

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

High Court Criminal Case No. HAC 115 of 2015

BETWEEN : STATE

AND : MOAPE DAVETA DELANA

Counsel : Ms Uce for the State
Mr Tunidau for the Accused

Dates of Hearing : 27 & 28 August 2019

Closing Speeches : 29 August 2019

Date of Summing up: 30 August 2019

SUMMING UP

Madam and gentlemen assessors,

1. I must now sum up the case to you. You must then retire to consider your opinion. 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. You must base your opinion only and only on the evidence given by the witnesses. 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 is not evidence unless it is admitted by the witness.
4. You may act only upon the evidence given by the witnesses 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 each element of the offence. You must not form your opinion based on the emotions, sympathies, prejudices, speculations and morality. As I said before you only have to consider the evidence given by the witnesses in this case and nothing else to form your opinion.

6. I will give you only a summary of evidence. I will not go through every word uttered by the witnesses 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. You may reject or accept any evidence in forming your opinion. 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. As I said before you may reject the whole evidence of a witness, accept the entirety or even accept only a part of a witness's evidence and may reject the rest. You have to decide whether a witness has spoken the truth or correctly recalled the facts and narrated them.
10. You have seen the demeanour of the witnesses and how they gave evidence in court. You have seen whether they were 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 and it is also likely that some may perceive the same incident differently and narrate differently. You have to use your common sense in assessing the reliability and credibility of witnesses. 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. Generally, complainants of sexual offences react differently when they got to narrate the traumatic experience they have gone through. Some may display obvious signs of distress, anxiety and restlessness, but some may not. Every witness has their 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 the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in court is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
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, and for other similar reasons. 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 respect, fear, or due to the reluctance to openly discuss matters relating to sex with elders.
13. 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 even solely rely on the evidence of the complainant without any other evidence to support it.
14. Another consideration may be; has the witness said something different at an earlier time or whether he or she is consistent in his or her evidence? In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies and omissions. You should first

decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. For example, might it result from an innocent error such as faulty recollection; or else could there be an intentional falsehood. Be aware of such discrepancies or inconsistencies and, where you find them, carefully evaluate the testimony in the light of other evidence. Memory is fallible, and you might not expect every detail to be the same from one account to the next. A witness may be honest enough but have a poor memory or otherwise be mistaken. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.

15. As a matter of law, I must direct you that what a witness said on oath is only considered as evidence. What a witness said in her or his statement to police, that is out of Court and therefore is not evidence. However, previous statements are often used to challenge a particular witness's credibility and reliability because a previous inconsistent statement may indicate that a witness said a different story then, and as a result her evidence might not be reliable. It is for you to decide the extent and importance of this inconsistency.
16. I must now explain to you, how to use credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
17. When you have decided the truthfulness and reliability of evidence, then you can use that credible evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the Accused is guilty or not. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as assessors, in

determining a question of fact, should utilise your common sense and wide experience which you have acquired living in this society.

18. It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence charged.
19. 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.
20. The Accused need not prove his innocence. The fact that the defence called a witness including the Accused 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.

Madam and gentlemen assessors,

21. We will now look at the offence that the Accused is indicted for. The Accused is charged for one count of rape in the Information filed by the Director of Public Prosecutions as follows;

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 44 of 2009.

Particulars of Offence

Moape Daveta Delana the 13th day of June 2015, at Nadi in the Western Division, penetrated the vagina of Paulini Daulakeba, with his penis without the consent of the said Paulini Daulakeba.

22. 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 complaint was not consenting; or the Accused was reckless as to whether or not she was consenting.

23. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the Accused and no one else committed the offence. The identity of the Accused is not in dispute in this case.

24. 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. However, in this case penetration is not in dispute as the Accused has admitted that he had sexual intercourse with the complainant.

25. The third and the fourth elements are based on the issue of consent. To prove the third element of the offence of rape, the prosecution should prove that the Accused penetrated the complainant's vagina without her consent.

26. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. For the offence of rape, the complainant consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. Consent obtained through force, threat or intimidation, fear

of bodily harm, or by use of authority is not considered as consent given freely and voluntarily. Submission without physical resistance by the complainant alone, to the act of the other person will not constitute consent.

27. The complainant must have the freedom to make the choice. It means she must not have pressured or forced to make that choice. The complainant must have mental and physical capacity to make that choice. Further, the consent given by the complainant may have been limited to a particular sexual activity and not for another sexual activity. Also, the consent can be withdrawn at any time. It is an ongoing state of mind its revocable once given. Consent of a person for sexual intercourse cannot be assumed.
28. In addition to proving that the complainant did not consent to the Accused to insert his penis into her vagina, the prosecution should also prove that, either the Accused knew or believed that the complainant was not consenting; or the Accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.
29. The Accused was reckless, if the Accused realised there was a risk that she was not consenting and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the vagina, you may find that the Accused was reckless as to whether or not the complainant was consenting. In other words, you have to see whether the Accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.
30. In this case the position of the defence is that the Accused believed that complainant consented to sexual intercourse. Therefore, you must carefully consider whether the prosecution proved beyond reasonable doubt that the Accused knew or believed that the complainant was not consenting.

31. If you believe that the prosecution proved all the elements of the offence you may find the Accused guilty of rape. Likewise, if you believe that the prosecution failed to prove all the elements of the offence you must find the Accused not guilty to the offence of rape.
32. The prosecution and the defence agreed to certain facts. Those facts are before 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.

Madam and gentlemen assessors,

33. 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 evidence adduced in this case when forming your opinions. Only the complainant was called by the prosecution to prove the case against the Accused. After the prosecution case was closed the Accused and another witness gave evidence for the defence.
34. The complainant, Paulini Daulakeba gave evidence that on 12 June 2015 she went to Valenimasima to clean the house where the alleged offence took place. She said that in the afternoon she was asked to go to the shop and when she returned it was after 8 pm. She said that the sitting room was closed and those who were there had gone to sleep. Then she had gone to the kitchen and had slept in a bed which was in the kitchen. The complainant stated that at around 1am to 2 am the Accused opened the kitchen door and switched on the light. She said that the Accused called her name and asked for his pillow and blanket. The Accused had then switched off the light and had slept on the floor.
35. Paulini said that after a while the Accused told her to move over for him to lie down beside her on the bed. She had then allowed him to sleep on the bed and she had gone to sleep on the floor. The complainant said that while she was lying down, she had felt someone on top of her. She said that the Accused told

her to have sex with him. She had told him that she could not have sex with him as he is a married man and she is a student.

36. The complainant said that the Accused did not care about what she said, and he took off her clothes and inserted his penis into her vagina. She said that she could not push him away as the Accused is a big person. She said that she smelt beer from his clothes, and she was scared that he would do something if she called out for help. She also said that the Accused was holding her tight with one hand while using the other to remove his pants.

37. The complainant said that she could not call out for help as there was no one at home. Later she said what she meant by saying no one was at home is that the others were sleeping at a distance in the sitting room. She said that the distance from where she was to the place the others were sleeping is similar to the distance from the witness box to the assessors table.

38. She also said that she told the Accused not to do what he was doing as it would spoil her reputation as a student. But she said that the Accused kept on saying 'just this once and after that its over'. After the sexual intercourse for 5 to 10 minutes she had pushed the Accused away and had gone outside. She said that she started crying and a neighbor had asked her as to what she was doing. The complainant had told him about what the Accused had done to her and the neighbor had told her to report the matter to the police. The complainant said that she does not know the name of the neighbor. She further said that she waited in the porch until sunrise.

39. The complainant had not complained about the incident to anyone that morning and she said that she thought no one would believe her. When she went to school on Monday, she had informed one of her friends about the incident.

40. During cross examination it was put to the complainant that the Accused has been a single man until now. However, the complainant said that the Accused is a married man and she cannot remember the name of his wife. She said that the Accused was renting in Savunawai with his wife and that afternoon she followed his wife up to where they resided.

41. Under cross examination she denied that she agreed to have sexual intercourse with the Accused. She said that she did not go home as it was nighttime. She admitted that it takes only less than 15 minutes to walk home. The complainant said that she went to buy a CD from the shop, and it took about two hours for her to return as she had to wait for the CD to be processed. However, she admitted that it takes about 10 minutes to walk to the shop. The complainant said that the Accused was drinking grog with others in the kitchen till about 9 pm. She denied that they drank grog till midnight. When she was asked as to why she did not run away she said that she did not think he would do such a thing to her. When it was put to her that the Accused believed that she was consenting as she did not raise any alarm within 5 -10 minutes of sexual intercourse, she responded as follows;

A: No my Lord, I am consenting, is because my Lord if I had shouted or I had asked for help he would have done something to me.

42. During reexamination the complainant said that the Accused was drinking grog with another person named Taito. She said that she returned from the shop at about 9 pm and that was the time the Accused and Taito left. She said that she did not not know where they went.

43. That was the case for the prosecution.

44. After the closure of the prosecution case the Accused was explained his rights. The Accused decided to give evidence and to call a witness for the defence. 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.

45. The Accused, Moape Daveta Delana gave evidence that he was single all through his life. He said that he had sexual intercourse with the complainant on 13 June 2015. However, he said that he spoke to the complainant when the grog session was going on, and she had agreed to have sexual intercourse with him in his bed, in the kitchen. The Accused also said that he asked her age to make sure that she is not a child and he got to know that she was in Form 6. According to the Accused they had finished drinking grog around midnight and had gone to a shop to drink more grog. He said he did not drink beer that night.

46. The Accused further stated that when he came to the kitchen the complainant hugged him and she started kissing him. When they were on the bed the bed had started squeaking and the complainant had dragged the mattress to the floor. The Accused said then he had sexual intercourse with her. He said most of the time the complainant was on top of him. The Accused said that the complainant uttered stop, stop in iTaukei language to stop him from ejaculating inside. He said then he ejaculated outside and later they both went to sleep. The Accused further said that the complainant took off her clothes and he took off his.

47. The Accused said that he believed that the complainant was consenting because the complainant was waiting for him until he came back from drinking grog. He also said that he believed that she was consenting as she came over to him and started hugging and kissing him.

48. Under cross examination the Accused admitted that he had had girlfriends and he had been in a de-facto relationship. The Accused said that he did not know what Form the complainant was studying in at school. When he was confronted with his statement where he had stated that she was in Form 5, the Accused said that he told the police that the complainant was in Form 6 and

not in Form 5. When the Accused was asked as to why he did not make any changes to the statement, he said that he was without lunch and he wanted to briefly read it and sign it. Further he said that he did not explain everything to police as he has not eaten anything. When he was shown that in his statement, he had said that he had fish curry for lunch, the Accused said that he had not had lunch and that was the lunch cooked at home. But later he again admitted that was what he had for lunch. When he was confronted with the statement where he had stated to police that they finished drinking grog at 11 pm, the Accused said it was between 11pm and 12 am. The Accused admitted that in his statement he had stated that it was him who started kissing the complainant in contrary to the evidence he gave. It was put to him that in his statement he had said that he took of the complainant's clothes in contrary to what he said in court. Then the Accused said that he helped her to remove her bra and it is included in the clothes.

49. He was further cross examined as follows about the issue of consent;

Q: I'm putting it to you that at no time did Paulini agree to have sexual intercourse with you that evening at no time ?

A: My Lord if she didn't give her consent to have sex, then why would she be lying down on my bed.

Q: I am putting it to you that Paulini was not consenting during the sexual intercourse because you were holding on to her tightly when she was trying to push you away?

A: She didn't push me away because she was happy with what was going on.

Q: Now I am putting it to you that you knew Paulini could not call out or shout for help because in the kitchen that morning it was only you and Paulini no one else?

A: She was happy with what was going on why should she shout when she was happy with what we were doing, she was happy, and I was happy too.

50. The Defence witness Anare Vocea gave evidence that the Accused is his brother. He said that on 12 June 2015 he drank grog with the Accused and another person. According to the witness they had started drinking grog around 8 pm, in the kitchen. They had finished drinking grog around midnight and had gone to a shop to buy more grog. He said they parted after 2 am.

51. That was the case for the defence.

Madam and gentlemen assessors,

52. It should be noted that in our law no corroboration is needed to prove a sexual offence. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters. In other words, the prosecution can solely rely on the evidence of the complainant only without any supporting evidence whatsoever in sexual offences. It is for you to decide how credible and consistent is the evidence of the complainant.

53. The prosecution case was that on 13 June 2015 the Accused penetrated the vagina of the complainant with his penis without her consent. According to the complainant she had not resisted due to fear. The law says that a person's consent to an act is not freely and voluntarily given if it was obtained by force, by threat or intimidation or by fear of bodily harm. However it is for you to decide whether her consent was obtained by force, threat, intimidation or fear of bodily harm.

54. The Accused admitted that he had sexual intercourse with the complainant with the consent of the complainant. It was his position that he believed that the complainant was consenting as a result of the conversation he had with the complainant and for the reason that she was waiting for him in his bed.

55. As it was said before, it is the duty of the prosecution to prove the elements of the offence against the Accused. The Accused need not prove his innocence. Even if you do not believe the evidence of the Accused or of the defence witness, you must still consider whether the prosecution proved the offence against the Accused beyond reasonable doubt.
56. 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.
57. If you believe that the prosecution has proved the elements of rape beyond reasonable doubt, you may find the Accused guilty.
58. If not, you must find the Accused not guilty.
59. 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?
60. 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: Kevueli Tunidau Lawyers