

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 74 OF 2014

STATE

-v-

TAWAKE WAQABACA WAQALEVU

Counsel : Mr. J. Niudamu for State
Accused tried in absentia

Dates of Trial : 11th, 12th and 13th April, 2018

Date of Summing Up : 13th April, 2018

(Name of the Complainant is suppressed. She is referred to as AD)

SUMMING UP

Ladies and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me, as the Judge who presided over this trial to sum up the case to you. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the Accused person.

2. I will direct you on matters of law which you must accept and act upon.
3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So, if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. In other words you are the judges of facts. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The Counsel for Prosecution made submissions to you about the facts of this case. That is his duty as the Counsel. But it is a matter for you to decide whether to accept his version of the facts or reject.
6. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the Accused person is innocent until he is proven guilty. The burden of proving his guilt rests on the Prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that, before you can find the Accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.
9. Your opinions must be solely and exclusively upon the evidence which you have heard in this Court and upon nothing else. You must disregard anything you might have heard or read about this case outside of this Courtroom. Your duty is to apply the law as I explain it to you to the evidence you have heard in the course of this trial.

10. Your duty is to find the facts based on the evidence and apply the law to those facts and draw reasonable inferences from facts proved. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
11. As Assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.
12. In deciding on the credibility of any witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gives evidence. Was he or she evasive? How did he or she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable.
13. The Accused person does not stand trial in this case. The trial is conducted in the absence of the Accused. In other words, he is tried *in absentia*. He is also not defended by a legal practitioner. Although the Accused is not here to defend his case, and is unrepresented, he is entitled to all the rights of an accused to a fair trial that are enshrined in the Constitution. You have to bear in mind that the evidence adduced for the Prosecution is not subjected to cross examination and therefore its credibility is not tested. Therefore you have to be fully satisfied that the evidence is credible and believable despite this frailty.
14. The Accused is charged with one count of Rape. The Information reads as follows:

Statement of Offence

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

Particulars of Offence

Tawake Waqabaca Waqalevu on the 2nd day of June, 2014 at Naivuvuni, Rakiraki in the Western Division, penetrated the vagina of AD with his finger, and at the relevant time the said AD was under the age of 13 years.

15. I will now deal with the elements of the offence of Rape. A person rapes another person if:
- (a) The person has carnal knowledge with or of the other person without other person's consent; or
 - (b) The person penetrates the vulva, vagina or anus of other person to any extent with a thing or a part of the person's body that is not a penis without other person's consent; or
 - (c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.
16. Consent means the consent freely and voluntarily given by a person with a necessary mental capacity to give such consent. A person under age of 13 years is considered by law as a person without necessary mental capacity to give consent. The Complainant in this case was 6 years of age at the time of the alleged offence and therefore, she did not have the capacity under the law to give consent. So, the Prosecution does not have to prove the absence of consent on the part of the Complainant because law says that she, in any event, cannot consent. The elements of the offence of Rape in this case are that:
- (a). the Accused,
 - (b). penetrated the vagina of the Complainant, with his finger.
17. Other parts of the offence of Rape are irrelevant to the facts of this case.
18. Apart from the elements of the offence, the identity of the person who is alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the accused-person that connects him to the offence that he is alleged to have committed.
19. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a Complainant who saw, heard and felt the offence being committed. In this case, for example, the Complainant was a witness who offered direct evidence, if you believe her as to what she saw, heard and felt.

20. Documentary evidence is also important in a case. Documentary evidence is the evidence presented in the form of a document. In this case, the medical report is an example if you believe that such a record was made. Then you can act on such evidence. The Doctor Alumita Serutabua who is said to have medically examined the Complainant was not called to give evidence because she is not available. Doctor Sharma, who worked with Doctor Alumita at the Rakiraki Hospital at the relevant time, presented a copy of the medical report on behalf of Doctor Alumita. The original medical report purported to have been made by the doctor who examined the Complainant is also not available. After hearing the evidence of the investigating officer, the Court allowed the Prosecution to tender a photocopy of the medical report. You have to be satisfied that the medical report is authentic and that such a report was made by Doctor Alumita upon examination of the Complainant.
21. I will now direct you as to how you should deal with evidence presented by the doctor as an expert witness. Usually, witnesses are not allowed to express opinions. They are allowed to give evidence on what they have seen, heard or felt by physical senses only. The only exception to this rule is the opinions of experts. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their opinions expressed on a particular fact to aid court to decide the issues/s before Court on the basis of their learning, skill and experience. In this case, the doctor gave evidence as expert witnesses. Expert evidence is not accepted blindly. You will have to decide the issue of rape before you by yourself and you can make use of doctor's opinion if her reasons are convincing and acceptable to you; and, if her opinion had been reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence led in the case.
22. You must remember that the expert evidence does not implicate the Accused or link him to the alleged offence even if you decide to rely on it. You can only use doctor's opinion to test the constancy of Complainant's story.
23. In evaluating evidence, you should see whether the story told in evidence is probable or improbable; whether witness is consistent in his or her own evidence and with his or her previous statements or with other witnesses who gave

evidence. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same test to evaluate evidence.

24. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in Court. You have seen how the witnesses' demeanor in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers or were they evasive? But, please bear in mind that many witnesses are not used to giving evidence and may find court environment distracting.
25. You can consider whether there is delay in making a prompt complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation for such delay.
26. Prosecution adduced evidence of Complainant's mother, Noma Sera Rokodike to show that the Complainant had made a prompt complaint about the incident. Noma Sera in her evidence said that she received such a complaint from the Complainant soon after the incident.
27. This form of evidence is known as evidence of recent complaint. Previous consistent statements are not generally admitted as evidence. Recent complaint evidence is an exception to that rule and admitted in cases of sexual nature only to test the consistency and truthfulness of the Complainant's evidence in Court. Noma Sera was not present to witness what had actually happened between the Complainant and the Accused and therefore, her testimony is not evidence as to what actually happened between the Complainant and the Accused. You are entitled to consider the evidence of recent complaint in order to decide whether or not Complainant has told the truth in Court. The Prosecution says that Complainant's prompt complaint to her mother is consistent with Complainant's account of this alleged incident and therefore she is more likely to be truthful. It is for you to decide whether the evidence of recent complaint helps you to reach a decision, but it is important that you must understand that the evidence of

recent complaint is not independent evidence of what had happened between the Accused and the Complainant. It therefore cannot of itself prove that the complaint is true.

28. Please remember, there is no rule in Fiji for you to look for corroboration of Complainant's story to bring home an opinion of guilt in a case of sexual nature. The case can stand or fall on the testimony of Complainant, depending on how you are going to look at his evidence.
29. I will now remind you of the Prosecution case. In doing this it would not be practical for me to go through the evidence of every witness. It was a short trial and I am sure things are still fresh in your minds. If I do not mention a particular witness, or a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your decision in this case.

CASE FOR PROSECUTION

PW 1 Noma Sera Rokodike

30. Noma Sera is the first witness for Prosecution. She is the mother of the Complainant. In 2014, she was residing at Naivuvuni Village with her dad, mum, husband and her five children, namely, Andy Joeli Tadu, Inise Verevuni, AD, Ilaijah Sadrau and Divika. Her daughter AD was 6 years old and was in Class 2 at that time.
31. On the 2nd of June, 2014, she was home with her baby, husband and her parents when her cousin Waqa came at around 12 noon. AD, Inise and Andy were in school at that time.
32. After 3.00 p.m. her kids came home from school. She asked them to go and have a bath in her neighbour's house. But her mother told them to go with uncle Waqa to the river. She was concerned about her daughters so he sent his eldest son Joeli to go with them.
33. After 6.00 p.m., her daughter AD came running and she was standing at the doorstep and crying. She asked her, *what's wrong?* AD said *'Waqa did something to me that only adult people do'*. Then she asked AD *what did Waqa do?* AD said *'he*

kissed me, put his tongue in my mouth and put his finger inside my vagina'. She went to her neighbour Poasa's house to inform the police. The police came and took them to the police station to take their statements. Then they went to the Rakiraki Hospital. AD was really scared. AD was holding her hand and was shaking. She comforted AD and told her to calm down saying nothing will happen to her; she will be okay. But she wasn't okay.

PW 2 AD (The Complainant)

34. AD is the next witness for Prosecution. She is the Complainant in this case. She was 10 years old at the time of giving evidence. In 2014, she was in Class 2. On the 2nd day of June, 2014, she went to school with her brothers and sister and returned home after 3.00 p.m. When she arrived home her grandfather, father, grandmother, mother, and uncle Waqa were home. At around 5.00 p.m., her mother told them to go for a bath at neighbor's place. Then her grandmother told them to go with uncle Waqa to the river to have a bath. She went to the river with her siblings, Inise, Ilaijah, Joeli and uncle Waqa. She came back from river with uncle Waqa and her younger brother Elijah, while her sister Inise and Joeli were still bathing. As they were coming, uncle Waqa told her younger brother Elijah to take his stick house and make it run. After that Waqa made her lay down and covered her mouth and put his one finger in her vagina. It was painful. She was scared. He put his tongue in her mouth. When Inise and Joeli came, they asked her what happened. She didn't tell them anything. She was just crying. Then she ran to her mother and told her that uncle Waqa did to her what adults do. When her mother went to call the police, her grandma and uncle Waqa told grandfather to tell her that when the police come she should not tell them what happened.

PW 3 Inise Verevuni

35. Inise is the eldest sister of the Complainant. On the 2nd June, 2014, she returned from school after 3 p.m. with Joeli and AD. When they reached home, her parents and grandparents were home with uncle Waqa. Her mother informed them to go and have a bath. Her grandmother then informed them to go and bath in the river with uncle Waqa. She went to the river with uncle Waqa, AD, Elijah and Joeli. They washed their uniforms and swam in the river. Around 6.00

p.m., uncle Waqa informed them to get out of the river. Uncle Waqa, AD and Elijah took the lead while she and Joeli were still in the river. When they came out of the river, AD, Elijah and Uncle Waqa were taking the lead home. At the FEA post, she saw her brother Elijah calling uncle Waqa. She did not see uncle Waqa and AD. On their way, uncle Waqa gave them a shock when she saw her sister AD standing beside uncle Waqa. She saw AD crying. She asked her why she is crying. She didn't inform her of anything and ran home.

PW 4 Constable Sailosi Bawaqa

36. Constable Bawaqa is the investigating officer of this case. In 2014, when he was attached to the Rakiraki Police Station, a report was filed of a rape case. The victim of the case is AD and the Accused is Tawake Waqabaca Waqalevu, also known as Waqa, who is the cousin of Complainant's mother. After receiving the report, he did the compilation of the documents. On the same day the report was lodged, the Complainant was medically examined. The original medical report was photocopied and exhibited in the Crimes Office and kept in the Crime Writers Office. Photocopies made from the original were attached to the file. Witness said that when this case was called last year he brought the original to Court with him. After the case was called off the original medical report was misplaced. Witness recognized the photocopy of the medical report he made from the original and tendered it marked as D1.

PW5 Doctor Krishneel Anesh Sharma

37. Doctor Sharma is the last witness for Prosecution. During 2013 and 2014, he worked with Dr. Alumita Serutabua for two years at the Rakiraki Hospital before she had left for Tamavua to specialize in Dermatology. He recognized Dr. Alumita's handwriting and her signature on the medical report of AD. According to the medical report, the medical examination had been conducted on the 2nd of June, 2014 at 8.45 pm, in the presence of the patient's mum and a midwife.
38. Referring to D.11 of the medical report, Dr. Sharma described the initial impression of the medical officer. The patient's legs were shaking and she was scared. Her mum had to keep hugging her to make her speak up.

39. In relation to specific medical findings in D.12, Dr. Sharma said that the patient's hymen was not intact, but nil bleeding was noted at vagina. Vaginal orifice opening is approximately 2 – 2.5 cm. which is not normal. He said that the diameter of a normal vaginal orifice in a pre-pubertal female should be less than 0.75 cm. whereas the examination finding given in the report states that the diameter is approximately 2 – 2.5 cm, which is beyond the normal. A bruising was noted over the *labia minora* and around the vaginal orifice.
40. Referring to D.14 where the professional opinion is mentioned, Dr. Sharma said that the bruising over *labia minora* may be due to the offender touching or fingering her vagina during the act. Hymen being not intact indicates that the patient is not a virgin. The *labia minora* region is quite sensitive and if large amount of pressure or increased pressure is applied to that region, then there is a tendency for it to get bruised or injured. The bruise noted would have been a result of a large mechanical or blunt pressure that was applied to the area.
41. That is the case for prosecution.

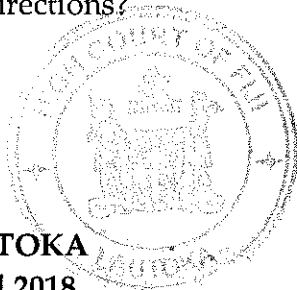
ANALYSIS

42. Ladies and gentleman assessor, the Accused is charged with one count of Rape. Before you could find the Accused guilty, you must be satisfied beyond reasonable doubt that the Accused Tawake Waqabaca Waqalevu had penetrated the vagina of the Complainant AD with his finger.
43. You must be satisfied that it was Tawake Waqabaca Waqalevu and no one else had committed this act. Complainant's mother said that Waqa is her cousin and he is related to her from her father's side. It was Waqa's second visit to her house after 2011. The Complainant referred to the person who penetrated her as uncle Waqa.
44. Prosecution called three witnesses and a police witness. They based their case substantially on the evidence of the Complainant. Recent complaint evidence was also led to show consistency of child Complainant's evidence.
45. You have to be satisfied that the evidence Complainant gave is truthful and believable. If you are satisfied that she told the truth, then you can safely act

upon her evidence in coming to your conclusion. No corroboration is required from an independent source.

46. Prosecution says that the Complainant maintained her consistency and promptly complained to her mother soon after the alleged incident. The Complainant was 6 years old student at the time of the offence. You consider if she was mature enough or she had a motive to make up such a serious allegation against the Accused who is her uncle.
47. You heard what the doctor who had examined the Complainant soon after the incident had stated in her medical report. You may take into the medical finding in coming to your conclusion as to the allegation of rape.
48. The Accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty. The burden to prove the charge beyond a reasonable doubt is on the Prosecution. The absence of the Accused at the trial does not make that burden a lesser one. As I have said, you must not make a negative inference and hold against the Accused merely because he is not here to defend his case.
49. If you accept the Prosecution's version of events, and you are satisfied that the Accused had penetrated the vagina of the Complainant with his finger and the Prosecution has proved the case beyond reasonable doubt, so that you are sure of Accused's guilt you must find him guilty.
50. You may now retire to deliberate on the case, and once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.

Any re-directions?



AT LAUTOKA
13th April 2018

A handwritten signature in black ink, appearing to read 'Aruna Aluthge'.

Aruna Aluthge
Judge

Solicitor: Office of the Director of Public Prosecution for State