

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 197 OF 2013

STATE

-v-

KOLINIO RAIKOTI RAISAMU

Counsels : Mr. A. Singh for the State
Mr. R. Kumar for the accused

Date of Trial : 30 June 2014 to 2 July 2014

Date of Summing Up : 3 July 2014

(Name of the victim is suppressed. She is referred to as ESN)

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 on law and evidence. 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 state counsel and the counsel for the defence made submissions to you about the facts of this case. That is their duty as the Prosecution Counsel and the defence 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. You must judge the case solely on the evidence that you heard in this Court room. There will be no more evidence and you are not to speculate on what evidence there might have been or should have been. You Judge the case solely on what you have heard and seen here.
11. 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.

12. 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.
13. In accessing 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. In deciding on the credibility of any witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gave evidence. Was he/she evasive? How did he/she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable.
14. I must give each one of you a word of caution. This caution should be borne in mind right throughout until you reach your own opinions. That is – as you could hear from evidence – this case involved an alleged incident of rape. 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.
15. In this case the prosecution and the defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. They are of course an important part of the case. The agreement of these facts has avoided the calling of number of witnesses and thereby saved a lot of court time.
16. The agreed facts of this case are:
1. The accused, **Kolinio Raikoti Raisamu** was born on the 17th of November, 1985.
 2. **ESN** is the complainant in this case born on the 11th of April 2005.
 3. **Kolinio Raikoti Raisamu** and his wife were employed by Danams Fiji Limited as Machinist in October 2013.

4. In October 2013, **Kolinio Raikoti Raisamu** resided at Allen Shaw Lane, Kermode Road, Lautoka with, her sister and the complainant, **ESN** in one room whilst Etuate Roko lived in another room with his family and the third room was occupied by another family.
5. On the 21st of October, **Kolinio Raikoti Raisamu** finished work at 5 pm whilst his wife finished work at 8 pm.

17. The information against accused is as follows:

COUNT 1

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Decree, 2009.

Particulars of Offence

KOLINIO RAIKOTI RAISAMU, on the 21st day of October 2013, at Lautoka in the Western Division, inserted his finger into the vagina of **ESN**, a child aged 8 years and 6 months.

COUNT 2

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Decree, 2009.

Particulars of Offence

KOLINIO RAIKOTI RAISAMU on the 21st day of October 2013, at Lautoka in the Western Division, inserted his penis into the vagina of **ESN**, a child aged 8 years and 6 months.

18. I will now deal with the elements of the offences.

19. The offence of rape is defined under Section 207 of the Crimes Decree. Section 207(1) of the Decree makes the offence of rape an offence triable before this court. Section 207 (2) states as follows:

A person rapes another person if:

- (a) The person has carnal knowledge with or of the other person without other person's consent; or

- (b) The person penetrates the vulva, vagina or anus of other person to any extent with a thing or a part of the person's body that is not a penis without other person's consent; or
- (c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

20. Carnal knowledge is to have sexual intercourse with penetration by the penis of a man to the vagina of a woman to any extent. So, that is rape under Section 207 (2) (a) of the Crimes Decree.

21. If a person penetrates the vagina of another person to any extent with a part of that person's body without other person's consent that is rape under Section 207 (2) (b) of the Crimes Decree.

22. So, the elements of the offence of Rape in the 1st Charge are that the accused penetrated the vagina of victim to some extent with finger which means that the insertion of finger fully into vagina is not necessary.

23. The elements of the offence of Rape in the 2nd Charge are that the accused penetrated the vagina of victim to some extent with penis which means that the insertion of penis fully into vagina is not necessary.

24. Consent as defined by 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. A woman under age of 13 years is considered by law as a person without necessary mental capacity to give consent. The girl in this case was 8 years of age and therefore, she did not have the capacity under the law to consent. So, the prosecution does not have to prove the absence of consent on the part of the girl because law says that she, in any event, cannot consent. This position will apply to both charges.

25. Apart from the elements of the offence, the identity of the person who alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the accused-person and connect him to the offence that he alleged to have been committed.

26. 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 victim who saw, heard and felt the offence

being committed. In this case, for example, the victim was witness who offered direct evidence, if you believe her as to what she saw, heard and felt.

27. 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. Then you can act on such evidence. You can take into account the contents of the document if you believe that contemporaneous recordings were made at the relevant time on the document upon examination of the victim.
28. Expert evidence is also important to 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, as described earlier. 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 express on a particular fact to aid court and you to decide the issues/s before court on the basis of their learning, skill and experience.
29. The doctor in this case, for example, came before court as an expert witness. The doctor, unlike any other witness, gives evidence and tells us her conclusion or opinion based on examination of the victim. That 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 her reasons are convincing and acceptable to you; and, if such opinion is 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.
30. In assessing evidence of witnesses you need to consider a series of tests. They are for examples:

Test of means of opportunity: That is whether the witness had opportunity to see, hear or feel what he/she is talking of in his/her evidence. Or whether the witness is talking of something out of pace mechanically created just out of a case against the other party.

Probability and Improbability: That is whether what the witness was talking about in his or her evidence is probable in the circumstances of the case. Or, whether what the witness talked about in his/her evidence is improbable given the circumstances of the case.

Belatedness: That is whether there is delay in making a prompt complaint to someone or to an authority or to police on the first available opportunity about the incident that was alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no

room for fabrication. If there is a delay, you should look whether there is a reasonable explanation to such delay.

Spontaneity: This is another important factor that you should consider. That is whether a witness has behaved in a natural or rational way in the circumstances that he/she is talking of, whether he/she has shown spontaneous response as a sensible human being and acted accordingly as demanded by the occasion.

Consistency: That is whether a witness telling a story on the same lines without variations and contradictions. You must see whether a witness is shown to have given a different version elsewhere. If so, what the witness has told court contradicts with his/her earlier version.

You must consider whether such contradiction is material and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter. If it is shown to you that a witness has made a different statement or given a different version on some point, you must then consider whether such variation was due to loss of memory, faulty observation or due to some incapacitation of noticing such points given the mental status of the witness at a particular point of time or whether such variation has been created by the involvement of some another for example by a police officer in recording the statement where the witness is alleged to have given that version.

You must remember that merely because there is a difference, a variation or a contradiction or an omission in the evidence on a particular point or points that would not make witness a liar. You must consider overall evidence of the witness, the demeanor, the way he/she faced the questions etc. in deciding on a witness's credibility.

You must also consider the issue of omission to mention something that was adverted to in evidence on a previous occasion on the same lines. You must consider whether such omission is material to affect credibility and weight of the evidence. If the omission is so grave, you may even consider that to be a contradiction so as to affect the credibility or weight of the evidence or both.

In dealing with consistency you must see whether there is consistency *per se* and *inter se* that is whether the story is consistent within a witness himself or herself and whether the story is consistent between or among witnesses. In deciding that, you must bear in mind that the evidence comes from human beings. They cannot have photographic or videographic memory. All inherent weaknesses that you and I suffer, insofar as our memory is concerned, the memory of a witness also can be subject to same inherent weaknesses.

Please remember that there is no rule in law that credibility is indivisible. Therefore, you are free to accept one part of a witness's evidence, if you are convinced beyond doubt and reject the rest as being unacceptable.

31. You need to consider all those matters in evaluating the evidence of witnesses. You shall, of course, not limit to those alone and you are free to consider any other factors that you may think fit and proper to assess the evidence of a witness. I have given only a few illustrations to help what to look for to evaluate evidence.
32. I will now deal with the summary of evidence in this case.
33. Prosecution called the victim as the first witness. She is nine years old now. In October 2013 she was living at her aunt's house. The accused is the husband of the aunt. She said that uncle did bad things to her. She had come home after school, had a bath and slept in the room. When she woke up uncle (accused) came to the room and locked the door. He removed her panty and inserted his 'Vo' to her 'Vo'. He also inserted his fingers to her 'Vo' and blood came out. He put his hand on her neck and said he will kill her. She had shouted. She pointed out her vaginal area when she was asked where is 'Vo'. Then she had gone to Roko's mum. She had told about this incident to Roko, Roko's wife, her aunt and her grandfather. Her aunt has taken her to police and the doctor.
34. Under cross examination she admitted that she fell in the school that day and she had a headache. She further admitted that she asked the accused to massage her head and stomach. She shouted when he was massaging her forehead. Then uncle had gone to pick the aunt. She had gone to speak to Roko. She also admitted that Roko told her that uncle touched her private parts and police lady told her that uncle grabbed her neck. But when she was asked that uncle never said that he will kill you, she said that he told that. When suggested that uncle never put his fingers or 'Vo' to her 'Vo' she said that he did both.
35. You watched her giving evidence in court. What was her demeanor like? How she react to being cross examined and re-examined? Was she evasive? How she conduct herself generally in Court? You must bear in mind the age of this witness at the time of the incident. Whether she has any reason to falsely implicate the accused? Given the above, my directions on law, your life experiences and common sense, you should be able to decide whether witness's evidence, or part of a witness's evidence is reliable, and therefore to accept and whether witness's evidence, or part of evidence, is unreliable, and therefore to reject, in your deliberation. If you accept the evidence of ESN beyond reasonable doubt then you have to decide whether that evidence is sufficient to establish elements of both charges.
36. The next witness for the prosecution was the aunt of the victim. She is also wife of the accused. She told that there were three families in the house. On 21.10.2013 she had finished work at 8.00 p.m. Her husband had come to pick her. When she came home, she observed that facial reaction of the victim was different. She looked like as she was afraid of something. Roko and wife had told her that they heard the victim shouting. She had called the victim outside to the drive way and questioned her. She had told her that the accused came to the room, locked the door and inserted his fingers into her 'Vo', private part. She felt pain and blood coming out. Roko and wife were present when victim was

telling this. She had gone with the victim to the police post. She had accompanied the victim to the doctor.

37. Under cross examination she said that the victim had pain in the head and back due to a fall at school. The victim did not have a bath before going to police. There was no blood in the under garments when she looked at them in the hospital.
38. You saw her giving evidence in Court. She had given prompt answers to questions put to her by the defence counsel. It is up to you to decide whether you could accept her evidence beyond reasonable doubt. If you accept her evidence it confirms the evidence of the victim regarding recent complaint.
39. Doctor was called as the next witness for the prosecution. She is a doctor with 5 years experience. She had examined the victim on 22.10.2013 at 1.10 a.m. She had given a history that her uncle Kolinio put his hand in her bum and blood came out. He had hold her neck tightly. Then he had put his 'Vo' in her 'Vo'. She looked uncomfortable, seemed afraid and reluctant to speak about the events. She had teary eyes and made very little eye contact. The medical findings were that there were no injuries in the vaginal area. The vagina was gaping and hymen was appreciated. The professional opinion was vaginal penetration is suspicious but cannot be ruled in or out conclusively. The findings are in line with the history. She complained of headache and pain in private parts. She was reviewed on 31.10.2013 and was treated for urinary tract infection. She tendered the Medical Examination Form marked PE1 and Medical Report marked PE2.
40. Under cross examination, she said that she had examined more than 10 child rape victims. She said that she cannot conclusively say the victim was raped or there was penetration by finger or penis 8 hours before. She further stated that vaginal gaping and appreciation of hymen could be caused by anything other than penetration by the finger or penis.
41. The doctor is an independent witness. It is your duty to decide what weight that you could attach to this evidence. Is this evidence confirming the evidence of the victim. Is this evidence raising a reasonable doubt in the prosecution case. Those are matters for you to decide.
42. The last witness for the prosecution was Etuate Roko. He was residing with the accused's family in the same house. There were three families in that house. He and his elder sister's family were living in one bed room separated by a curtain. The accused's family was living in another room. On 21.10.2013 he was preparing dinner for everyone in the kitchen. The accused came home around 5.30 p.m. and he went to his bed room. The victim was also in the bed room. After about 30 minutes he heard the victim screaming. The accused came out from the room followed by the victim. The victim went to the bath room and came to the kitchen. She looked scared. She asked his in law to massage her.

43. When his aunt was massaging the victim the accused called the victim from the room. The victim looked scared. She held the aunt tightly. She did not go. After dinner his in law had asked him to enquire from the victim, why she was screaming. The accused had left to pick his wife. He had taken the victim to his room. When he asked the victim had told him that the accused entered the room, held her neck tightly and put his fingers in her 'Vo' which is her private part.
44. He had told this to his wife. She wanted him to wait till accused's wife come back home. When the accused's wife came home, they had told this. She had called the victim out and victim had told the story to accused's wife. This was in the driveway. The accused was having dinner at that time.
45. Under cross examination he said that when he enquired from the victim his infant child was with him. It was suggested that he never told police that the victim told him that the accused put his finger in to her 'Vo'. He said that he told the police about that. He had not asked the accused after victim told him what happened. This is because accused's wife told him not to inform anyone.
46. You saw him giving evidence in Court. He had given prompt answers to questions put to him by the state and defence counsel. It is up to you to decide whether you could accept his evidence beyond reasonable doubt. If you accept his evidence it confirms the evidence of the victim regarding recent complaint and what happened at the house of the accused that evening.
47. After the prosecution case was closed you heard me explaining the accused his rights in defence.
48. The Accused elected to remain silent. That is his right. No adverse inference should be drawn from his silence. The prosecution still has to prove the case beyond reasonable doubt.
49. I have summarized all the evidence before you. But, still I might have missed some. That is not because they are unimportant. You heard every item of evidence and you should be reminded yourselves of all that evidence and form your opinions on facts. What I did was only to draw your attention to the salient items of evidence and help you in reminding yourselves of the evidence.
50. Please remember, there is no rule for you to look for corroboration of the victim's story to bring home an opinion of guilty in a rape case. The case can stand or fall on the testimony of the victim depending on how you are going to look at her evidence. You may, however, consider whether there are items of evidence to support the victim's evidence if you think that it is safe to look for such supporting evidence. Corroboration is, therefore, to have some independent evidence to support the victim's story of rape.

51. 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. 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.

52. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of accused's guilt of each charge you must find him guilty for that charge. 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 for that charge. You have to consider evidence against each charge separately. The fact that the accused is Guilty or Not Guilty of one charge does not necessarily mean that he is Guilty or Not Guilty of the other charge as well.

53. Your possible opinions are as follows:

- | | | |
|------|-----------------------|------------------------------|
| (i) | First charge of Rape | Accused Guilty or Not Guilty |
| (ii) | Second charge of Rape | Accused Guilty or Not Guilty |

54. 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.

55. Any re-directions?

Sudharshana De Silva
JUDGE



At Lautoka
03rd July 2014

Solicitors : Office of the Director of Public Prosecution for State
Office of the Legal Aid Commission for Accused