

IN THE HIGH COURT OF FIJI  
AT LAUTOKA  
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 31 OF 2014

STATE

-v-

BALBIR SINGH

Counsels : Mr. F. Lacanivalu for the State  
Ms. S. Ratu for the accused  
Date of Trial : 18 August 2014 to 20 August 2014  
Date of Summing Up : 20 August 2014

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

SUMMING UP

Madam Assessors and Gentlemen 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 counsel for Prosecution and the defence counsel 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. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
11. As assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.

12. In 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.
13. 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 offence with which the accused-person is charged, in a short while.
14. 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.
15. The agreed facts of this case are:
  1. The Accused is one Balbir Singh (Accused), 48 years old, Unemployed of Malaqereqere in Sigatoka.
  2. The child Complainant is MS (PW-1), 8 years old (Born: 25/05/05), a Year 3 student of Nadroga Sangam Primary School in Yadua in Sigatoka.
  3. She resides with her parents – her two sisters.
  4. Between 2012 and the 9<sup>th</sup> of March 2014, the Accused was residing with the Complainant at Malaqereqere in Sigatoka.
  5. The Accused was employed at the Myola Plantation Villas in Malaqereqere, Sigatoka.
  6. The Accused is the uncle of the Complainant as he is her father's half-brother.
  7. The Accused was caution interviewed on the 10<sup>th</sup> of March 2014.

16. The charge against the accused is a charge of rape under Section 207 (1) (2) (a) of the Crimes Decree No. 44 of 2009. The particulars of the offence, as alleged by the prosecution, are:

***Statement of Offence***

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

***Particulars of Offence***

**BALBIR SINGH** on the 09<sup>th</sup> of March 2014 at Sigatoka in the Western Division, had carnal knowledge of **MS**, a 7 year old girl.

17. I will now deal with the elements of the offence. 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.

18. 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.

19. 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 7 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.

20. So, the elements of the offence in this case are that the accused inserted his penis into the vagina of the victim to some extent which means that the insertion of a penis fully into the vagina is not necessary.
21. Evidence that the accused has been identified by a witness as doing something must, when disputed by the accused, be approached with special caution because experience has demonstrated, even honest witnesses have given identification which has been proved to be unreliable. I give you this warning not because I have formed any view of the evidence, but the law requires that in every case where identification evidence is involved, that the warning be given.
22. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a victim who saw, heard and felt the offence being committed. In this case, for example, the victim was a witness who offered direct evidence, if you believe her as to what she saw, heard and felt.
23. Documentary evidence is also important in a case. Documentary evidence is the evidence presented in the form of a document. In this case, a 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.
24. Expert evidence is also important to be borne in mind. Usually, witnesses are not allowed to express opinions. They are allowed to give evidence on what they have seen, heard or felt by physical senses only, 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 expressed on a particular fact to aid the court and you to decide the issues/s before the court on the basis of their learning, skill and experience.
25. The doctor in this case, for example, came before the 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 for yourself and you can make use of the doctor's opinion if her reasons are convincing and acceptable to you; and, if such an opinion is reached by considering all necessary matters that you think fit. In accepting the doctor's opinion, you are bound to take into account the rest of the evidence in the case.

26. 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 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.

27. 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.
28. I will now deal with the summary of evidence in this case.
29. Prosecution called victim as the first witness. She was 7 years old at the time of the incident. On 9.3.2014 she was at accused's room watching video clips from his phone. He had asked her to lie down on the bed. Her sister was asked to hold the curtain. Then the accused had put a blanket on top of her. Then the accused had taken his penis out and started putting that thing into her private part. She felt pain. Her mother saw this from a hole in the bed room. Her mother locked the door and called her out. Her mother had asked about what accused did. She had told her mother. She identified the accused in Court.
30. Under cross examination she admitted that the accused was living with them for about two years. She stated that before coming to Court her mother told her not be frightened. When her mother called her, sister was not inside that room. She admitted another uncle was living in the same compound. She said that she came to know the time of the incident as it was 12 o'clock in the phone and she heard her mother telling her father about the time. At the time mother saw them, the blanket was not on them. The mother had seen this through a small hole. Her mother had told Rohan to see what was happening. Her mother had asked her to go to the accused's room to give the phone.

31. 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? Was there any reason for her to make a false allegation. What is the relationship between her and 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 the victim beyond reasonable doubt then you have to decide whether that evidence is sufficient to establish all elements of the charge.
32. The second witness for the prosecution was the victim's mother. The accused was her husband's step-brother. The accused was staying in her house for almost two years. On 9.3.2014 she was making her younger daughter to go to sleep as she was very sick. The accused was playing with the other two kids in the sitting room. When she did not hear the voice of them for few minutes she became suspicious. When she checked the accused's room the accused was having sex with the victim. She had peeped through a small hole in the Masonite wall between the two rooms. The accused was on top of the victim having sex. She felt very bad. She had called her husband's brother Rohan. She had told him to see what his brother is doing. Then she had called her daughter to her room and asked her to take off the clothes. Her panty was wet. When she put her finger into her vagina she found sperms inside. The victim had told her that the accused was having sex with her. She had called her husband and told him what she saw.
33. Under cross examination she admitted that the accused supported her husband financially when asked by her husband. She denied that this allegation was made after accused stopped giving money. She admitted that when she saw this she called Rohan without helping her daughter. When he called Rohan he was coming to the wash room. She said if she had a knife she would have chop the accused at that time.
34. In assessing her evidence you have to keep in mind that she is the mother of the victim. If you believe her evidence beyond reasonable doubt then there is evidence of recent complaint. You have to decide whether her evidence confirms the evidence of the victim.
35. The next witness for the prosecution was Doctor. She had examined the victim on 9.3.2014. In short history she had stated her uncle put his long thing in her and took it out. The patient was found by mom with uncle having sex in the bed room. The patient was calm and cooperative. Her vagina was open and gaping. Hymen was not intact. There was redness around the vagina. Her findings are consistent with history. Evidence of



penetration of vagina with blunt object was present. The blunt object could be penis. She tendered the Medical report marked PE1.

36. Under cross examination she admitted that she expect bruising in the perennial area as the examination was done on the same day. There were no signs of struggle. She admitted that a pediatrician or gynecologist could have been a better person to do this examination. But such doctors are not available at Sigatoka hospital. A scan was done as child complained of abdominal pain. Nothing was detected from scan. She could not tell when the hymen became not intact.
37. The Doctor is an independent witness. She had examined the victim on the same day. She had observed the redness around vagina. Her vagina was open and gaping. Hymen was not intact. You have to decide whether that evidence is confirming the evidence of the victim or creating any reasonable doubt in the prosecution case.
38. The next witness for the prosecution was WSC Alesi Likutabua. She had taken photographs of the scene on instructions received from the crime officer. She tendered booklet of 7 photographs marked PE2.
39. Under cross examination she said that she came to know about victim's mother seeing the incident through a hole after she took the photographs. She had not taken a picture of that.
40. The last witness for the prosecution was the investigating officer. He is an officer with 15 years' experience. He had received the report around 5.00 p.m. He had proceeded to the scene. He had drawn a rough sketch plan. He had taken steps to record the statements. He had taken the clothes worn by the victim and the accused. He had also taken DNA samples. He identified the accused in Court. He tendered the sketch marked PE3 and explained the same to Court. He had observed a crack in the wall between the two rooms. He had peeped through that. The bed of the alleged incident was in his view.
41. Under cross examination he stated when he looked through the wall it was tunnel vision. There were no blood stains in the victim's clothes. The DNA report is not yet available.
42. After the prosecution case was closed you heard me explaining the accused his rights in defence.
43. The accused gave evidence. He stated that he wanted to prove himself that he is not guilty. He was living in complainant's house for two years since 2012 on rent. He said that he was

not talking to the brother Sanjay. He said that he enters his room through window not to disturb others. There were defects in his room earlier but he had repaired those. His sister-in-law was not happy since he came. As there were only two bed rooms, why her husband had given it on rent to earn some money. When husband was away complainant used to fight with him. She was saying that she will do something for me to move out.

44. On the date of incident he was at home drank kava and went to bed. The girls came to his room. They watched video clips on his mobile phone. Then they slept on his bed. Rohan came and asked him what he was doing? Then complainant came and dragged the daughter out of his room. He wasn't aware what happened. He had seen the victim crying later. She had told him that mother had beaten her.
45. Under cross examination he denied the allegation. He admitted that he didn't allow the victim to go out as she will drop the phone. There was no problem with him and the victim. He had not told police about problems with the complainant as it is family dispute. He admitted that he did not put the present position to the victim or mother when they came to give evidence.
46. You watched the accused giving evidence in court. What was his demeanor like? How he react to being cross examined and re-examined? Was he evasive? How he conduct himself generally in Court? His position taken up in evidence is different from position he took up in cross examining the prosecution witnesses. It is up to you to decide whether you could accept his version and his version is sufficient to establish a reasonable doubt in the prosecution case. If you accept his version accused should be discharged. Even if you reject his version still the prosecution should prove its case beyond reasonable doubt.
47. I must remind you that when an accused person has given evidence he assumes no onus of proof. That remains on the prosecution throughout. His evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
48. You will generally find that an accused gives an innocent explanation and one of the three situations then arises:
  - (i) You may believe him and, if you believe him, then your opinion must be Not Guilty. He did not commit the offence.
  - (ii) Alternatively without necessarily believing him you may say 'well that might be true'. If that is so, it means there is reasonable doubt in your minds and so again your opinion must be Not Guilty.

- (iii) The third possibility is that you reject his evidence as being untrue. That does not mean that he is automatically guilty of the offence. The situation then would be the same as if he had not given any evidence at all. He would not have discredited the evidence of the prosecution witnesses in any way. If prosecution evidence proves that he committed the offence then the proper opinion would be Guilty.

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 from 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 the charge you must find him guilty for the 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 accused's guilt, you must find him not guilty for the charge.


53. Your possible opinions are as follows:

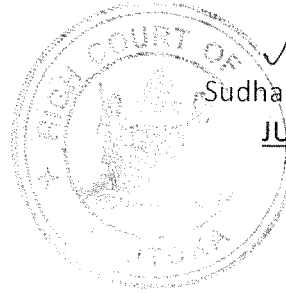
Charge of Rape

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  
20<sup>th</sup> August 2014

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