

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 51 of 2020

STATE

V

SW

Counsel: Ms. A. Vavadakua for the State
Ms. L. Manulevu with Ms. K. Marama for the Accused

Date of Hearing: 12th January 2021

Date of Summing Up: 13th January 2021

SUMMING UP

1. The name of the Complainant and the Accused are suppressed. Hereinafter the Complainant will be referred to as **MM** and the Accused will be referred to as **SW**.
2. The hearing of this case has now reached its conclusion. I have to sum up the case now. As I explained to you before the commencement of the hearing, we have different functions. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies to this action. You must accept the law from me and apply all directions I give you on matters of law.

3. Your function is to determine the facts of the case based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I explain it to you, to the facts as you find them to be, and in that way, arrive at your opinion.
4. I may comment on the facts if I think it will assist you when considering the facts. However, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard any comment I make about the facts unless it coincides with your own independent opinion.
5. You must reach your opinion on evidence and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box. This summing up, statements, arguments, questions, and comments made by the parties' counsel are not evidence. The purpose of the opening address by the learned counsel for the Prosecution is to outline the nature of evidence intended to be put before you. Therefore, the opening address of the Prosecution is not evidence. The closing addresses of the counsel of the Prosecution and the Defence are not evidence either. They are their arguments, which you may properly consider when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
6. If you heard, read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony put before you in this courtroom. Ensure that no external influence plays a part in your deliberation. You are allowed to talk, discuss, and deliberate facts of this case only among yourselves. However, each one of you must reach your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that your opinion does not bind me, but I assure you that I will give the greatest possible weight to your opinions when I make my judgment.
7. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether sympathy for or prejudice against the accused, the Complainant, or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to

influence you. It would be best if you approached your duty dispassionately, deciding the facts solely upon the whole of the evidence. You have to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

Burden and Standard of Proof

8. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused guilty of the offence.
9. The burden of proof of the charge against the accused is on the Prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words, there is no burden on the accused to prove his innocence, as his innocence is presumed by law.
10. The standard of proof in a criminal trial is "proof beyond a reasonable doubt." It means that you must be satisfied in your mind that you are sure of the accused's guilt. If there is a riddle in your mind about the accused's guilt that means the Prosecution has failed to satisfy you the guilt of the accused beyond a reasonable doubt. If you find any reasonable doubt about the commission of the offence as charged or any other offence by the accused, such doubt should always favor the accused.

Information and elements of the offences

11. The accused is being charged with one count of Rape, contrary to Section 207 (1) (2) (b) and (3) of the Crimes Act. The particulars of the offence are in the information. Hence, I do not wish to reproduce them in the summing up.
12. The main elements of the offence of Rape are:
 - i) The accused,
 - ii) Penetrated the vulva of the Complainant with his fingers.

13. The Complainant was below the age of thirteen years at the time of this alleged incident. The Defence has not disputed the age of the victim. Hence, she is incapable of giving consent to any form of penetration of her vulva as defined under Section 207 of the Crimes Act.

Representative Count

14. You could see the information which states the first count as representative count. The Prosecution alleges that the accused had penetrated the vulva of the Complainant with his fingers on multiple occasions during the period between the 1st day of March 2020 and the 31st day of June 2020. The Complainant could not remember when those incidents took place exactly but could remember that few of them took place between the 1st day of March 2020 and the 31st day of June 2020.
15. When the Prosecution cannot say precisely when or how often the offences were committed, they can bring a charge that covers more than one incident. This is what the Prosecution has done here. The information alleges that the accused had penetrated the vulva of the Complainant with his fingers at least one occasion during the period between the 1st day of March 2020 and the 31st day of June 2020. Accordingly, if you are sure that the accused had penetrated the vulva of the Complainant with his fingers at least one occasion during the period as stated in the information, you can find him guilty of Rape as charged.

Accused

16. It is the onus of the Prosecution to prove beyond a reasonable doubt that it was the accused who committed this offence to the Complainant.

Penetration

17. Evidence of the slightest penetration of the vulva of the Complainant with the fingers of the accused is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

Admitted Fact

18. I now request you to draw your attention to the Agreed Facts, which are before you. They are the facts that the Prosecution and the Defence have agreed without dispute. Hence, you are allowed to consider them as proven facts by the Prosecution beyond a reasonable doubt.

Evidence of Corroboration

19. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. It means that if you are satisfied with the evidence given by the Complainant and accept it as reliable, credible, and truthful, you are not required to look for any other evidence to support the account given by the Complainant.
20. One or more of you may have assumptions as to what constitutes Rape, what kind of person may be the victim of Rape, what kind of person may be the rapist, or what a person is being raped will do or say. Though such assumptions are natural in ordinary life, you must leave behind such assumptions as there is no stereotype of circumstances for a rape, a rapist, or a victim of Rape.
21. Offences of this nature can occur in any circumstance between any person who acts in various ways. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgment strictly on the evidence that you have heard from the witnesses during the hearing.

Alternative Count

22. If you find the accused not guilty to the offence of Rape, you are allowed to consider an alternative count that is Sexual Assault though it is not charged in the information. The main elements of the offence of Sexual Assault are that:
- i) The accused,
 - ii) Unlawfully and Indecently,

iii) Assault the Complainant.

23. The word "unlawfully" means without lawful excuse. An act is an indecent act if a right-minded person would consider the act as indecent. It is your duty as Assessors to consider and decide whether the fondling of the genital area of the Complainant is an indecent act amounting to sexual assault.

Evidence of the Prosecution

24. Let me now remind you of the evidence presented by the Prosecution and the Defence during the hearing. This is a very short hearing, where the Prosecution adduced the evidence of one witness and the Defence presented the evidence of two witnesses. I trust that you have heard those evidence and still could recall them.
25. The Complainant was seven years old in 2020. During the school break, she stayed home with her stepfather, the accused, when her mother had gone to work at the Women Club in the village. She lived with her mother, two sisters, the stepfather and the grandfather since she was at class two. While her mother was at work, her stepfather had fondled her "pepe" with his index finger. He had done it many times. According to the Complainant, it had happened in the room, when she was laying down. No one else was present in the room when her stepfather had done this. The learned Counsel for the Prosecution asked the Complainant to show her "pepe" using a toy bear. The Complainant pointed out the groin area closer to the genital between the legs of a toy bear as the place of her "pepe". Furthermore, the complainant said that she felt pain when the accused fondled her "pepe".
26. You have heard the last question of the evidence-in-chief. I will reproduce it here for you to recall it correctly.

"Meme that thing that you told us about what Ta SW did to you inside the room. Can you tell us is it true, or are you making it up or did someone tell you to say it?"

27. For this last question, the complainant answered as "yes". During the cross-examination, the learned Counsel for the Defence asked the Complainant whether she made up this story, for which the Complainant answered "no"
28. The Complainant said that her mother usually takes her sister with her when she works at the village. When she was with her stepfather at home, her grandfather was also staying with them. The Complainant had told her mother about this incident when her mother asked about it. According to her, there were instances where she had stayed home alone with her stepfather.
29. You may recall that during the cross-examination, the Complainant said that her namesake had told her to tell that Ta SW had fondled her "*pepe*". When her mother gave birth to her baby sister four months ago, she stayed with her namesake.

Evidence of the Defence

30. At the conclusion of the Prosecution's case, the accused was explained about his rights in defence. The accused opted to give evidence and also called one witness for his defence. I will now proceed to summarize the evidence presented by the Defence briefly.
31. In his evidence, the accused denies this allegation, claiming that he had never fondled the "*pepe*" of the complainant. Moreover, he explained that he had never stayed at home with the complainant alone as her grandfather were always with them at home. The complainant's mother, who gave evidence for the Defence, said that she takes her children, including the complainant with her when she goes to work if the weather is good. If the weather is bad, she leaves them at home with the accused and her father. She had never left the complainant alone with the accused at home.
32. I have summarized the evidence presented during this hearing. However, I might have missed some. It is not because they are not important. You have heard every item of evidence. I only wanted to draw your attention to the main items of evidence and help you in recalling yourselves of the evidence.

Analysis and Directions

33. According to the evidence presented by the Prosecution and the Defence, you have to determine, firstly whether this alleged incident actually happened. If then, has the accused penetrated the vulva of the Complainant with his fingers? To do that, you have to determine the reliability and credibility of the Prosecution and the Defence's evidence.

Evaluation of the Evidence

34. I now take your attention to the direction of evaluation of the evidence. The evolution of evidence consists of two main steps, the determination of the reliability and the credibility of the evidence.

Reliability of Evidence

35. You must be satisfied that you can rely on the evidence as reliable evidence. To do that, you have to be satisfied that evidence is free from mistakes, errors, and inaccuracies. If you find the evidence is free from such mistakes, errors, and inaccuracies, you can consider the evidence as reliable evidence.

Credibility of Evidence

36. The assessment of the credibility of evidence does not concern the unintended inaccuracy, mistakes, or errors. It focuses on the lies or inaccurate facts that are intentional and motivated attempts to deceive.
37. Evaluation of the reliability and credibility of evidence will help you determine what evidence you may accept and what part of the evidence you may refuse. In doing that, you may accept or reject such parts of the evidence as you think fit. It is for you to decide whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.

38. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear, and or feel what the witness is talking in the evidence. You have to then consider whether the witness's evidence is probable or improbable, considering the circumstances of the case. Apart from that, you are required to consider the witness's consistency not only with his or her evidence but also with other evidence presented in the case.
39. It is your duty to consider the witnesses' demeanour, how they react to being cross-examined, and re-examined and were they evasive to decide the witness's credibility.
40. Moreover, you must bear in mind that 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 accurate in another thing.

Defence's Case

41. Let me now take your attention to the defence of the accused.
42. The accused is not obliged to prove his innocence and also not required to give evidence. However, in this hearing, the accused not only elected to give evidence on oath but also called a witness to give evidence for the Defence. Therefore, you have to take into consideration the evidence adduced by the accused and his witness when you determine the issues of fact of this case.
43. Accordingly, it is for you to decide whether you believe the evidence given by the Defence. If you consider that the account given by the Defence is or may be true, you must find accused not guilty.
44. If you neither believe nor disbelieve the version of the Defence, yet, it creates a reasonable doubt in your mind about the Prosecution's case. You must find the accused not guilty.

45. Even if you reject the version of the Defence that does not mean that the Prosecution has established that the accused guilty to this offence. Still you have to satisfy that the Prosecution has established on its own evidence beyond reasonable doubt that the accused has committed their offence as charged in the information..

Presentation of the Evidence of the Child Complainant

46. You saw that the Complainant gave evidence via Skype from a separate room. Giving of evidence in this way is perfectly normal in cases like this. It is designed to enable the witness to feel more at ease when giving evidence. It is not intended to prejudge the evidence which the witness gives. The fact that the evidence has been given in that manner, must not in any way be considered by you as prejudicial to the accused.

Evidence of the Child Complainant

47. The most important part of your task is to determine whether the child witness has told the truth and has given a reliable and credible account of the events that she was describing. Some of you may have children, grandchildren, or relatives of this age as of the Complainant. If so, I think you will recognize the advice that I will offer you about your opinion of the evidence of the child complainant, but remember that I am speaking only about an approach to consider the evidence. Still, the evaluation of the evidence is your responsibility. You do not have to accept my advice if you disagree with it.
48. Children do not have the same life experience as adults. They do not have the same standards of logic and consistency. Their ability to understand certain events may be severely limited for several reasons, such as their age and immaturity. Life viewed through a child's eyes and mind may seem very different from life viewed by an adult. Children may not fully understand what they are describing, and they may not have the words to describe it. However, they may have come to realize that what they are describing is, by adult standards, bad or, in their perception, naughty. They may be embarrassed about it. They might think that using some words are naughty, and therefore find it difficult to speak.

49. Remember how you usually talk to children of this age. You should bear those difficulties in mind when you consider the answers given by the child Complainant. All decisions about the evidence are for you to make.
50. As I explained before, you have to determine whether this alleged incident took place. If you determine that this alleged incident had taken place, then you must decide if the accused had penetrated the vulva of the Complainant with his fingers. In doing that you could consider the Complainant's evidence, where she said the accused fondled her "*pepe*". The learned Counsel for the Prosecution asked the Complainant to show her "*pepe*" using a toy bear. The Complainant pointed out the groin area closer to the genital between the legs of a toy bear as the place of her "*pepe*".
51. You have to determine whether there is evidence to establish that the Complainant referred to her vulva as "*pepe*". Has the Prosecution presented any evidence to establish whether the Complainant was dressed up or not when the accused fondled her "*pepe*". You can only make your determination based on the evidence presented. The Prosecution submitted that they had given evidence in the forms of direct evidence and circumstantial evidence.
52. If there is reliable evidence from a witness who actually saw the accused had penetrated the vulva of the Complainant with his finger, or if there is reliable evidence of the accused himself had admitted it, these are good examples of direct evidence against the accused.
53. On the other hand, direct evidence of all the elements of a crime is often not available, and the Prosecution relies upon circumstantial evidence to prove certain elements. In this case, the Prosecution relies upon circumstantial evidence to prove that the accused had penetrated the vulva of the Complainant with his finger.
54. The Prosecution relies upon evidence of various circumstances related to the crime and the accused, which the Prosecution says, when taken together, will lead to the sure conclusion that the accused have committed this crime. The Prosecution presented the evidence of the Complainant, where she said the accused fondled her "*pepe*". She then used a toy bear to point out where she had claimed as "*pepe*". Accordingly, she pointed out the groin area

between the legs of a toy bear. She had felt pain when the accused fondled her "pepe". The Prosecution suggests that when taking these evidence together, will lead to a sure inference that the accused had penetrated the vulva of the Complainant with his finger.

55. Lady and Gentlemen, it is your duty to examine the evidence presented by the Prosecution and the Defence and then decide whether you accept them or not. Afterwards, you can determine what inference you can draw from them.
56. What conclusion or inference you reach from the evidence is entirely for you to decide. However, considering what inference you should draw or what conclusion you should reach, it is important to be mindful that speculation has no part in this process. The inference must be the only and certain rational conclusion of the guilt of the accused. Suppose the evidence that you accepted as reliable suggests you some other probable inferences or conclusions, which show the accused's innocence or create doubt about the guilt of the accused. In that case, you are not entitled to draw any inference of guilt of the accused person.

Final Directions


57. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the Prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged, you can find the accused guilty of the said offence of Rape.
58. If you are not satisfied or have doubt whether the Prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged, you must find the accused not guilty of the said count of Rape.
59. If you found him not guilty for the offence of Rape, you are then allowed to consider the alternative count of Sexual Assault. If you are satisfied that the Prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault, you can find him guilty of the alternative count of Sexual Assault.

60. If you are not satisfied or have doubt whether the Prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault, you must find the accused not guilty for the said count of Sexual Assault.

Conclusion

61. Madam and Gentlemen assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the Court could reconvene.
62. Learned Counsel of the Prosecution and the accused, do you have any redirections to the assessors?




.....
Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva

13th January 2021

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.