with. 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.
21. 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 this count. 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.
22. If you are not satisfied that the accused had penetrated the vagina of the complainant with his penis then as a matter of law I direct you to consider the lesser offence of indecent assault. In respect of the offence of indecent assault the accused counsel in her cross examination of the complainant had put the proposition to the complainant that the accused had touched the buttocks of the complainant which she had agreed.

23. To prove the offence of indecent assault beyond reasonable doubt the prosecution must prove the following elements of this offence:
- a) The accused;
 - b) Unlawfully and indecently;
 - c) Assaulted the complainant “LR” by touching her buttocks.
24. The first element of the offence of indecent assault is concerned with the identity of the person who allegedly committed this offence.
25. 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.
26. Assault is the unlawful use of force on the complainant “LR” by the act of touching her buttocks.
27. If you are sure that all the elements of the offence of indecent assault have been proven beyond reasonable doubt, then you must find the accused guilty. 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.
28. 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

29. 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.
30. 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.
31. 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. This 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

32. The prosecution called one witness to prove the charge against the accused.
33. The complainant informed the court that the accused is her cousin and in the year 2015 she was a class 4 student living with the accused and his family at Yaqeta village in the Yasawas.
34. One day during the second term of school after the complainant came back from school she was alone in the house with the accused. The accused told her to go to his bedroom and get a torch. When the complainant was in the bedroom the accused came and pushed her on the floor and made her lie on

her back facing up. At this time, the accused removed her panty as she tried to get up he told her to lie down, not to move and to lie still.

35. The complainant was scared of the accused, he was wearing a ¾ pants which he removed with his underwear, he then penetrated his penis into her vagina and had sexual intercourse with her for about 3 minutes. The complainant was embarrassed with what the accused had done to her which was not good.
36. After the accused finished he told the complainant not to tell anyone about what he had done to her. When the parents of the accused returned later that day she did not tell them about what the accused had done to her because the accused had told her not to tell anyone.
37. The complainant was also scared to tell her teacher about what had happened to her, however, she told her aunt who was her namesake in Labasa when she went to attend class 5. Her aunt would ask her questions and was observing her since most of the time she would be day dreaming. Despite the accused telling her not to tell anyone about what he had done to her when the complainant went to Labasa she decided to tell her namesake about what the accused had done to her.
38. In cross examination the complainant said that her aunt continued to ask her whether anyone had done anything bad to her, as a result she told her aunt what she told the court. The only reason she told her aunt about what the accused had done to her was because she wanted to be sent back to the accused family or her family.
39. The complainant also agreed that in 2015 the accused had only touched her buttocks and that was all he had done to her. However, upon further cross examination she maintained that the accused had inserted his penis into her vagina. The only reason she came up with this story about the accused was for her to get away from her aunt. The complainant also agreed that when

she was taken to Labasa by her aunt she was crying and she had refused to stay in Labasa.

40. In re-examination the complainant stated that the accused had sex with her in 2015 and the reason why she did not want to stay with her aunt in Labasa was because she was scared of her uncle who used to beat her when she did anything wrong.
41. This was the prosecution case.

DEFENCE CASE

Ladies and Gentleman Assessors

42. 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 guilt beyond reasonable doubt remains on the prosecution at all times.
43. 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.
44. From the line of cross examination the defence takes the position that the accused did not commit the offence of rape as alleged. The accused did not rape the complainant by penetrating her vagina with his penis.
45. The complainant made this complaint since she wanted to leave her aunt's house in Labasa so the only way she could leave was to make up a story against the accused which she did so that her aunt would bring her over. The complainant agreed that the accused had only touched her buttocks which

add to the fact that the story narrated by the complainant did not happen and therefore she should not be believed.

46. This was the defence case.

ANALYSIS

47. The prosecution alleges that between the 1st January to the 31st December, 2015 the accused had penetrated the vagina of the complainant and had sexual intercourse with her for about three minutes. This happened when the complainant and the accused were alone in the house.

48. The accused had sent the complainant into his bedroom to get a torch when she was in his bedroom the accused came and pushed the complainant on the floor when she was lying on her back he forcefully removed her panty. Thereafter the accused removed his $\frac{3}{4}$ pants and underwear and had forceful sexual intercourse with her.

49. Since the complainant was 10 years of age she was incapable of consenting to what the accused had done to her. After having forceful sexual intercourse the accused told the complainant not to tell anyone about what he had done to her. When the complainant left the house of the accused and went to Labasa she told her aunt about what the accused had done to her.

50. On the other hand, the defence is saying that nothing had happened as mentioned by the complainant she did not want to leave the accused and his family when she was taken to Labasa she was crying and did not want to stay there so she made up a story against the accused.

51. As a result of what she told her aunt she was brought back to Lautoka which she was happy about. Furthermore, the complainant had agreed in court that the accused had only touched her buttocks and done nothing else to her.

52. The defence is asking you to disregard the evidence of the complainant that she was raped by the accused as described by her which is not possible upon her own evidence.

Ladies and Gentleman Assessors

53. While considering the age of the complainant keep in mind that complainant's 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 complainant's reluctance to complain to anyone as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
54. 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 whether the prosecution witness was reliable or not. You observed the witness give evidence in court. You decide if the witness was forthright and truthful or not. You may use your common sense when deciding on the facts. Assess the evidence of the witness and her demeanour in arriving at your opinions.
55. In deciding the credibility of the witness and the reliability of her evidence it is for you to decide whether you accept the whole of what the witness said, 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 the witness told the truth and was correctly recalling the facts about which she has testified. You can accept part of the witness evidence and reject other parts. The witness may tell the truth about one matter and lie about another or be accurate in saying one thing and not be accurate in another.

56. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge against the accused person 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 her own evidence or not.
57. 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.
58. 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 guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
59. The accused person is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
60. Your possible opinions are:-

ONE COUNT OF **RAPE**: Accused - GUILTY OR NOT GUILTY.

If you find the accused not guilty of rape then you are to consider whether the accused is guilty or not guilty of the lesser offence of **INDECENT ASSAULT**.

Ladies and Gentleman Assessors

61. 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.

62. 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
**Sunil Sharma
Judge**

At Lautoka

07 October, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.