

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 21 OF 2013

BETWEEN : STATE

AND : A.B.

Counsel : Mr. J. Niudamu for State
Mr. Iqbal Khan for the Accused

Date of Hearing : 17th of August 2016, 15th and 17th of November
2016

Date of Closing Submissions : 17th of November 2016

Date of Summing Up : 21st of November 2016

SUMMING UP

1. The name of the victim and the accused are suppressed.
2. Madam assessors and Gentleman assessor, you have heard the evidence adduced by the prosecution and the defence and also the respective closing submissions of the learned counsel for the prosecution and the defence. Now, 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. Our functions in this trial have been and remain quite different. Throughout this trial the law has been my area of responsibility, and I must now give you directions as to the law which applies in this case.
4. It is also my function to remind you of the prominent features of the evidence. However, it has always been your responsibility to judge the evidence and decide all the relevant facts of this case. You and you alone must decide what evidence you accept, what evidence you do not accept and what evidence you are not sure about; and when you come to consider your opinion, you and you alone, must do that.
5. You do not have to decide every point which has been raised; only such matters as will enable you to say whether the charge laid against the accused has been proved. You will do that by having regard to the whole of the evidence including the material tendered as exhibits and forming your own opinion about the witnesses, and which evidence is reliable and which is not. The evidence consisted of the oral testimony of witnesses and the material tendered as exhibits.
6. You all have been chosen from the community and represent a pool of common sense, knowledge and experience of the conduct of human beings in our community. You have sworn an oath or affirmed that you will deliver a true opinion according to the evidence. Therefore you must decide this case only on the evidence which has been placed before you.
7. You must reach your opinion 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.

8. 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.
9. 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.
10. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is

your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

11. Matters which will concern you are 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.
12. 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 talking 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.
13. 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, whether they were evasive, in order to decide the credibility of the witness and the evidence.

Burden and Standard of Proof

14. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of

innocence is in force until you form your own opinion that the accused is guilty for the offence.

15. The burden of proof of the charge against the accused is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused to prove his innocence, as his innocence is presumed by law.
16. 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 person'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.

Information

17. The accused is being charged with one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Decree. The particulars of the offences are before you, hence I do not wish to reproduce them in my summing up.
18. The prosecution alleges that the accused forcefully had a sexual intercourse with the victim on the 26th of January 2013. The accused is the step father of the victim. She was asked by the accused to come and press his back in the early morning of the 26th of January 2013. Her mother and other siblings had gone to the flea market and she was alone with the accused at home. While she was

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going out of the room after pressing his back, he had stopped her and started to kiss her. He then has dragged her to the bed and had sexual intercourse with her without her consent.

19. The defence denies the allegation and claims to be false. The accused stated that the victim together with her boyfriend conspired and made this false allegation as he always disapproved their relationship.
20. The main elements of the offence of Rape as charge are that;
 - i) The Accused,
 - ii) Penetrated into the vagina of the victim with his penis,
 - iii) The victim did not consent to the accused to penetrate into her vagina with his penis,
 - iv) The Accused knew the complainant was not consenting for him to insert his penis in that manner.
21. The agreed facts before you are the facts that the prosecution and the defence have agreed without any dispute. Hence, you are allowed to consider them as proven facts beyond reasonable doubt.
22. The accused completely denied this incident as a false fabrication. However, he does not dispute that he was at the house with the victim in the morning of 26th of January 2013. He further said that he asked her to come and press his back. Therefore, the main dispute in this matter is whether the accused has forcefully

penetrated his penis into the vagina of the victim and if so, whether she consented for such a penetration.

23. I now draw your attention to the element of penetration. Evidence of slightest penetration of the penis 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.
24. Let me now draw your attention to the issue of consent. It is your duty to decide whether the prosecution has proven beyond reasonable doubt that the victim did not give her consent to the accused to insert his penis into her vagina as charged.
25. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of an 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, by threat, by exercise of authority, by use of force and by intimidation could not be considered as consent expressed freely and voluntarily. A submission without physical resistance by the victim to an act of another person shall not alone constitute consent.
26. If you are satisfied, that the accused had inserted his penis 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 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 the alleged incident took place.

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 a person the rapist would be 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. Let me now remind you the evidence presented by the prosecution and the defence during the course of the hearing.

Evidence of the Prosecution.

31. The first witness of the prosecution is AB. She is the victim of this case. Initially, she refused to give evidence stating that she does not want to recall the incident that happened in 2013 as she has moved on with her life. However, after several adjournments, she consented to give evidence.

32. The victim in her evidence stated that she was alone at home with her step-father in the morning of 26th of January 2013. Her mother, elder sister and brother had gone to the flea market early in the morning. While she was doing some work in the computer in the dining area near the kitchen, her step father had come and asked her whether all others have left home. He then went and closed the front door. Though it was unusual, she had thought that it was still early morning and that was the reasons why he closed the door. She recalled the time was around 5.45a.m. to 6a.m..

33. After a while her step father called her into her parents' room and requested her to scratch his back. It was a normal thing for her as she and her siblings used to do it for him. Once she scratched his back, he asked her to stand on his back. That also was a normal thing happened as she and her siblings used to do it. After doing it, she had tried to go out. As she was going out, the step-father had got off the bed and stood in front of her and had started to kiss her. She asked him as to what he was doing. She has got scared and shouted. He had threatened her not to shout. She was still in her night dress and he was dressed in a short. The victim said that she was shocked and surprised because all of the years that she lived with her step-father, he has never done such things and they always have had a normal father-daughter relationship.

34. When she told him that he was not supposed to do such things because he is like her father, he told her that he was keeping an eye on her for a long time. He then dragged her to the bed, that was few feet away from the door. She tried to push him away. She could not shout as he has threatened her. She was scared and was very weak at that time. He then took off her undergarment and inserted his penis inside her vagina and had sexual intercourse with her. She told him to stop and get off on her. She was crying and asking him to let her go. He had sexual intercourse with her for about five minutes.
35. Once he got off, she ran out of the room and out of the house. He was still inside the house. She then called her boyfriend and informed him about this incident. He said he will come soon. She stayed outside. On his way, the boyfriend has reported this matter to the Namaka police station. Once the boyfriend entered into the house, he came and asked her about the incident. Soon after his arrival, the police also came. Police then took her to Nadi Hospital. She said that she did not give her consent to her step father to have sexual intercourse with her on the 26th of January 2013.
36. During the cross examination, she agreed that in the statement made to the police on the 29th of January 2013, that her step father had threatened her not to shout had not been recorded. She said that at that point of time she had so many things in her head. She was horrified and still shocked with the incident when she made her statement to the police. She said that she did not suffer any injuries due to the dragging from the door to the bed. She further said that she did not serve him breakfast, but it was on the table as her mother had already made it and placed on the table before she left.

37. The victim stated that after the incident the step father went to have his shower. She said she felt more comfortable and safer in informing her partner and that was the reason why she did not inform any neighbour about this incident. She said Naushad Ali, one of her grand uncles came to the house soon after the incident took place. She was still staying outside the house. After he came, her step father had come out and left with Naushad Ali.
38. The victim stated that her step father was a protective person as she was having a relationship with his boyfriend at that time. She had stated in her statement made to the police that her step father was very protective to her and her siblings and they always treated him like their father.
39. She has stayed at home alone with her step father many times before this incident took place. He had never done such things on any such occasions. Her step father had found her boyfriend hiding under her bed in the month of fasting in the year of 2012. He has then assaulted and chased him away. Her step father has also called the police. The police officers of Sabeto Police Station came and warned her boyfriend.
40. The victim said that she did not conspire with her boyfriend to make this allegation in order to take revenge from her step-father.
41. She further stated that she got sick and was admitted to Lautoka Hospital for ovarian cyst. She said that the doctors never told her that the bleeding she had at that time was due to the abortion. She has no idea whether her step father called her boy friend at that time as she was really sick and could not recall many things. The victim said that her step father did not like her boyfriend coming to

their house. She said that he did not come every day but came only a couple of times.

42. The victim said that she was hesitant to give evidence in court because she did not want to come to the court and undergo the same thing over and over again. She also thought that this matter had already finished and only came to know that the case was still pending when she was summoned by the court. She said that she gave evidence in court because what was happened on the 26th of January 2013 was true.
43. The second witness of the prosecution is the boyfriend of the victim. He stated that he received a text message on his mobile phone from the victim, stating that wake up and she wants to tell him something. He then called her and she told him stay online as she could not answer at that time. In a while she called him and told him about what her step father had done to her. She said that her step father forced her to sleep with him. She said that she want to kill herself and she can't show her face to anyone. He then asked her if she want to inform this to police and her mother. She said yes. He then called her mother and informed her about this incident. He then went to Namaka Police Station and reported the matter on his way to the victim's house.
44. When he reached to victim's house, he found her mother was already there, comforting her. She was crying and sitting on the couch with her mother. He did not go into the house and talk to her as she was not in a position to talk to him. At the same time, the police came.

45. During the cross examination, he said that it had not been recorded in the statement he made to the police that she said that she feel like killing herself. He said that before this incident took place in the morning of 26th of January 2013 he was talking to her.
46. He said that the accused never spoke to him, but her mother called him and told him to have Nikah with the victim. He agreed the victim's family was insisting him to marry the victim in the years of 2010 to 2013. He said that he went to her house in the month of fasting in 2012 while the accused was at the mosque. When the accused came he hide under the bed of the victim. The accused found him and assaulted him. They called the police as well. He could not remember whether police spoke to him. He cannot remember whether he was caught by the accused while he was at her place when they were living at Navo, Nadi.
47. He further stated that the victim was admitted to the hospital for ovarian cyst and not due to the abortion. However, he admitted that he made her pregnant and she aborted the child. She aborted the child in 2011 and she was admitted to the hospital in 2012. He said he never liked the accused.
48. He said that he was going to marry the victim by the end of this year, but it had to be postponed due to this case.
49. At the conclusion of the prosecution case, you have heard that I explained the accused about his rights in defence. The accused opted to give evidence on oath and informed the court that he does not call any other witness for his defence.

The Evidence of the Defence

50. The accused in his evidence stated that he married the mother of the victim in 2007 and initially lived with her at Novo, Nadi. At that time, her children were with his in-laws and used to come and stay with them time to time. He said he loves his wife and her children and looked after them since he got married to her. He said that his landlord called and informed him that a boy was at his house with his daughter when they were staying at Novo, Nadi. He then came in his car and saw the boyfriend of the victim was running away when he came. When they moved to Sabeto in 2010, he came to know about this relationship from their neighbours. The accused stated that he and his wife asked the boyfriend several times to marry the girl, but he kept on refusing it. He remembers that in the month of fasting in 2012, he found the boy friend hiding under the bed of the victim. He then dragged him out and slapped him several times. He then called the police and asked them to warn him not to come again.
51. According to the accused, the victim used to go to work early in the morning before 8 a.m. and return late night around 10 to 11 p.m. She said she was doing overtime. But he found that she normally finished her work at 5 p.m.
52. He could recall that 11th of January 2012, they took her to Zen Medical Centre, and then to the Lautoka Hospital. Dr. Zen told them that she was having a severe internal bleeding and her chances of survival was low. She was rushed to the hospital in an ambulance in the middle of the night. Dr Zen told them that the bleeding was due to a recent abortion she had done. He as the step father, called the boy and asked him to marry her, but he refused.

53. The accused in his evidence stated that he got up in the morning of 26th of January 2013 and got ready to go to work. He called Naushad Ali to come and take him to work. While the victim was pressing his back, Naushad Ali came. He asked him to wait and rashly got ready. He asked the victim to serve him breakfast. He denies this allegation and said it's a false allegation.
54. During the cross examination, the accused explained that they tried to contact the elders of the boy's family and discuss the issue of marriage. The parent of the boy refused the girl. He denied the allegation during the cross examination.
55. 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.

Directions and Analysis

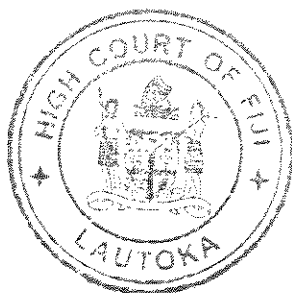
56. The prosecution and the defence presented conflicting versions of event that took place in private between the victim and the accused.
57. You have seen the victim giving evidence in court. At the commencement of the hearing, she refused to give evidence stating that she did not want to go back and recall the incidents that took place in 2013 as she has moved on with her live. Neither she blames nor found any evidence that the accused has forced or prevented her giving evidence. Hence, you must not make any adverse inference on the accused on her refusal of giving evidence in court at the commencement of this hearing.

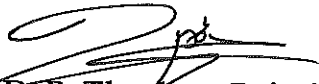
58. You might recall that the learned counsel for the accused person questioned the victim and her boyfriend during their respective cross examinations about the inconsistencies in their respective statements made to the police with the evidence that have given in court. The evidence of the witness is what he/ she told us in court on oath. The statements made to the police are not evidence unless they are tendered as exhibits.
59. I now explain you the purpose of considering the previously made statement of the witness with the evidence given in court. You are allowed to take into consideration about the inconsistencies and the omissions in such a statement when you consider whether the witness is believable and credible as a witness. However, the statement itself is not evidence of the truth of its contents.
60. 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.
61. 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.

62. You have heard the evidence of the boyfriend of the victim, stating that she informed him about this incident when she ran out of the house after this alleged incident took place. She told him about what had happened to her. This form of evidence is known as evidence of recent complaint. It is not an evidence as to what actually happened between the victim and the accused. The boyfriend was not present and witnessed what happened between the victim and the accused.
63. 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 complain 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 the victim and the accused. It therefore cannot of itself prove that the complaint is true.
64. You heard the evidence presented by the accused, where he denied this allegation. If you accepted the version of the accused person is or may be true, then the case of the prosecution fails. You must then acquit the accused from this charge.
65. 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.
66. Even if you reject the version of the accused person 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 this offence as charged in the information.

67. Upon consideration of all evidence, if you believe that the count of rape is proved beyond reasonable doubt, you can find the accused is guilty of the charge. If you believe that that charge is not proved beyond reasonable doubt, then you must find the accused not guilty.
68. 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 person. 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.
69. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?




R.D.R. Thushara Rajasinghe
Judge

At Lautoka
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Solicitors : Office of Director of Public Prosecution
Messrs Iqbal Khan & Associates