

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 126 OF 2014

STATE

-v-

KELEMEDI LENATI

Counsel : Ms. S. Naibe for State

Ms. V. Narara for Accused

Dates of Trial: 3rd & 4th of March, 2017

Date of Summing Up: 6th March, 2017

SUMMING UP

Madam and Gentlemen Assessors,

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. You are free to decide all matters of facts. 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 and Defence made submissions to you about the facts of this case. That is their duty as Counsel. But it is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions, and 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 proved 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 decisions 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. You are free to draw reasonable inferences from facts proved by evidence. 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 the 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 assessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole.
13. An incident of rape would certainly shock the conscience and feelings of our hearts. It is quite natural given the inherent compassion and sympathy with which human-beings are blessed. You may, perhaps, have your own personal, cultural, spiritual and moral thoughts about such an incident. You may perhaps have your personal experience of such a thing, which undoubtedly would be bitter. You must not, however, be swayed away by such emotions and or emotive thinking. That is because you act as judges of facts in this case not to

decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law to which every one of us is subject to. I will deal with the law as it is applicable to the offences with which the Accused-person is charged, in a short while.

14. It would be understandable if one or more of you came to this trial with certain assumptions as to what constitute rape, what kind of person may be the victim of rape, what kind of person may be a rapist, or what a person who is being, or has been, raped will do or say. It is important that you should leave behind any such assumptions about the nature of the offence because experience tells the courts that there is no stereotype for a rape, or a rapist, or a victim of rape. The offence can take place in almost any circumstances between all kinds of different people who react in a variety of ways. Please approach the case with open mind and dispassionately, putting aside any view as to what you might or might not have expected to hear, and form your opinion strictly on the evidence you have heard from the witnesses.
15. I must emphasize that the assessment is for you to make. However, it is of paramount importance that you do not bring to that assessment any preconceived views or stereotypes as to how a Complainant in a rape case such as this should react to the experience. Any person who has been raped, will have undergone trauma whether the Accused were known to her or not. It is impossible to predict how that individual will react, either in the days following, or when speaking publically about it in Court or at the Police Station. The experience of the Courts is that those who have been victims of rape react differently to the task of speaking about it in evidence.

16. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. They are of course an important part of the case. The agreed facts of this case are:

1. The accused in this matter is Kelemedi Lenati.
2. The accused date of birth is on the 11th of July 1968 and he is also known as *Driss*.
3. The accused is married to Alesi Lenati.
4. The complainant in this matter is Nicole St. John.
5. The accused was caution interviewed on the 27th of January, 2013.
6. The accused was formally charged with 1 count of Rape on the 5th of March, 2014.
7. The alleged incident occurred on the 26th of January, 2013.
8. At about 4pm on the 26th of January, 2013 the accused was drinking grog at home with a friend after which he drank 6 more bottles of beer.
9. The accused and his friend finished 2 cartons of beer before heading to town.
10. At about 7pm the accused was at Reenees Nightclub and he later headed to the Hunters Inn Nightclub.
11. It is agreed that the following documents are tendered in by consent:
 1. Accused person's Copy of Caution Interview dated 27/01/13; and
 2. Medical Report of the victim dated 27/01/13.

17. I now turn to elements of the offence with which the Accused is charged. The count against Accused is as follows:

Statement of Offence

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

Particulars of Offence

KELEMEDI LENATI on the 26th day of January, 2013, at Lautoka in the Western Division, penetrated the vagina of **NICOLE St. JOHN** with his finger, without the consent of **NICOLE St. JOHN**.

18. I will now deal with the elements of the offence of Rape in this case. 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.
19. In this case, Prosecution says that the Accused digitally raped the Complainant Nicole St. John. To prove a digital rape, the Prosecution must establish that the Accused Kelemedi Lenati penetrated the vagina of the Complainant with his finger or fingers to any extent without Complainant's consent.
20. Consent as defined in Section 206 of the Crimes Decree, means the consent freely and voluntarily given by a person with a necessary mental capacity to give such consent and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.
21. 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 as to what she saw, heard or felt.

22. Documentary evidence is evidence presented in the form of a document. In this case, the cautioned interview statement and the medical report are documentary evidence. These documents were tendered in agreement and therefore you can act on this evidence without further proof.
23. 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.
24. In evaluating evidence, you should see:
 - whether the story relayed in evidence is probable or improbable;
 - whether the witness is consistent in his or her own evidence or with his or her previous statements or with evidence of other witnesses who gave evidence;
 - whether the witness is capable to testify to a particular fact or he or she has any interest in the matter in hand.

It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same tests and standards in evaluating evidence.
25. 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? How did

they conduct themselves in Court? In general, what was their demeanor in Court? But, please bear in mind that many witnesses are not used to giving evidence and may find Court environment distracting.

26. You must bear in mind that the evidence comes from human beings. They cannot have photographic or video graphic memory. The witness can be subjected to the same inherent weaknesses that you and I suffer insofar as our memory is concerned.
27. In testing the credibility of a witness, you can consider whether there is delay in making a 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 the complaint is prompt, that usually leaves no room for fabrication.
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 her evidence.
29. I will now deal with the summary of evidence in this case. In doing this I do not propose going through all the evidence. It should still be fresh in your minds. If I refer to only some aspects of a witness's evidence it does not mean that the rest is unimportant. You must weigh up and assess all the evidence in coming to your decision on this case.

CASE FOR PROSECUTION

30. Prosecution called Nicole St. John (Complainant) as its first witness.

31. On the 26th day of January 2013, the Complainant came to town with her cousin Mere to see Mere's relatives from Ba. Around 10.00 pm the Complainant together with Mere went to Hunters Inn nightclub where she met Kelemedi who was already drinking with his friends. As soon as she entered the nightclub, she went to the washroom. On her way back from the washroom Kelemedi pulled her hand and asked her to drink with him and his friends, but she refused. The Accused then took her to where they were drinking with his friends and asked her to drink but she still refused. When she refused to drink, Kelemedi poured beer on her.
32. The Complainant then stated that the Accused put three fingers on her vagina and poked and dragged it up. she did not like this.
33. The Complainant further stated that the Accused's friends also put their fingers on her vagina and were playing with it. The Complainant stated that she did not like it.
34. Moreover, the Complainant stated that the Accused dragged her outside the nightclub and took her to the back of Coronation church where the drain is located. While they were there, the Accused removed her clothes and asked her if they can have sex but she refused. The Accused then started licking her vagina, later the Accused forced her head down to his penis and wanted her to suck his penis. The Complainant stated that the Accused tried to put his private part on her vagina. When she tried to run away the Accused pulled her back.
35. When the Accused was licking her vagina she was pushing his head away but he didn't move. The Complainant said that when she wanted to shout for help the

Accused blocked her mouth. When the Accused was knocked out on the bench she ran away towards the Churchill Park Police Post. Complainant met a Police Officer whom she complained that she had been raped by the Accused. The Complainant then came with the Policeman to where the Accused was knocked out. Then both of them were transported to the Lautoka Police Station where her statement was recorded. She was then transported to Lautoka Hospital where she was medically examined.

36. Under cross examination, Complainant admitted that she knew the Accused from Topline prior to the incident. Then she said she did not know him prior to the incident. She admitted that there were security personnel at the night club but none of them came forward to help her despite her calls for help.
37. Complainant also admitted that accused and his friends were playing with her vagina for nearly two hours and her pants were pulled halfway down the thighs and her vagina was exposed to others.
38. Complainant said that there was an Indian couple at the Coronation church park. They too did not come to help her. She got injured when she was dragged to the drain behind the Coronation Church.
39. Investigating Officer Iren Singh giving evidence said that, upon receiving a report on the 27th January, 2013 from the Complainant, she started the investigation and recorded a statement from the Complainant. She then accompanied the Complainant to the Lautoka Hospital for a medical examination. She tendered in evidence the record of caution interview of the Accused.

40. That is the case for the Prosecution. At the closure of the Prosecution case, you heard me explain to the Accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or he could give evidence in which case he would be cross-examined.

41. As you are aware, Accused elected to exercise his right to remain silent. That is his right under the Constitution. He does not have to prove his innocence or prove anything at all. Now you must not draw an inference that the Accused did not choose to give evidence in his own defence because he is guilty. Burden of proof remains with the Prosecution throughout.

CASE FOR DEFENCE

42. Complainant was subjected to a lengthy cross examination by the Defence Counsel. Accused in his caution interview had admitted penetrating her with his fingers. He had stated to police that the Complainant was his sexual partner and everything happened with Complainant's consent. Case for the Defence boiled down to one single issue- the credibility of the Complainant's evidence. Defence maintained that the Complainant was lying under oath.

ANALYSIS

43. Before you find the Accused guilty, you must be sure that he penetrated the Complainant without her consent.

44. There is no dispute as to the identity of the Accused. Accused admits in his record of caution interview which is an admitted document in this case that he penetrated Complainant's vagina with his finger.

45. Prosecution asserts that the act of penetration took place without Complainant's consent. Accused, while denying the allegation, maintains that the Complainant was his sexual partner and that the penetration took place with her consent. Conflict is dramatic and turns on one word against the other.
46. Prosecution based its case entirely upon the evidence of the Complainant. As I have told you, her evidence alone is sufficient to find the Accused guilty if you believe her evidence to be truthful.
47. You must be sure the Complainant did not consent to this sexual activity with the Accused. That will require an assessment by you of the Complainant's evidence.
48. Prosecution says that Complainant's version is credible and consistent because she promptly made a complaint to police. They also say that there was no apparent motive for her to make up a case against the Accused.
49. Complainant made a complaint to the police soon after the incident. She had been examined by a doctor in the same night. The medical report which is an admitted fact was tendered in evidence. Prosecution relies on these pieces of evidence and claims that the Complainant has been consistent in her evidence thus proving the allegation to be truthful.
50. Defence on the other hand submits that the Complainant kept on changing her evidence, especially in respect of her prior knowledge about the Accused and her marital status and therefore she is unworthy of credit. It is also submitted that she was hiding something and that's why she was evasive in answering questions.

51. Complainant admitted that there were security personnel in and out of the night club and there was also a police post just opposite the night club. There was an Indian couple at the Coronation Church Park when she was taken there. Defence argues that if this incident really happened without her consent, she could have complained or raised alarm.
52. You have to consider whether she had any reason not to complain or raise alarm until she eventually made a complaint to the policeman whom she met near the Churchill Park police post. If you are satisfied that she had made a prompt complaint to police you can take her recent complaint as a matter boosting the consistency and credibility of her evidence that she did not consent.
53. During the course of Complainant's evidence it was suggested to her that she could have screamed and otherwise objected to what the Accused was doing. You heard the Complainant's explanations. In her closing argument Defence Counsel submitted to you that her failure to scream and to protest, demonstrates that she was not telling the truth; and that she had consented. In light of general direction I gave about rape victims, you consider whether her conduct is consistent with her version.
54. Complainant said that she wanted to scream and in fact called for help but, at the night club, no one including his uncle who is a security man came to help her. According to her evidence, during Coronation park incident, her mouth was blocked by the Accused. She made the complaint after he had knocked out. You consider all the evidence and see if the complaint she eventually made to police was genuine and honest.
55. Complainant under cross examination admitted that her tight pants were pulled halfway down up to thighs and her vagina was exposed to others when the

Accused and his friends were playing with it for nearly two hours. Defence argues that this type of a conduct in a public place like a crowded night club is highly improbable. They also claim that dragging a woman in a public road for nearly five minutes without being noticed is unbelievable. You consider this evidence is probable or improbable.

56. Complainant in her evidence admitted that five friends of the Accused who were drinking with the Accused also took turns in playing with her vagina. In her complaint to police made soon after the incident, Complainant had not mentioned anything about other friends playing with her vagina. Defence argues that if such an incident ever occurred, she would definitely have told police that she was sexually abused by Accused's friends also. Prosecution says that this omission may have been due to a loss of memory or due to distressful condition aftermath the incident. You decide if this omission on her part is material contradiction so as to discredit her version.
57. Complainant said, she knew Accused very well because she was brought up in Natokowaqa and then she said, she knew him because he used to drink a lot at the ground at Top Line. When she was asked if she mentioned his name- Kelemedi to police then she said, the first time she came to know of his name was at the night club. She had not mentioned Accused's name to police and identified the culprit as a 'Fijian guy'.
58. Under cross examination, Complainant admitted that she got injured at the Coronation park incident and was bleeding. According to the medical report, no injuries had been noted by the doctor who had examined her soon after the incident. Defence took up the position that her evidence is not consistent with the medical report because she was lying.

59. It is up to you to decide whether you could accept the version of the Prosecution or whether the Defence has established a reasonable doubt in the Prosecution case. If you have a reasonable doubt in the Prosecutions' case you must not find the Accused guilty.
60. The Accused is not required to prove his innocence or prove anything at all. In fact, he is presumed innocent until proven guilty.
61. If you accept the Prosecutions' version of events, and you are satisfied that the Prosecution has proved the case beyond reasonable doubt, so that you are sure of Accused's guilt you must find him guilty of the charge.
62. 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.
63. Any re-directions?




Aruna Aluthge

Judge

AT LAUTOKA

6th March, 2017

Solicitors for State: Office of the Director of Public Prosecution

Solicitors for Accused: Legal Aid Commission