

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 78 OF 2013

STATE

-v-

KOLAIA RALULU

Counsel : Mr. A. Dutt for the State
Ms. Vulimainadave for Accused

Dates of Trial: 10th to 12th April 2017

Date of Summing Up: 13th April, 2017

SUMMING UP

Madam Assessors 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 fact. 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 and the Defence made submissions to you about the facts of this case. That is their duty as the 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 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. 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 following 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.
 - I. THAT the complainant in this case is Losana Nalolo, of Nabutolu, Ba (“the complainant”).
 - II. THAT the complainant’s date of birth is 04th January 1996.
 - III. THAT the accused in this case is Kolaia Ralulu, of Nabutolu, Ba (“the accused”).
 - IV. THAT the complainant was medically examined on 13th April 2013 at Ba Mission Hospital by Dr. Siteri Sautuca.

- V. THAT the accused was cautioned interviewed by DC 2982 Tomasi Nakeke on 14th April 2013.
- VI. THAT the accused was charged with one count of ‘Abduction of a young person under 18 years of age with intent to have carnal knowledge’ and one count of ‘Rape’ by DC 3874 Suraj on 15th April 2013.
- VII. THAT the following documents are to be tendered by consent:
- a. Extract of Entry of birth of the complainant;
 - b. Rough Sketch Plan; and
 - c. Fair Sketch Plan.
17. I now turn to elements of the offences with which the accused is charged. The charge against accused is as follows:

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009

Particulars of Offence

KOLAIA RALULU on the 13th day of April 2013 at Rarawai, Ba in the Western Division, inserted his penis into the vagina of **LOSANA NALOLO** without her consent.

18. I will now deal with the elements of the offence of Rape in this case. A person rapes another person if the person has carnal knowledge with or of the other person without other person's consent.
19. Carnal knowledge is to have sexual intercourse with penetration by the penis of a man of the vagina of a woman to any extent. So, that is Rape under Section 207 (2) (a) of the Crimes Decree.
20. So, the elements of the offence of Rape in this case are that:
 - a. the Accused
 - b. penetrated the vagina of Complainant to some extent with his penis
 - c. without her consent
21. Consent as defined in Section 206 of the Crimes Decree, means the consent freely and voluntarily given by a woman with a necessary mental capacity to give such consent.
22. 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.
23. Documentary evidence is also important in a case. Documentary evidence is the evidence presented in the form of a document. In this case, medical report is an example if you believe that such a record was made. You can take into account the contents of the document if you believe that contemporaneous recordings were made at the relevant time upon examination of the Complainant. Please bear in mind that sexual history relayed to the doctor by the Complainant is not admissible as evidence in this case. Therefore, just ignore sexual history stated under D.10 of the medical report.

24. Expert evidence is also important to be borne in mind. 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 an expert witnesses. Doctor's 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 his/her reasons are convincing and acceptable to you; and, if their 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 in the case.
25. In evaluating evidence, you should see whether the story narrated 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 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 tests and standards to evaluate evidence.
26. 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.
27. 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.

28. 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.
29. 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.
30. 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 in this case.

CASE FOR THE PROSECUTION

Losana Nalolo

31. Prosecution called the Complainant Losana Nalolo as its first witness. Losana was 20 years old at the time she gave evidence. She was born on 4th January 1996. She came to know the accused Kolaia Ralulu through her cousin Rovika. Prior to April 2013 she had met Kolaia Ralulu only once at a carnival.
32. On the 13th day of April 2013, Losana met Ralulu at the Ba bus stand. He told her to meet him before going home. Then she got into a bus and went to her uncle's daughter Deborah Losana's house at Field 28 to pack her clothes. After packing her clothes, she was walking towards her home in the afternoon when she saw Kolaia coming from the back and calling her. Then he invited her to go to his sister's place.

33. She told him that she was going home. He offered to drop her home. She agreed and accompanied him to his sister's place in opposite direction on a gravel road surrounded by cane fields. It was getting dark. Then he told her to have some rest near a cane field. She refused and wanted to go back home. When she was turning back to go home he held her hand and took her to the cane field and pushed her down. He took off his ¾ trousers. Then he started to take off her clothes. She was trying to stop him but could not.
34. She was wearing a skirt, a top and underwear. He took off only the underwear and put his penis into her vagina. After putting his penis into her vagina he was biting her neck. She was in pain and trying to push him but failed. She did not agree to what he was doing. He stopped it when the 'water' came out. Then he wore his clothes, told her to go back home and went away while she was still lying down on the ground.
35. She got up, wore her clothes with blood stains and started to walk towards her home crying. She saw a vehicle coming on the road. It was Jakir, her relative. He stopped and told her to get in. He asked her, 'why you crying'? Then she told the whole story about what happened. He told her that he will take her to the Police Station. As they were proceeding along the way they saw Kolaia on the road. She showed Kolaia to Jakir. Jakir took her to the Ba Police Station. One female Police Officer named Miri recorded her statement and took her to the Ba Mission Hospital for a medical examination. A female doctor examined her. She told the doctor what happened. She identified the Medical report to which she had subscribed her signature.
36. Under Cross-examination Losana said that she was schooling at DAV College during 2012 and 2013. She admitted having said to police in her statement that she was doing domestic duties. She said she had met with Kolaia only once before the incident although he used to call her on her cousin's phone. She admitted having been in a girlfriend-boyfriend relationship since 2012 till this allegation was brought up.

37. She denied meeting Kolaia on the road on a prior arrangement. She denied having agreed to his offer to have sex. She denied having started kissing and asked Kolaia to make love bites near the cane field. But she admitted having kissed Kolaia in 2012.
38. She denied that Kolaia took off her skirt first and put it down on the ground and then removed her tights. She denied removing her panty on her own. She denied that the only reason why she had gone to the police station was because her mother will get angry at her because she was late in the night.
39. She did not want to withdraw the complaint but his parents wanted her to withdraw the complaint.

Saiyad Jakir Hussein

40. Jakir was a carrier driver. On 13th April 2013 around 6.45 pm he was returning to Ba town. As he was driving through Field 28, he saw one girl standing at the junction. She was crying. When he came closer, he recognized her as Lolo. He knew Lolo because he used to transport her family to the church. He stopped his vehicle. Lolo opened the door and came inside the van. He noticed some leaves on her clothes. Then he asked her what happened. She told him that she was raped. He asked her who did this and where did the boy go to her. She pointed towards Varadoli back feeder road and said that he is going in front, so he followed. Then she pointed to the boy Kolaia when they were about to reach DAV School junction.
41. He did not stop because he wanted to go first to the police station and bring a police man. He went to the police station and accompanied a policeman to where the boy was. But they couldn't find the boy. Sometimes later Kolaia came to him with his parents and wanted to go to girls place with yaqona. He took them Lolo's place.
42. Under Cross Examination Jakir denied that he called Lolo that night and was planning to meet up with her.

Aliveta Navuni

43. Navuni is Complainant's mother. She said that she did not know Kolaia Ralulu or Losana Nalolo's romantic relationship with him. She said that Losana did not have a mobile phone in 2013.

Rovika Singh

44. Rovika is Complainant's cousin. She was staying with Complainant's family. She said that she had never heard of Kolaia. Then she said Kolaia used to call on her mobile phone, and wanted to talk to Losana. She used to give the phone to Losana to talk. But Losana did not call Kolaia using her phone.
45. When they were talking on the phone she came to know of Kolaia and saw them together in a carnival in 2012.
46. Under Cross Examination Rovika said that she knew Losana was having an affair with Kolaia from 2012. However, she didn't know anything about them in 2013.

PW 5 Dr. Siteri Sautuca

47. The last witness for the state was Doctor Siteri Sautuca. Having been satisfied with her qualifications and experience Court declared her to be an expert witness in the field of medical science. Doctor said she examined Losana on 13th April 2013 at 11 pm, the same day Losana said she was raped. She tendered the medical examination report marked as PE.1 she prepared upon examination of Losana that night. Doctor's initial impression was that she was alert/awake oriented but her clothes were dirty and her hair was unkempt. She noted two bruises or 'love bites' on both sides of her neck. She described bruises in this case as discoloration of the skin surface. Upon vaginal examination, she found Losana's hymen not intact. She also noted two lacerations 4 mm in length in her introitus which is the opening to the vagina. They were at 5 o'clock and 7

o'clock positions towards the bottom of the vagina. There was no active bleeding noted. Her professional opinion as a doctor was that the two lacerations at introitus were consistent with forced entry or forced penetration by a blunt object. She said that a penis in its erected form could cause such trauma.

48. When asked if such lacerations could be caused by consensual but rough sex. She said that consensual rough sex would probably cause abrasion not lacerations. Abrasion is the rubbing of the skin without breaking the continuity of the skin.
49. Under cross examination, Doctor said that consensual sex with a girl who was menstruating would still not cause 4 mm lacerations. She also said that rough sex with large penis would still not cause lacerations definitely not at the bottom where Losana had the injury.
50. 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.
51. As you are aware, accused elected to give evidence. That is his right. Now I must tell you that the fact that an accused gives evidence in his own defence does not relieve the Prosecution of the burden to prove their case to you beyond reasonable doubt. Burden of proof remains with the prosecution throughout. Accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.

DEFENCE CASE

Kolaia Ralulu (Accused)

52. During 2012 -2013 period, Kolaia was a student of DAV College in Ba following an Automotive Engineering Certificate course conducted by Fiji National University.
53. He was in a romantic relationship with his girlfriend Losana Nalolo who was attending the same school in Form 4.
54. They first met at the Ba bus stand and then they used to meet every afternoon and call her on her sister Rovika Singh's number because Losana did not have a phone in 2012. During that time all her sisters and her mother knew that Losana was his girlfriend. This relationship continued till the allegation was brought in on 13th April, 2013.
55. On 13th April 2013 she came to the Ba town in a bus and met Losana Nalolo near the fish market and asked her if they can meet in the afternoon to which she agreed. Then they moved apart. Having roamed in the town till 5 p.m., he went to his sister's place at Varadoli and was having tea and watching movies. After having dinner he walked down to Field 28 to meet Losana because she had agreed to meet him at 7.30. He met Losana at the Feeder Road. They sat beside the cane field and talked to each other. After a while he asked her if they could have sex and she agreed. When she agreed they started kissing each other. After that she lied down and asked him to bite her neck to make love bites. He spread the skirt on the ground. She sat on top of it. After that he removed her underwear. Then he said that he first pulled her skirt down and then removed her underwear. He did not protest kick or push.
56. Having partly removed his trousers and underwear he inserted his penis into her vagina. When he inserted his penis it wasn't very hard. Her vagina was wet and she was not in pain. She didn't shout to show that it's paining. There was a call on her mobile phone but they did not stop. Then he ejaculated having had sexual intercourse for half an hour. At

no time she did resist, yell, kick or push him away. While they were having sex she used both of her legs to grip him very tight and kept on kissing him. She liked it. She did not cry when they finished. She went home saying 'goodbye'.

57. Under Cross Examination, Accused said he did not run away from police because he had nothing to cover up. After having sex he asked her if he could drop her at her place but she said 'no it's ok'. That's why he did not accompany her.
58. He denied that he forced his penis into her vagina. He did not know how those lacerations came about. When asked why Losana made a complaint against him if the incident happened with her consent, Accused said the carrier driver Jakir was behind making up this allegation.
59. He said Losana too called him using Rovika Singh's phone. He asked his Counsel to ask about tights but he forgot to mention about the tights in his evidence.
60. He said that he did not know she was an underage girl although he was in a relationship with her for two years.

That is the case for the Defence.

ANALYSIS

61. There is no dispute in this case as to the identity of the accused. Accused admits to having had sexual intercourse with the Complainant the 13th of April 2013.
62. Prosecution says that the sexual intercourse took place without Complainant's consent. Accused denies the allegation. Accused says that he was in a romantic relationship with the Complainant for two years and the sexual intercourse took place as part of that relationship with her full consent.

63. Prosecution called five witnesses. Prosecution based its case substantially on the evidence of the Complainant.
64. You must decide whether you are sure the Complainant did not consent to sexual intercourse with the accused. That will require an assessment by you of the Complainant's evidence.
65. Complainant does not dispute the fact that she was in a romantic relationship with accused. You have to decide whether at this particular moment on the 13th April 2013 she had given her consent.
66. During the course of Complainant's evidence it was suggested to her that she could have yelled and otherwise objected to what the accused were doing. In her closing argument Defence Counsel submitted to you that Complainant's conduct as was described by the Accused, demonstrates that she had consented to sexual intercourse. You should not assume that there is any classic or typical response to an unwelcome demand for sexual intercourse. The experience of the Courts is that people who are being subjected to nonconsensual sexual activity respond in variety of different ways.
67. Prosecution relies on recent complaint evidence to prove consistency of Prosecution version of events. It says that Complainant's version is credible and consistent because she relayed the incident to the first person she saw Jakir soon after the incident and went with him to the police station and made a prompt complaint within hours. Jakir came and gave evidence to say that he received such a complaint. A medical examination was done in the same night and she relayed the same story to the doctor. You would appreciate that there is little room for fabrication when a prompt complaint is made. You decide whether her complaint promptly made boosted the credibility and consistency of her version.
68. Prosecution also relies on the doctor's evidence and says that bruises doctor noted on Complainant's neck and two lacerations at the base of her vaginal opening are consistent with forceful sexual intercourse. Doctor said the lacerations have been caused by forced

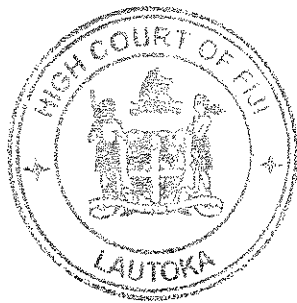
penetration by a blunt object. She ruled out the possibility of such lacerations being caused by consensual sexual intercourse. You heard what the doctor said about it. Considering all other evidence led in the trial, you decide what weight you should attach to doctor's pinion.


69. Prosecution also relies on distress evidence. Prosecution says that the Complainant was crying, and her cloths were dirty and had leaves on them soon after the incident. You consider this piece of evidence also in coming to your conclusion.
70. Prosecution also takes up the position that there was no motive on the part of the complainant to fabricate such a serious allegation against her boyfriend if there was no injustice caused to her. You decide what weight you attach to that proposition.
71. Prosecution says that Defence version is not consistent and that it is implausible. They say that the version of the Accused and the version put to prosecution witnesses by his Counsel were not consistent.
72. You consider whether the version of the Defence is consistent and believable. You watched accused giving evidence in court. You can apply the same tests and your common sense to evaluate the evidence of the Defence.
73. Accused maintained that the Complainant was his girlfriend and the sexual intercourse took place with her full consent. He adduced evidence to describe the events that led to the alleged sexual activity to show that it happened with her agreement. You decide whether you could accept his version. It is up to you to decide whether you could accept the version of the Defence and it is sufficient to establish a reasonable doubt in the Prosecution case.
74. If you accept the version of the Defence you must find the accused not guilty. Even if you reject the version of the Defence and do not believe a single word accused told in Court, still the Prosecution should prove its case beyond reasonable doubt. Remember, the

burden to prove the accused's guilt beyond reasonable doubt lies with the Prosecution throughout the trial, and never shifts to the accused, at any stage of the trial.

75. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty.
76. 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.
77. 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?




Arun Aluthge
Judge

AT LAUTOKA

13th April, 2017

Solicitors for State:

Office of the Director of Public Prosecution for State

Solicitors for Accused:

Legal Aid Commission for Accused