

IN THE HIGH COURT OF FIJI

CRIMINAL JURISDICTION

AT LAUTOKA

CRIMINAL CASE: HAC 121 OF 2013

BETWEEN : STATE

AND : AMRIT LAL

Counsel : Mr. S. Nath for State
Mr. J. Singh with Ms. Singh for the Accused

Date of Hearing : 24th - 26th of August 2016

Date of Closing Submissions : 29th of August 2016

Date of Summing Up : 29th of August 2016

SUMMING UP

1. Name of the victim is suppressed.
2. It is my duty to sum up the case to you. 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.
3. You are to determine the facts of the case based on the evidence adduced during the course of the hearing. 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.

4. I may comment on the facts if I think it will assist you when considering the facts. However you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard my comments on the facts unless it coincides with your own independent opinion. I say so because you are the sole judges of the facts.
5. You all have been chosen from the community and represent a pool of common sense, knowledge, and the experience of the conduct of the members in our community. Accordingly, you are required to use your experience, common sense, knowledge of the community and the conduct of its members in your deliberation of facts of this case.
6. You must reach your opinion only on evidence. Evidence is what the witnesses said from the witness box, documents and other materials received as exhibits and agreed fact. 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 of the prosecution is not evidence. The purpose of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. The closing addresses of the counsel of the prosecution and the accused 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 testimonies, agreed facts and

the exhibits put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation.

8. 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 conclusion or form 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 your opinion will assist me in reaching my judgment.
9. Moreover, 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 of Proof and Standard of Proof

10. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until his is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused is guilty for the offences.
11. 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. Accordingly, the burden of proof rest on the prosecution throughout the trial and

it never shifts to the accused. In other words there is no burden on the accused to prove his innocence, as his innocence is presumed by law.

12. 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 found 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

13. The accused is being charged with two counts of Rape contrary to Section 207 (1) and (2) (b) of the Crimes Decree and one count of Indecent Assault, contrary to Section 212 (1) of the Crimes Decree. The particulars of the offences are before you. Hence, I do not wish to reproduce them in my summing up.
14. The victim was thirteen years old in 2013. The accused is her biological father. She was brought from Taveuni to Nadi together with her elder sister by her mother to live with the accused in order to obtain better education. She was then matriculated at AD Patel Memorial Primary School. During the first term of the school, the accused came to the victim while she was sleeping with her sister on a bunk bed. He then removed her cloths and touched her breast and body. While doing it, the accused inserted his finger into her vagina without her consent.

15. The prosecution further alleges that the two other sisters of the victim came to stay with them during the first term school holidays. She was then shifted to another room to sleep. The accused came to her while others were asleep in the night and started to touch her breast and body. He then removed her short and undergarments, and inserted his finger into her vagina. He threatened her that he will kill and bury her somewhere if she tells this to anyone else.
16. The main element of the offence of rape as charged under the first and second counts are that;
- i) The Accused,
 - ii) Penetrated into the vagina of the victim with his fingers,
 - iii) The victim did not consent to the accused to penetrate into her vagina with his fingers,
 - iv) The Accused knew the victim was not consenting for him to insert his fingers in that manner.
17. The prosecution and the defence have agreed that the accused and the victim are related as biological father and daughter. They lived in the same house during the period material to this matter. The accused completely denies this allegation. Hence, it is the onus of the prosecution to prove beyond reasonable doubt that it was the accused who committed these crimes as charged in the information.
18. I now draw your attention to the element of penetration. Evidence of slightest penetration of the finger of the accused into the vagina of the victim is sufficient

to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

19. 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 victim consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. A consent obtained through fear or by threat or by exercise of authority or 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 victim to an act of another person shall not alone constitute consent.
20. The victim must have the freedom to make the choice. It means that she must not be being pressured or forced to make that choice. Moreover, the victim must have a mental and physical capacity to make that choice freely.
21. If you are satisfied, that the accused had inserted his finger into the vagina of the victim and she had not given her consent, you are then required to consider the last element of the offence, that is whether the accused honestly believed that the victim was freely consenting for this alleged sexual intercourse. I must advise you that belief in consent is not the same thing as a hope or expectation that the victim was consenting. You must consider whether the accused knew either that the victim was not in a condition or a position to make a choice freely and voluntarily, or the victim had made no choice to agree to sexual intercourse. If you conclude that the accused believed that the victim was consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that prevailed at the time of the alleged incident took place.

22. The main elements of the offence of Indecent Assault are that;
 - i) The Accused,
 - ii) Unlawfully and Indecently Assault,
 - iii) The victim,
23. The prosecution and the defence have agreed that the victim was below the age of sixteen years old at the time of these alleged offences took place. Accordingly, the consent of the victim to the indecent act is not a defence for the accused.
24. Assault means any form of hostile or adverse act done towards the victim. If such hostile or adverse act was done on the victim without any lawful reasons and accompanied by any form of socially unacceptable conduct, then the accused has committed an offence of Indecent Assault. Indecent means unbecoming, immodest and obscene.
25. I now request you to draw your attention to the agreed fact, which is before you. They are the facts that the prosecution and defence have agreed without dispute. Hence, you are allowed to consider them as proven fact by the prosecution beyond reasonable doubt.
26. The prosecution has charged the accused with three counts. As judges of facts, you are required to consider each and every count separately. If you found the accused is guilty of one count, that does not automatically make him guilty for the remaining counts.

27. You must bear in mind that offences of sexual nature do not need the evidence of collaboration. It means that if you are satisfied with the evidence given by the victim and accepts it as reliable and truthful, you are not required to look for any other evidence to support the account given by the victim.
28. One or more of you may have assumptions as to what constitutes rape, what kind of person may be the victim of rape, what kind of person may be the rapist or what a person who is being or has been raped will do or say. Though such assumptions are natural in ordinary life, it is important that you must leave behind such assumptions as there is no stereotype of circumstances for a rape or a rapist or a victim of rape.
29. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety of ways. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgment strictly on the evidence that you have heard from the witnesses and the exhibits during the course of the hearing.
30. It is your duty as judges of facts to assess the evidence in order to determine whether the victim gave her consent to the accused for this alleged sexual intercourse. In doing that, you must be mindful that not to bring in to the assessment of the evidence any preconceived views as to how a victim of rape in a trial such as this should react to the experience that the victim had gone through. Every person has his or her own way of coping with such incident. Some may display obvious signs of distress and others may not. Demeanor of the victim in the court while giving evidence is not necessarily a clue to the truth of the victim's account.

31. Let me now remind you the evidence presented by the prosecution and the defence during the course of the hearing.

The Evidence of Prosecution

32. The first witness of the prosecution is the victim of this case. She is now attending at Bucalevu Secondary School in class 11 and staying with her grandparents in Taveuni Island. She is now sixteen years old. I will now summarised the evidence given by the victim as follows.
33. The victim with her elder sister was brought from Taveuni to Nadi by their mother to stay at her father's place at the beginning of the year 2013 for them to have better education. She was then matriculated at AD Patel Memorial Primary School in Malolo, Nadi. She was in class 8 at that time. Their mother then went back leaving them with the father. Her father was good to them for a week. He then used to come to and switch off all the lights while she was sleeping in the bunk bed with her sister. He then undressed all of her cloths and used to touch her body. He used to touch her breast and pubic area. He used to insert his finger into her vagina. This happened after 11.30 in the night. Her sister was sleeping on the upper bed while she slept on the lower one. These incidents took place during the first term of the school, that was between February to April 2013.
34. The victim further stated that her father told her that if she tells anyone about this, he will kill and burry her somewhere. He further told her that he will hit her if she were to tell anyone about this. The Father always used to hit her with a chopper. She said that she did not like what her father did to her. He started to hit her when she told him that she will report this matter.

35. During the school holidays, other two sisters also came to stay with them. She was then shifted to another room to sleep. It was at the back, near the kitchen. Her father asked her to keep the back door open for him to come to her in the night. In the night, he came to the room and took off her clothes and then forced his finger into her vagina.
36. Her elder sister, Asha Ashmita asked her why she always look scared. The victim then told her what her father had been doing to her. Her sister then told her that they cannot do anything, and she has to go and report it to the teacher in charge of girl at the School. She then went and report it to Mrs. Mani, who was the teacher in charge of girls. The teacher then reported the matter to the Head Teacher. The Head Teacher then reported it to the Social Welfare Office and the police. She was then taken to the Hospital for Medical Examination. The victim explained that she did not report this matter earlier because the father used to hit her.
37. During the cross examination, she said that she did not like to stay in Nadi and wanted to go back to Taveuni. It was because that her father used to say that she was not her daughter and also used to hit her. She was brought to Nadi for better education and not because of her attitude towards her studies. She said her father did these alleged incidents while her elder sister was sleeping on the upper bunk bed.
38. Despite her father's threatening, she has warned him twice that she will report this matter to the police or to her teachers at the school She has told the police about his threats and it was recorded it her statement made to the police. She admitted in her evidence that she did not tell the police that he threatened her

that he will bury her somewhere. The victim explained the reasons why she did not inform the teachers at school during the first school term. She was thirteen years old at that time and if anyone scolded and hit, it was hard for her to go and inform someone. She said that she reported this matter to Mrs. Mani, the teacher in charge of girls at the school during the first term of the school. She did not want to tell her friends about this.

39. The victim during her cross examination explained the settings of the other room, which she used to sleep during the school holidays. It is an extension of the same room that she slept during the first term of the school. She said it has two doors. She slept on a sofa and it was about six to seven meters away from the bunk bed where her sisters used to sleep. She said that all the time her father did these alleged acts while her sisters were sleeping in the room. She said when she was trying to alarm them, her father started to hit her.
40. When she was asked by the learned counsel for the defence whether she had opportunity to scream or raise alarm to her sister, she answered that she was thirteen years old and was not much talkative. She then stated during the cross examination that she could recall an incident where she screamed to raise an alarm when she felt someone was trying to pull her legs while she was sleeping on the bunk bed with her sister. It happened during the first term of the school.
41. The victim in her evidence stated that she reported these incidents to Mrs. Mani twice. Once during the first term of the school and then after the school holidays.
42. During the re-examination, the victim said that she was not able to remember some of the things when she made her statement to the police.

43. The second witness of the prosecution is Sirleen Shobna Mani. She is a primary school teacher and now teaching at Jasper Williams Primary School. She was teaching at AD Patel Memorial Primary School in 2013. She was the teacher who was entrusted to look after the welfare and personal issues of the school girls. She recalls that on 16th of May 2013, the victim came to her and told her that her father used to come to her in the night and touched all over her body and private parts with his fingers. It has happened during the school's holidays. She then reported the matter to the head teacher. The head teacher then reported it to the Social Welfare Office and the Police.
44. During the cross examination, Mrs. Mani stated that the victim reported this to her only once and she then recorded and reported it to the head teacher. She further said that she noticed some marks on the wrist and back of the hand of the victim. The victim told her that those marks were caused by the assault of her father.
45. The third witness of the prosecution is Asha Asmitha Lal. She is the elder sister of the victim. She has three younger sisters. The victim is one of them. I will now summarise the evidence given by Asha Ashmitha as follows.
46. In the year 2013, she was schooling at Swami Vivekananda College in Nadi. She was staying with her father and her sister, the victim at Malolo Nadi. She recalls that on the 15th of March 2013, her sister screamed in the night. They were sleeping in a bunk bed. She was on the upper bed and her sister was on the lower bed. The lights of the house went off just before she screamed. The bed started to shake and then her sister screamed. She was scared and covered herself with the blanket. She was afraid because her father told her that the house

was a haunted one. Just after a second of the scream of her sister, her father asked what was happening. It was dark and she did not see anything. She saw a glowing greenish light. On the following day she discovered that glowing greenish light was her father's wrist watch. She saw that glowing light beside their bed. On the following morning, when they were watching movies, she saw the wrist watch of her father. She was discussing with her sister of what happened on the previous night. She said her relationship with the father was clean and it was a relationship that a father and daughter shared.

47. Ashmitha said during the cross examination, that she did not tell the police everything and only told them what she thought was important for this case. She was informed by the police officer who recorded her statement that her statement will be given to her father before the commencement of the court proceedings, she then felt scared to record everything in the statement. The police officer then told her that if she is scared, she can tell everything in the court. So she only stated important facts of this allegation in her statement and withheld other information in order to tell them in the court. She said there are no two different versions and it is a same story with two difference parts. She is still staying with her father during the school's holidays, even after she made her statement to the police.
48. The last witness of the prosecution is Dr. Agnes Dunn. She is the doctor who conducted the medical examination of the victim. In her evidence Dr. Dunn explained the specific medical findings she found during the medical examination. She found the hymen was lacerated and not intact. Hyman can be break due to many causes and she explained them. She explained that a blunt penetrative force could cause the hymen laceration as she found on the victim.

She further said that her conclusion made at item D 16 of the medical report is not conclusive as there is a possibility the victim can lie.

49. At the conclusion of the prosecution case, the accused was explained about his rights in defence. The accused opted to give evidence on oaths. However, he advised the court that he does not wish to call any other witnesses for his defence.
50. The Accused in his evidence denied these allegations. He said that the victim and his eldest daughter were brought to Nadi from Taveuni by their mother for them to have better education. However, the victim wanted to go back to Taveuni as she was grown up with her grandparents all the time. He told her that he will arrange things for her to go back if he managed to contact her mother or any of her family members during the school break. However, he failed to do that and she told him that he will see the consequence of not sending her back to Taveuni.
51. The accused in his evidence stated that the victim and her sister slept on the bunk bed during the first term of school. During the school vacation, other two daughters of him came to stay with them. The victim then slept on the sofa on the other side of the room ,which is an extension of the same room. Two of his daughters slept on the bunk bed and the youngest daughter slept with him. There was no separate door to enter to the area where the victim slept on the sofa. It has only one door.
52. I have summarised the evidence presented during the cause of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence and reminded yourselves of all of them.

What I did only to draw your attention to the main items of evidence and help you in reminding yourselves of the evidence.

Analysis

53. The prosecution and defence presented conflict versions of the events. In order to determine whether the prosecution has proven beyond reasonable doubt that the accused is guilty for these offences as charged in the information, you have to consider the credibility of the witnesses, and the reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. 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 he or she has testified. You can accept part of a witness's evidence and reject other parts. 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.
54. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is testifying in the evidence. You then should 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 his or her own evidence but also with other evidence presented in the case.
55. It is your duty as judges of facts to consider the demeanor of the witnesses, how they react to being cross examined and re-examined, were they evasive, in order

to decide the credibility of the witness and the evidence. Moreover, you have to consider the knowledge of the witness on the facts that he or she is testifying, his or her integrity, and his or her veracity in order to determine the credibility of the witness and his evidence.

56. The victim gave evidence behind a screen. The giving of evidence in this way is perfectly normal. It is designed to enable the witness to feel more at ease when giving evidence. It is not intended to prejudice the evidence by the witness. The fact that the witness gave evidence in this manner must not be considered against the accused.
57. You saw the victim giving evidence in court. A young person as of the victim may not have the same standards of logic and consistency as of an adult person. Her understanding may be different from experience of an adult person for a number of reasons, such as the age, limited experience and immaturity. Life viewed through the eyes and mind of a young adolescent person may seem very different from life viewed by an adult. You must bear those considerations in your mind when you consider the evidence given by the victim.
58. The learned counsel for the defence proposed you to consider the inconsistent nature of the evidence given by the victim with her own evidence and also with other evidence presented by the prosecution. As judges of facts, you are allowed to consider whether the evidence given by the victim is inconsistent with her own evidence and also with the evidence given by other witnesses.
59. Moreover, you may recall that the learned counsel for the defence questioned the victim and her elder sister during the cross examination about the inconsistent

nature of their evidence given in court and the statements they made to the police.

60. I will now explain you the purpose of considering the inconstant nature of the evidence given by a witness with his or her own evidence or the evidence of other witnesses. You can also apply this direction in considering the inconsistent nature of the evidence given in court and the previously made statement of a witness. You are allowed to take into consideration about such inconsistencies and the omissions when you consider credibility and reliability of the evidence given by the witness. However, the previously made statements are not evidence of the truth of its contents. The evidence is what a witness testified under oath in the court.
61. 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. Moreover, as I explained above, the victims of rape react differently to the trauma and the experience they have gone through, specially in revealing those incidents to another person. Sometimes they are unable to recall every minute detail soon after the incident due to the traumatic impact or the experience they undergo *et cetera*. Sometimes, with the passage of time they would be able to resurrect their memory and recall some details of those traumatic experiences.
62. 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.

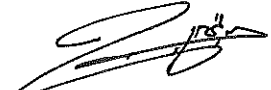
63. The victim in her evidence stated that her sister asked her why she always looked scared. The victim in her evidence did not specify when and where her sister asked it. The victim has then told the sister about what the father had been doing to her. The sister then told her that they cannot do anything. Sister then told her to inform the teacher in charge of girls at school. The victim then informed the Teacher in charge of girls, Mrs. Mani. The victim in her evidence stated that she informed Mrs. Mani twice. Once during the first term of school and then after the school holidays was over. Mrs. Mani in her evidence stated that the victim came and informed her about these allegations only on the 16th of May 2013. The victim has informed her the father took off her undergarment and touched her private part with the fingers.
64. These form of evidence referred as evidence of recent complaint. It is not an evidence as to what actually happened between the victim and the accused. Neither the elder sister nor Mrs. Mani was present and witnessed what happened between the victim and the accused.
65. The sister of the victim in her evidence did not state anything about asking the victim why she always looked scared. She did not state that the victim informed her about what her father had been doing to her sister. Hence, you must disregard the evidence of the victim to the effect that she told her sister about these incidents. In order to consider the evidence as recent complaint, both the

complainant and the person who received the complaint must give evidence to that effect. However, you are entitled to consider the evidence of Mrs. Mani as evidence of recent complaint.

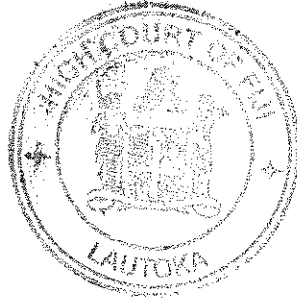
66. You are entitled to consider the evidence of recent complaint in order to decide whether or not the victim has told the truth. It is for you to decide whether the evidence of recent complaint helps you to reach a decision, but it is important that you must understand that the evidence of recent complaint is not independent evidence of what happened between victim and Accused. It therefore cannot of itself prove that the complaint is true.
67. The main allegation of the victim is that the accused inserted his finger into her vagina. According to the evidence given by Mrs. Mani, the victim told her that her father touched her private parts with his fingers. The complaint need not disclose all of the ingredients of the offence. But it must disclose evidence of material and relevant unlawful sexual conduct on the part of the Accused. It is not necessary for the complainant to describe the full extent of the unlawful sexual conduct. It is for you to decide whether the complaint made to Mrs. Mani by the victim has disclosed material and relevant unlawful sexual conduct of the accused and how it affects to the credibility of the evidence given by the victim.
68. Ladies and Gentleman, it is your duty now to consider whether the evidence presented by the prosecution is reliable and truthful. If you accept them as reliable and truthful, then you can consider whether you accept them as proven facts. Likewise, you must consider whether the evidence presented by the accused could be accepted as reliable and truthful. I must again remind you that the accused has no responsibility to prove his innocence.

69. You heard the evidence presented by the accused, where he denied these all allegations. If you accepted the version of the accused as reliable and credible, or consider it as reasonably true, although you are not convinced that it is true, then the case of the prosecution fails. You must then acquit the accused.
70. If you neither believe nor disbelieve the version of the accused, yet, it creates a reasonable doubt in your mind about the prosecution case. You must then acquit the accused from this charge.
71. Even if you reject the version of the accused that does not mean that the prosecution has established that the accused is guilty for this offence. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the accused has committed each of these counts as charged in the information.
72. Upon consideration of all evidence, if you are satisfied that each of the counts or some of the counts are proved beyond reasonable doubt, you can find the accused is guilty for each of the counts or for the counts that you find as proved beyond reasonable doubt. If you are satisfied that each of the counts or some of the counts are not proved beyond reasonable doubt, then you must find the accused not guilty for each of the counts or some of the counts as you find.
73. 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 on the charge against the accused. You will be asked individually for your opinion and are not required to give reasons for your opinion. Once you have reached your opinion, you may please inform the clerks, so that the court could be reconvened.

74. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?


R. D. R. Thushara Rajasinghe
Judge

At Lautoka
29th of August 2016



Solicitors : **Office of Director of Public Prosecution**
Samusamuvodre Sharma Law