

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 311 OF 2011S

STATE

VS

DHARMENDRA BAL RAM

Counsels : **Ms. L. Latu for the State**
Mr. J. Savou and Mr. M. Fesaitu for Accused

Hearings : **29th, 30th and 31st July, 2013**

Summing Up : **1st August, 2013**

SUMMING UP

A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.
2. State and Defence Counsels have made submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

B. THE BURDEN AND STANDARD OF PROOF

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.

5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that you must be satisfied, so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion, that he is not guilty.

6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victim. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

C. THE INFORMATION

7. For this trial, you are only concerned with counts no. 1 (rape) and count no. 3 (sexual assault). You are not concerned with count no. 2, therefore ignore it completely. You have a copy of the information with you, and I will now read the relevant part to you:

"... [read from the information]...."

D. THE MAIN ISSUES

8. In this case, as assessors and judges of fact, each of you will have to answer the following questions:

- (i) On count no. 1, did the accused, between 18th and 19th September 2011, at Nasinu in the Central Division, rape the complainant?
- (ii) On count no. 3, did the accused, between 18th and 19th September 2011, at Nasinu in the Central Division, sexually assault the complainant?

E. THE OFFENCES AND THEIR ELEMENTS

9. Previously, under the repealed Penal Code, Chapter 17, count no. 1 was treated as “Indecent Assault”. Under the Crime Decree 2009, count no. 1 was now classified as “Rape”. For the accused to be found guilty of rape in count no. 1, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused penetrated the complainant’s vagina with his finger;
 - (ii) without the complainant’s consent; and
 - (iii) he knew the complainant was not consenting to (i) above, at the time.
10. The slightest penetration of the complainant’s vagina by the accused’s finger is sufficient to satisfy element 9(i) above.
11. It must also be shown by the prosecution, beyond reasonable doubt that, the complainant did not consent to 9(i) above, at the time. Consent is to “agree freely and voluntarily and out of her own free will”. If consent was obtained by force, intimidation or fear of bodily harm to herself, that “consent” is deemed to be no consent. The consent must be freely and voluntarily given by the complainant. If the consent was induced by fear, it is no consent at all. For a child under 13 years, as a matter of law, she cannot give consent to element 9(i) above.
12. It must also be shown by the prosecution beyond reasonable doubt that, the accused knew the complainant was not consenting to 9(i) above, at the time. To decide this issue, you must consider what the complainant and the accused did at the time, including the surrounding circumstances.
13. For a child under 13 years, as a matter of law, once element no. 9(i) above is proved beyond reasonable doubt by the prosecution, the fact that she is incapable of giving her consent, and that the accused is deemed to know that she is incapable of giving her consent, is presumed in law. In

other words, once the prosecution proved element 9(i) above, it is a presumption in law that the under 13 year old child is incapable of giving her consent, and that the accused knew she was not capable of giving her consent to sex, at the time. So, the prosecution need only prove element 9(i) above, to find the accused guilty of the offence of rape.

14. In this case, the issue of whether or not the accused's finger penetrated the complainant child's vagina was a contested issue, given the child's medical report. In D(12) of the medical report, the doctor (PW3) wrote, "...**Tear at 6 o'clock position at the vaginal opening...hymen intact...**". The doctor's evidence was mixed. At one point, he said there was penetration of the child complainant's vagina by the accused's finger. Later, he said there was no such penetration.
15. Because of the above, and if you find there was no penetration of the complainant's vagina by the accused's finger, you will have to consider the alternative charge of "attempted rape", although the accused was not formally charged with the same. For the accused to be found guilty of "attempted rape", you must consider our discussions on the offence of "rape" in paragraphs 9, 10, 11, 12 and 13 hereof. Furthermore, on the facts, you must find that the accused intended to penetrate the complainant's vagina with his finger, and he did some overt acts to manifest that intention, although he did not commit the offence of rape, as described in paragraph 9 hereof. In other words, he intended to rape the complainant, and he did some overt acts to manifest that intention.
16. Count No. 3 involved the offence of "sexual assault". "Sexual Assault" is in fact, an aggravated form of "indecent assault". For the accused to be found guilty of "sexual assault", the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) the accused
 - (ii) unlawfully, and
 - (iii) indecently
 - (iv) assaulted
 - (v) the female complainant.

17. "Assault", in law, means "the unlawful application of force to the person of another". For example, A takes a stick and hit B with the same, that is, by hitting B with the stick, without any reasonable excuse, A is applying unlawful force to the person of B. Likewise, in the context of this case, if A licks B's vagina, without any reasonable excuse or without her consent, A would be applying unlawful force to the person of B. The defence of consent by B is not available to A, because B is a child.
18. A's licking of B's vagina was unlawful, because it was done without any reasonable excuse or consent by B, and in any event, the defence of consent is not available to A, because B is a child. The "assault" must therefore, not only be unlawful, it must also be "indecent". An "indecent assault" is one committed in circumstances of indecency. A circumstance of indecency is what right-minded people would consider "indecent", for example, a man licking a 7 year old niece's vagina. The prosecution must not only prove beyond reasonable doubt that an assault had occurred, it must also prove beyond reasonable doubt that the assault was "indecent", in the sense that right-minded people, would consider the act to be indecent.

F. THE PROSECUTION'S CASE

19. The prosecution's case were as follows. On 18th September, 2011, the female child complainant was 7 years 10 months old. She lived with her mother (PW2), who was 29 years old, at the time. Her mother was married to the accused's elder brother (DW2), who was 40 years old at the time. DW2 was not the child complainant's biological father, but her stepfather. Her mother and DW2 had 2 children of their own, that is, a daughter (DW3) and a son. The child complainant lived with her mother (PW2), step-father (DW2), half-sister (DW3) and half-brother, in a five bedroom house in Nasinu.
20. In the house, the stepfather's mother, sister and the accused (DW1) and his son also lived there. In one bedroom were the stepfather, his wife (PW2) and their son. In another adjacent bedroom was the child complainant and her half-sister (DW3). The other bedrooms were shared by the other family members. On 18th September, 2011 (Sunday), all the family was at home. The accused was helping her sister with the family canteen, which was attached to the house, and also

consuming some liquor, from 6 pm to 10.30 pm. He was also watching the World cup rugby on TV with DW2. The accused went to sleep after 10.30 pm.

21. According to the prosecution, the accused came to the child complainant's bedroom early morning on 19th September 2011 (Monday). The child complainant was asleep. According to the prosecution, the accused touched the complainant's body and private parts (ie. vagina). It appeared the child woke up. She said, the accused used his hand to touch her vagina, and according to her, it was painful. She said, the accused then used his lips to lick her vagina. She said, she did not allow the accused to do the above, and she felt uncomfortable. She shouted, "kaka (uncle) go away!" She said, she told her mother about the above, in the morning. She said, her mother reported the matter to police on the same day, and an investigation was carried out. She was medically examined at CWM Hospital. Given the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged on counts nos. 1 and 3. That was the case for the prosecution.

G. THE ACCUSED'S CASE

22. On 29th July, 2013, the first day of the trial, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to count nos. 1 and 3. In other words, he denied the allegations of "rape" in count no. 1, and "sexual assault" in count no. 3. When the prosecution closed their case, and a prima facie case was found against him, wherein he was put to his defence, he choose to give sworn evidence in his defence, and called his elder brother – the child's stepfather – (DW2), and the child's half-sister (DW3), as his only witnesses. That was his right, in order to defend himself.
23. In his sworn evidence, the accused denied that he penetrated the complainant's vagina with his finger, and also denied licking her vagina, at the material time. DW2 said, he was sleeping in his adjacent bedroom, at the material time, and suspected nothing in her step-daughter's bedroom, but heard her calling out the accused's name, in the early morning. DW3 said, she was sleeping with her half-sister, the complainant, in the same bedroom, and did not see her uncle, the accused, come into their bedroom, at the material time. In other words, the defence is saying that the complainant was mistaken, and they are asking you, as assessors and judges of fact, to find the

accused not guilty as charged on counts nos. 1 and 3, and acquit him accordingly. That was the case for the defence.

H. ANALYSIS OF THE EVIDENCE

(i) The Agreed Facts:

24. The parties have submitted an “Agreed Facts”. A copy of the same is with you. There are six paragraphs in the “Agreed Facts”. Because the parties are not disputing the same, you may take it that those facts have been proven by the prosecution beyond reasonable doubt, and you may treat the same as established facts.

(ii) The Complainant’s Evidence vs The Accused’s Evidence:

25. What had allegedly occurred in this child complainant’s family was a tragedy. The family is in turmoil. The allegations had forced the family to take sides. On one side, the mother (PW2) and her 9 year old daughter (PW1). On the other side, the accused (DW1) – the child complainant’s uncle, the accused’s elder brother (DW2) – the child’s step-father and the child’s elder half sister (DW3). This was to be expected, when an allegation such as the present, surfaced in a family. However, you must follow what I told you in paragraph 6 hereof. You must decide the facts without prejudice or sympathy, to either parties. You must evaluate the facts coldly and objectively, and apply the law to the evidence you have accepted.
26. You have heard the sworn evidence of the child complainant, as against the sworn evidence of the accused, on counts nos. 1 and 3. I will not bore you with the details, but I will summarize to you the competing version of events of the parties, on the elements of the alleged offences.
27. As far as the child complainant (PW1) was concerned, she said, she recalled a night when her uncle, the accused came to her room. She said, she was asleep at the time. She said, the uncle started touching her body, including her private part, that is, her vagina. She appeared to say that, she woke up, as it was painful. She said, the accused also licked her vagina. She said, she was uncomfortable, and she did not consent. She said, these events occurred when she was in Class 2. She said, she reported the matter to her mother (PW2) in the morning. She said, she was taken to the Valelevu Police Station. She said, she was also medically examined at CWM Hospital on

the same day. On the dates of the alleged incident, the child complainant was not clear, but you are entitled to get the dates of the alleged incidents from her mother's (PW2) evidence, and the date of the medical examination, which we will consider later.

28. As far as the accused was concerned, he completely denied PW1's allegation. He said, he did not penetrate the complainant's vagina with his finger, nor licked her vagina, as alleged. He said, the complainant appeared to be mistaken.
29. The above summarizes the parties' competing version of events on the "rape" and "sexual assault" allegations.

(iii) Mother's Evidence (PW2) – Recent Complaint Evidence:

30. The child complainant's mother (PW2) gave evidence in support of the prosecution. She said, on the morning of 19th September 2011, her child (PW1) complained to her that the accused came to her room naked. She said, PW1 told her she shouted "kaka (uncle) go away from here!" PW2 said, she was upset. She went to work. When she returned, she asked PW1 again. She then reported the matter to police. She then accompanied PW1 to CWM Hospital for her medical examination. PW1 was medically examined by Doctor Rakei Kaarira (PW3). PW1's medical report was tendered in evidence as Prosecution Exhibit No. 2.
31. PW2's evidence is what is often termed "evidence of recent complaint". As a matter of law, PW2's evidence cannot be used to prove the truth of the alleged rape and sexual assault allegations, because she was not present at the crime scene, at the material time, to directly witness the alleged rape and sexual assault incidents. However, PW2's evidence of "recent complaint" can be used as evidence of the consistency of the complainant's conduct with the story she told in the witness box, and also as evidence, to negative her consent to the alleged incidents, although as a matter of law, she was incapable of giving her consent. In other words, was it normal for a 7 year old child to tell her mother that "uncle came naked to her bedroom?" If you accept PW2's evidence, it will have the effect of strengthening the child complainant's evidence, in the consistency in her conduct in reporting the matter. If you don't accept PW2's evidence, then you will have to work on the other evidence to decide the guilt or innocence of the accused.

(iv) Child's Medical Report – Prosecution Exhibit No. 2

32. The child complainant was examined by Doctor Rakei Kaarina (PW3) on 19th September 2011, beginning at 7 pm and concluding at 7.30 pm. PW3 tendered the report as Prosecution Exhibit No. 2. A copy of the report is with you, and you must examine it carefully and understand the same. This was a medical examination conducted soon after the alleged incident. D(10) of the report outlined the patient's story. D(12) of the report outlined the doctor's medical finding as follows, **"...Tear at 6 o'clock position at the vaginal opening...Hymen Intact..."** The significance of this finding was that, it appeared to confirm the child complainant's complaint that the accused came to her room early that morning and touched her private part, although the defence tried to explain the injury away as the result of scratching. If you accept the above position, then the findings of the medical report will tend to strengthen the credibility of the child complainant's version of events, as opposed to the accused's denials. Injuries to the body do tell their own stories.
33. However, on element no. 1 of the rape complaint, that is, whether or not the accused's finger penetrated the child complainant's vagina, the doctor's evidence was mixed. At first, when examined in chief, he said there was penetration of PW1's vagina by the accused's finger. When cross-examined, he said there was no penetration of PW1's vagina by the accused's finger. He said, his medical findings in D(12) of the report is consistent with D(10) of his report. What you make of the doctor's evidence on the medical report is entirely a matter for you.

(v) Step father's (DW2) Evidence:

34. You have heard the step-father's (DW2) evidence. He sleeps with his wife (PW2) next to his step-daughter's bedroom. He said, before he went to sleep at 11 pm on 18th September 2011, he was drinking beer with the accused, his younger brother, and watching the World Cup rugby on TV. He said, early in the morning of 19th September 2011, he heard PW1 shouting out the accused's name, "kaka! (uncle)". If you accept this evidence, it will have the effect of strengthening the child complainant's version of events. In cross-examination, DW2 said he loved his brother, the accused, and would do anything for him.

(vi) Half-Sister's (DW3) Evidence:

35. DW3 is PW1's half-sister. At the material time, she was sleeping with PW1 in the same bedroom. She said, she went to sleep at 12 am and awoke at 3 am on 19th September, 2011. She said, she was awake from 3 am to 6 am. She said, she did not see the accused, her uncle, come into the bedroom. She confirmed that PW1 shouted, "Uncle go away from here!" However, she said PW1 was asleep. When cross-examined, she said, she loved the accused, her uncle, and would do anything for him.

(vii) Credibility of All Witnesses:

36. You have heard the four prosecution witnesses, that is, the child complainant (PW1); her mother (PW2); the doctor (PW3); and W/Sgt 2345 Sunita Devi (PW4). You have also heard the accused (DW1); his elder brother and PW2's husband (DW2); and PW1's half-sister (DW3). You have seen them give evidence in the courtroom. You have seen how they respond to the questions put to them. Were they forthright? Were they evasive? Were they hiding anything from you? Who, from your point of view, was telling the truth? Your acceptance or otherwise of their evidence depends on whether or not you find them to be a credible witness. If you find a witness to be credible, you may accept the whole of his or her evidence, or part of his or her evidence. If you find a witness not to be a credible witness, you may reject the whole of his or her evidence, or reject part of his or her evidence. The acceptance or otherwise of the witnesses' evidence is like playing the jigsaw puzzle. At the end of it all, you will be able to find whether or not the prosecution had proven its case beyond a reasonable doubt. It is a matter entirely for you.

I. SUMMARY

37. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.

38. Your possible opinions are as follows:

(i) Count No. 1 Rape : Accused : Guilty or Not Guilty

If you find the accused not guilty of rape, then you must consider the alternative of attempted rape – Guilty or Not Guilty

(ii) Count No. 3 Sexual Assault : Accused : Guilty or Not Guilty

39. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.

Salesi Temo

JUDGE

Solicitor for the State : Office of the Director of Public Prosecution, Suva
Solicitor for the Accused : Legal Aid Commission, Suva.