

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 08 of 2017

STATE

v.

JOSEFA ROLIGADRA

Counsel: Ms. K. Semisi for State
Mr N. Lajendra for Respondent

Date of Hearing: 18th and 19th June 2018

Date of Summing Up: 21st June 2018

SUMMING UP

1. The name of the Complainant is suppressed.
2. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. You will then retire to consider your respective opinions.
3. Our functions are different. 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 in this action. You must accept the law from me and apply all directions I give you on matters of law.
4. You are 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 shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

5. I may comment on the facts if I think it will assist you when considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard it unless it coincides with your own independent opinion.
6. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box and the documents tendered as exhibits. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The opening address of the learned counsel for the prosecution is not evidence. The purpose of the opening address is to outline the nature of evidence intended to be put before you. The closing addresses of the counsel of the prosecution and the defence are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
7. If you heard, or 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 during the course of this trial. Ensure that no external influence plays a part in your deliberation. As judges of facts 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 I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I make my judgment.
8. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the

facts solely upon the whole of the evidence. It is your duty as judges of facts 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

9. 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 is guilty for the offence.
10. 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 person to prove his innocence, as his innocence is presumed by law.
11. The standard of proof in criminal trial is "proof beyond 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 as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you find any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

Information

12. The accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act, one count of Assault with Intent to Commit Rape, contrary to Section 209 of the Crimes Act and one count of Act with Intent to Cause Grievous Harm, contrary to Section 255 (a) of the Crimes Act. The particulars are before you hence, I do not wish to reproduce them in the summing up.
13. The main elements of the offence of Rape as charged are that:

- i) The Accused,
 - ii) Penetrated into the vagina of the complainant with his fingers,
 - iii) The complainant did not consent to the accused to penetrate into her vagina with his fingers,
 - iv) The Accused knew or believed that the complainant was not consenting for him to insert his fingers in that manner.
14. The main elements of the offence of Assault with Intent to Commit Rape are that:
- i) The accused,
 - ii) Assaulted the complainant,
 - iii) With the intention to insert his fingers into her vagina.
15. The main elements of the offence of Act with Intent to Cause Grievous Harm are that:
- i) The accused,
 - ii) With intent to maim, disfigure or disable, to do some grievous harm,
 - iii) Unlawfully wounded or caused any grievous harm to the complainant

Agreed Facts

16. I now take your attention to the agreed facts, which are before you. They are the facts that the prosecution and the defence have agreed upon without any dispute. Hence, you can take them into consideration as the facts that are proven beyond reasonable doubt.

Separate Consideration

17. The accused is charged with one count of Rape and one count of Assault with Intent to Commit Rape and one count of Act with Intent to Cause Grievous Harm. It is your duty to consider each of these three counts separately. If you found the accused is guilty for one count that does not automatically make him guilty for the remaining counts for which he is charged with.

The Accused

18. It is the onus of the prosecution to establish beyond reasonable doubt that, it was the accused who committed this crime to the complainant.

Penetration

19. Evidence of slightest penetration of the fingers of the accused into the vagina of the complainant is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

Consent

20. Let me now draw your attention to the issue of consent. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of rape, the complainant consents only, if he had the freedom and capacity to voluntarily make a choice and express that choice freely. A consent obtained through fear, by threat, by exercise of authority, by use of force or by intimidation could not be considered as a consent given freely and voluntarily. A submission without physical resistance by the complainant to an act of another person shall not alone constitute consent.
21. If you are satisfied, that the accused had inserted his penis into the anus of the complainant and he had not given his consent, you are then required to consider the last element of the offence, that is whether the accused honestly believed or knew or reckless that the complainant was freely consenting for this alleged sexual encounter. I must advise you that belief in consent is not the same thing as a hope or expectation that the complainant was consenting. You must consider whether the accused knew either that the complainant was not in a condition or a position to make a choice freely and voluntarily, or the complainant had made no choice to agree to sexual encounter. If you conclude that the accused believed or knew that the complainant was consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that was prevailed at the time of the alleged incident took place.

Corroboration

22. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. The first and second counts are such offences of sexual nature. It means that if you are satisfied with the evidence given by the complainant and accepts it as reliable and truthful; you are not required to look for any other evidence to support the account given by the complainant.

Evidence of the Prosecution

23. Let me now remind you briefly the summary of the evidence presented by the prosecution during the course of the hearing. This is a fairly short hearing and lasted only for two days. Therefore, I trust that you can properly and correctly recall all of the evidence adduced during the hearing.
24. The prosecution alleges that the accused had come behind the complainant and grabbed her, putting his hands around her arms, while she was walking back home, after buying some food items for her brother, in the evening of the 20th of November 2016. The accused had then dragged her towards the old abandoned house, which was situated at the corner of the street. The complainant had struggled to get herself released but failed. While the accused was trying to drag her into the abandoned house, she lost her control and fell down. Her head had hit on a rock that injured her head. The accused had then grabbed her from the front side of the collar of her t-shirt and dragged her into the house. The complainant had tried to redeem her balance and get up, but the accused had pushed her down with the collar of her t-shirt. Meanwhile, the complainant had managed to throw a punch on the face of the accused. He then came on top of her and tried to strangle her neck with his hand, demanding her to be quite. The complainant had then decided to be quite and obey the demand of the accused, as she wanted to get herself released from the strangulation by the accused. When she stopped screaming, the accused had relaxed his grip. Once he released his grip, the complainant had shouted and screamed, calling for help. The accused again started to strangle her neck. She then stopped her screaming, but again started to scream when the accused released

his grip. After sometimes, the complainant felt tired, and then the accused stopped strangulation.

25. He then made the complainant to kneel down. Afterward, he had removed her undergarments. He had removed the white coloured t-shirt that he was wearing, and tied her hands with it. According to the evidence given by the complainant, the accused had ripped off her clothes. He then came from behind and inserted his fingers into her vagina. The complainant said that it was painful. The complainant had sit down, facing the accused, that position had prevented the accused to continue his penetration into the vagina with his fingers. She had managed to untie her hands from the t-shirt and put the t-shirt on her in order to cover up from the accused. All of her other clothes had been ripped off by the accused.
26. The complainant had then told the accused that she has money. The accused got frustrated and said that why did not she tell it before. He then picked a piece of timber and started to hit her on her head. The complainant had braced her hands in order to cover it up. He hit her with that piece of timber about 4 to 5 times. When the timber get broke, he picked a piece of iron roofing, and started to hit her on her head with it. After hitting her few times with the iron roofing, the accused had left the scene.
27. The complainant then managed to go back home. She was then admitted to hospital and had three medical examinations. The reports of all three medical examinations were tendered in evidence as the exhibits of the prosecution.
28. You may recall that the complainant explained in her evidence that she saw the perpetrator who committed this crime. She had seen him face to face three times during this ordeal. The first time is when he grabbed the front side of her t-shirt and pulled her up. The second time is that when he came on top of her and strangled her neck. The third time is that when she sat down and looked at him after he had inserted his fingers into her vagina. Moreover, the complainant said that she saw the face of the perpetrator when he hit her on her head with a piece of timber. The complainant said that when she saw the accused, there were no obstacles or anything in between them, blocking her view of the accused. There was sufficient light for her to see the accused.

29. The complainant explained the description of the perpetrator. He was tall and dark in complexion male, had a beard at that time, a cut on his left cheek and broad nose. He had wide bloodshot eyes, liked he had taken marijuana.
30. Once she was discharged from the hospital, she was shown some pictures of suspects, who has the similar description as of the description given by the complainant to the police. However, the complainant said that she found all of these people in those picture were looked the same. She had not picked any from those photos.
31. The complainant had then attended to an identification parade, in which she had identified the accused as the perpetrator from the ten men who stood for the identification parade. You may recall that the complainant explained the manner that she participated at this identification parade.
32. The second witness of the prosecution is Detective Corporal Livai, who is the investigation officer of this matter. He explained how did he conduct this investigation. Cpl. Livai had received information from one of their informers that the accused was the one who had committed this crime. He then found that the accused was already in the police custody for another crime investigation. Cpl. Livai had then questioned the accused and conducted a caution interview for the accused. Thereafter, an identification parade was conducted in which the accused was identified by the complainant as the perpetrator who committed this crime to her.
33. Cpl. Livai said that they have sent certain items, including DNA samples of the accused and the complainant to Police Forensic Unit for DNA testing. However, the Police had charged the accused with these offences, before they received the results of the DNA test. He further said that the decision of charging the accused was not made by him, though he was the investigation officer. It was made by his superiors.

Case of the Defence

34. You may recall that the two witnesses of the prosecution were cross examined by the learned counsel for the defence. During the cross examination, the complainant was

questioned about the DNA test report. The complainant identified the photo of the white t-shirt as the same t-shirt that was worn by the accused on that day. The same t-shirt had then used to tie up the hands of the complainant. After she managed to untie her hands, the complainant had put the same t-shirt on her.

35. The police had charged the accused for these offences without waiting for the result of the DNA testing.

Right to Remain in Silence

36. At the conclusion of the prosecution's case, the accused was explained about his rights in defence. The accused opted not to give evidence. The accused does not have to give evidence. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing. It does nothing to establish his guilt.

Presentation of the Evidence of the Complainant

37. You have seen that the complainant gave evidence behind a screen. 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.

Analysis and Directions

38. You heard the evidence presented by the prosecution. The defence presented their case by cross examined the witnesses of the prosecution. The prosecution and the defence have conflicting versions of events. The prosecution alleges that it was the accused who committed this crime to the complainant. The defence says that it was not the accused, but someone else had committed this crime.

39. Accordingly, the case of the prosecution mainly depends upon the correctness of the identification made by the complainant. You may recall that the complainant in her evidence explained how she identified the accused as the perpetrator of this crime.
40. The defence case is mainly based upon the result of the DNA test, where the defence suggested that the DNA analysis report has found the presence of DNA profile of an unidentified male together with the complainant's, but not any DNA profile which matches with the DNA profile of the accused. I will explained you how you should evaluate this DNA report in evidence, in details, in a while.
41. Accordingly, the main dispute in this matter is whether the accused was the person who actually committed this crime to the Complainant or someone else. In order to determine that, you have to take into consideration whole of the evidence presented by the prosecution, including the oral evidence and documentary evidence.
42. The prosecution presented the evidence in the form of direct, circumstantial and documentary evidence.

Direct Evidence

43. Sometimes you may find that some facts have been proven by direct evidence. For example, if there is reliable evidence from a witness who actually saw the accused committing a crime; if there is a video recording of the incident that plainly demonstrates his guilt; or if there is reliable evidence of the accused, himself, having admitted it, these would all be good examples of direct evidence against the accused.
44. In this case, the complainant in her evidence said that she identified the accused as the perpetrator, who committed this crime. The complainant had then identified the accused as the perpetrator at the identification parade.

Circumstantial Evidence

45. The circumstantial evidence means that you can rely upon evidence of various circumstances related to the crime and the accused, if you take them together will lead to the sure conclusion of another fact that could establish the guilt of the accused or not.
46. Circumstantial evidence can be powerful evidence, indeed, it can be as powerful as, or even more powerful than, direct evidence, but it is important that you examine it with care, with all evidence, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt, or whether on the other hand it reveals any other circumstances which are or may be of sufficient to cast doubt upon or destroy the prosecution case.
47. In this case, the defence has mainly relied upon the report of the DNA test. The result of the DNA test, confirms that the DNA profile of the accused were not found in any of the items that were tested, including the white t-shirt, which the complainant claims in her evidence, was worn by the accused.

Documentary Evidence

48. The evidence presented in the form of documents is documentary evidence. Accordingly, you can consider the contents and information in these documents as evidence. In this case, the prosecution tendered number of documents as the evidence, including the photographs of the items that were tested for DNA profile and the report of the DNA test.

Evaluation of Evidence

49. Madam and gentleman assessors, I now take your attention to the directions on evaluation of evidence. It is your duty to determine this case based on the evidence. In doing that, you are required to evaluate the evidence in order to determine the credibility, reliability and truthfulness of them. That will assist you to 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 judge whether a witness is telling the truth and is correctly recalling the facts about which she or he has testified.

50. Moreover, you must bear in your 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.
51. In assessing evidence of a witness, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking about in the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with her own evidence but also with other evidence presented in the case.
52. It is your duty to consider the demeanour of the witnesses, how they react to being cross examined and re-examined and were they evasive, in order to decide the credibility of the witness and the evidence.

Inconsistencies in the Evidence of the Complainant

53. Madam and Gentleman assessors, you have heard that the complainant was asked by the learned counsel for the defence, about the omissions and inconsistencies in statement that she made to the police and the evidence given in the court. Moreover, he cross examined the complainant about the inconsistency nature of the evidence given by the complainant during the evidence in chief and the cross examination.
54. I now explain to you the purpose of considering the previously made statement of the complainant with her evidence given in court. You are allowed to take into consideration about the inconsistencies and the omissions in such statements when you consider whether the complainant is believable and credible as a witness. However, the statement itself is not evidence of the truth of its contents.

55. It is obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next.
56. If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to 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 of the reliability of such witness.

Evidence of Identification

57. When you consider the evidence given by the complainant, explaining how she identified the accused, you need to exercise special caution. The reason for this is that experience tells us that even an honest and impressive witness, genuinely convinced of the correctness of their identification, have, in the past, made mistakes. You cannot convict the accused unless you are sure that the identification made by the complainant was accurate and, in making that judgment, you need to look carefully at the circumstances in which it was made and also at any other evidence in the case which may support or suggest otherwise. In doing that you have to take into consideration the following factors, that:
- i) How long did the complainant have the accused under observation?
 - ii) At what distance?
 - iii) In what light?
 - iv) Was the observation impeded in any way, as for example by passing traffic or the presence of people or any other obstacle?
 - v) Had the witness ever seen the accused before? How often? If only occasionally, had any special reason for remembering the accused?
 - vi) How long elapsed between the original observation and the subsequent identification to the police?

- vii) Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?
58. In this case, the complainant had not seen the accused before this incident. You have to take into consideration the circumstances under which this incident took place. According to the complainant, the accused was in an aggressive mood and was always, either, assaulting or aggressively behaving towards her. The complainant had made her observation about the suspect under such an aggressive and violent circumstances. The complainant in her evidence explained the description of the suspect as a tall, dark complexion, male. He had a beard at that time, a cut on his left cheek and broad nose. He had wide bloodshot eyes, liked he had taken marijuana.
59. Moreover, the complainant said that she was shown some photographs of the suspects who had similar descriptions as of the description given by the complainant to the police. The complainant said that all of those photos looked same to her. On a subsequent date, after seen those photographs, the complainant made an identification of the accused as the perpetrator of this crime at the identification parade. You have to take into consideration all of these factors, when you consider the evidence of identification given by the complainant.
60. The defence has admitted in paragraph 10 of the admitted facts, that the identification parade was conducted on the 24th of November 2016 in which the complainant identified the accused. Accordingly, there is no dispute between the parties in relation to the identification parade. Hence, the only issue you have to determine whether the identification of the complainant is accurate and correct.

DNA Evidence

61. I now take your attention to the report of the DNA test, which is tended in evidence as one of the exhibits of the prosecution.

62. DNA evidence is one of the most trusted and accurate forms of evidence. It is based on our genes, encoded in DNA (deoxyribonucleic acid). DNA evidence can be collected from blood, hair, skin cells, and other bodily substances. Each individual has a unique DNA profile (except for identical twins, who share the same genetic code). A minuscule amount of genetic material could be sufficient to identify a suspect.
63. In this jurisdiction, the DNA evidence is considered as unassailable evidence, unless the accuracy of the procedure of the testing and result is challenged. In this case, both parties have admitted the correctness and the accuracy of the DNA report. Hence, you are allowed to take into consideration the result of the DNA test as proven facts beyond reasonable doubt.
64. The DNA evidence has been introduced to the criminal justice system in 1980s. Since then, it has gained a reputation as one of the most trusted and reliable forms of scientific evidences in criminal cases. There are instances, where the courts have exonerated some convicted prisoners based on the finding of different DNA profiles, many years after the conviction, even though the convicted had previously confessed in committing the crime. I explain this, in order to assist you to understand the effect and importance of DNA evidence. However, it is your duty to determine how do you take these evidence of DNA in to your consideration.
65. DNA evidence is especially valuable for investigating violent crimes such as homicides or sexual assaults, because blood, semen, skin cells or saliva may be left behind by the perpetrator or victim. If such blood, semen, skin cells or saliva find in a suspect's clothes, or the clothes of the victim, or an item used by the suspects in commissioning the crime, containing the suspect's DNA, this is a powerful piece of physical evidence, that can establish that the suspect was presence at the scene during the commissioning of the crime.
66. In this case, the complainant said that the accused was dressed in a white t-shirt. He then removed and used it to tie up the hands of the complainant. Subsequently, the complainant had managed to untie her hands and put that t-shirt on her, in order to cover herself from the accused, who inserted his finger into her vagina. The said white

t-shirt had taken for DNA testing. The complainant, in her evidence, identified the photograph of the said white t-shirt.

67. Certain DNA samples have been extracted from the t-shirt and tested with the DNA profiles obtained from the complainant and the accused. According to the report, it has found a mixed DNA profile in the t-shirt, containing a major contributor and a minor contributor. It had been confirmed that the complainant cannot be excluded as the major contributor of this DNA profile found in the t-shirt. Moreover, it has found that the minor contributor is an unknown male contributor, and not the accused.
68. This finding supports the evidence given by the complainant, only to the extent that she put the t-shirt on her, after she managed to untie her hands. Because of the fact, that she had worn this t-shirt, her DNA profile has been found in the t-shirt. However, DNA profile of the accused has not been found in the t-shirt, even though the complainant claims that it was worn by the accused.
69. Moreover, it has found that the two female undergarments tested for the DNA profile, also contained with mixed DNA profile, contributed by the complainant and unknown male contributor. The DNA profile of the accused has not been found in any of the items tested for the DNA profile.
70. Having considered all of these evidences, including the evidence of identification given by the complainant, and the DNA evidence, if you satisfied or have doubts that it was not the accused who committed this crime, you must find the accused is not guilty.
71. If you decide to disregard the report of the DNA evidence, but still have doubt about it, you must still find the accused not guilty for these offences.
72. If you decide to disregard the DNA report, still you have to carefully consider the evidence of identification given by the complainant, in order to determine the guilt of the accused.

Final Directions

73. Madam and gentleman assessors, having taken into consideration 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 for the said offence of Rape.
74. 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 for the said count of Rape.
75. If you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Assault with Intent to Commit Rape as charged, you can find the accused guilty for the said offence of Assault with Intent to Commit Rape.
76. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Assault with Intent to Commit Rape as charged, you must find the accused not guilty for the said count of Assault with Intent to Commit Rape.
77. Likewise, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Act with Intent to Cause Grievous Harm as charged, you can find the accused guilty for the said offence of Act with Intent to Cause Grievous Harm.
78. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Act with Intent to Cause Grievous Harm as charged, you must find the accused not guilty for the said count of Act with Intent to Cause Grievous Harm.

Conclusion

79. Madam and Gentleman 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.
80. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?




R.D.R.T. Rajasinghe
Judge

At Suva
21st June 2018

Solicitors
Office of the Director of Public Prosecutions for the State.
Lajendra Lawyers for the Defence.