

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 228/2012

BETWEEN : THE STATE

AND : WATISONI SERELEVU

COUNSEL : Mr S Nath and Ms S Navia for the State
Mr P Tawake and Ms K Vulimainadave for the Accused

Dates of Trial: 13-14/10/2014

Date of Summing Up: 15/10/2014

[Name of the victim is suppressed. She will be referred to as U.L]

SUMMING UP

Ladies and Gentleman Assessors,

1. It is now my duty to sum up this case to you. I will direct on matters of law which you must accept and act upon. On matters of facts however, which witnesses to accept as reliable, which version of the evidence to accept, these are matters for you to decide for yourselves. So if I express my opinion to you about facts of the case or if I appear to do so it is a matter for you whether you accept what I say, or form your own opinion. In other words you are the judges of facts. All matters of facts 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.

2. You have to decide what facts are proved and what inferences drawn from those facts. You then apply law as I explain it to you and form your individual opinion as to whether the accused is guilty or not guilty.
3. Prosecution and defence made their submissions to you about the facts of this case. That is their duty. But it is a matter for you to decide which version of the facts to accept or reject.
4. You will not be asked to give reasons for your opinions but merely your opinions of yourself and your opinion need not be unanimous but it would be desirable if you agree on them. Your opinions are not binding on me but I can tell you that they carry great weight with me when I deliver my judgment.
5. On the question of proof, I must direct you as a matter of law that the onus of burden of proof lies on the prosecution throughout the trial and never shifts. There is no obligation on the accused person to prove his innocence. Under our criminal justice system accused person is presumed to be innocent until he is proved guilty. This is the golden rule.
6. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means 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.
7. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence that who saw the incident or felt the offence being committed. The other kind of evidence is circumstantial evidence that you put one or more circumstances together and draw certain irresistible inferences. Evidence presented in the form of a document is called Documentary evidence.
8. 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 have heard about this case outside of this court room.

9. Your duty is to find the facts based on the evidence apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotions.
10. Now let's look at the charge.

FIRST COUNT

Statement of Offence

RAPE: Contrary to Section 207(1) and 207(2) (b) and (3) of the Crimes Decree No: 44 of 2009.

Particular of Offence

WATISONI SERELEVU from the 1st day of January 2011 to the 31st day of December 2011, at Wailoku, in the Central Division, penetrated the vulva of U.L a child under the age of 13 years, with his fingers.

11. In Fiji law, the offence of Rape is committed when the vagina or vulva is penetrated either by the penis or by the finger of the accused. It is not necessary for the prosecution to prove that there was full penetration. Hence in this case the prosecution has to prove:
 1. It was the accused
 2. Who had sexual intercourse with the victim or that he sexually abused the victim by invading her with his finger,
 3. Penetrated the vulva of the victim to some extent, by inserting his fingers, (Vulva is the outer opening of the female sex organ)
 4. Without her consent.

12. As far as the element of consent is concern, in our law, a child is under the age of 13 years is incapable of giving consent. In this case the victim was 11 years old at the time of the offence. Hence consent is immaterial in this case.
13. Now let's look at the evidence led by the prosecution in this case.
14. The victim is now 14 years old a class 06 student at St. Johns' Primary School, Wailoku. At present she and her two sisters are inmates of a children home. She does not know her mother's whereabouts. The accused is her biological father. In the year 2011 she resided with his parents at Wailoku first and then went to New Town. At New Town her step father also stayed with her family. In the year 2011 her relationship with the accused was not always good. While she was at New Town one day the accused touched her mimi (vagina) with his hand. This happened in the room after she returned from the school. Due to fear she did not shout and she felt very bad. She said that the accused placed his hand on the place where she passes urine. She told the incident to her Uncle Poasa. Her relationship with her mother is bad as she leaves her and her siblings without care. Further her father and her mother also had problems. As a result she and her siblings are now living in a children home. Her mother did not visit them until now. She marked her birth certificate as P1 and identified the accused in open court.
15. In the cross examination the victim said that the incident happened in New Town. While she was sleeping on a bed the accused touched her vagina. The accused touched her vagina for a while and took off his hand. She felt pain but no bleeding from her vagina. The victim admitted that she gave her statement on 04/07/2012. In her statement she said that the incident happened while she was seated. But she took up the position that the incident happened while she was sleeping. In her statement answering to question 14 the victim said that the incident happened last week. But she reiterated that the incident happened in 2011. The victim could not answer regarding the date of offence. The victim said that she was not forced by anybody to give a statement to the police. Witness admitted that her mother was present at the police station when she gave her statement. She further admitted that her mother was speaking to the police officers about the incident.

16. Dr. Evelyn Tuiraga a MBBS doctor with about 10 years' experience examined the victim at Paediatric Department of CWM Hospital on 07/07/2012. In her history to the doctor, the victim said that her dad put his finger in her mimi(vagina) on two separate occasions last week. The doctor had noted that her hymen is intact. Further she had noted that a slight abrasion on left side of the external vaginal orifice. In her professional opinion she said that injury found on victim vagina could be due to rubbing but not excluded fingering. The medical report was marked as P2.
17. In the cross examination, witness said the injury found on the victim's vagina was a recent one. But if happened in 2011 it could have healed before examination.
18. This is the end of the prosecution case. Defence was called and explained the rights of the accused. After understanding his rights the accused elected to give evidence from the witness box.
19. According to the accused he was residing at Wailoku in the year 2011. He lived with his family happily. The victim is his biological daughter. He denied the charge and did not know why his daughter lodged a complaint against him. The accused also said that his wife goes out of the house leaving the children unattended.
20. In the cross examination the accused said that he moved to New Town in the year 2011. He reiterated that his family relationship was good. According to the accused his wife could have forced his daughter to lodge the complaint against him. He denied the charge.
21. This is end of the defence case.

Analysis of the Evidence

22. Ladies and Gentleman Assessors, in this case the victim gave evidence first. According to her the incident happened in 2011 but the complaint was lodged in year 2012. The victim did not explain the reason why the complaint was lodged very late. In her complaint the victim said that she complaint to the police last week. According to the doctor the injury was

very recent one. It is quiet consistent with the date of examination (07/07/2012). But the victim's position is that the incident happened in 2011. According to the doctor if this incident happened in 2011 there would not be any injury in the victim's vagina. There is a contradiction with regards to the place of incident. In the information the place of incident mentioned as "Wailoku". But according to the victim the incident happened in New Town. The victim said when she went to the police to lodge the complaint, she saw her mother talking to the police officers. When she was at New Town her step father also stayed with them. The relationship between her father (accused) and mother was not good. According to her the accused had no control over her mother. As assessors and judges of facts you have to consider her evidence very carefully.

23. Ladies and Gentleman Assessors, although the doctor did not exclude fingering, but her finding reflects rubbing over victim's vagina. She gave evidence as an expert.
24. Accused denied the charge. He doesn't know why the victim lodged a complaint against him. He admitted that the relationship between him and his wife was not good as his wife totally neglect their children welfare. As Assessors and Judges of facts you have to consider this evidence very carefully.
25. Ladies and Gentleman Assessors, in this case the accused opted to give evidence from the witness box. That is his right. But he has nothing to prove to you.
26. In this case the accused is charged for rape contrary to Section 207(1) and 207(2) and (b)(3) of the Crimes Decree No: 44 of 2009. I have already explained to you about the charge and its ingredients.
27. Ladies and Gentleman Assessors as per section 129 of the Criminal Procedure Decree 2009 no corroboration shall be required in sexual offence cases.
28. You have heard all the prosecution witnesses. You have observed them giving evidence in the court. You have observed their demeanour in the court. Considering my direction on the law, your life experiences and

common sense, you should be able to decide which witness's evidence, or part of their evidence you consider reliable, and therefore to accept, and which witness's evidence, you consider unreliable and therefore to reject.

29. You must also carefully consider the accused's position as stated above. Please remember, even if you reject the version of the accused that does not mean that the prosecution had established the case against the accused. You must be satisfied that the prosecution has established the case beyond reasonable doubt against the accused.
30. Ladies and Gentleman Assessors, remember, it is for the prosecution to prove the accused's guilt beyond reasonable doubt. It is not for the accused to prove his innocence. The burden of proof lies on the prosecution to prove the accused's guilt beyond reasonable doubt, and that burden stays with them throughout the trial.
31. Once again, I remind, that your duty is to find the facts based on the evidence, apply the law to those facts and come to a correct finding. Do not get carried away by emotions.
32. This is all I have to say to you. You may now retire to deliberate. The clerks will advise me when you have reached your individual decisions, and we will reconvene the court.
33. Any re-directions

I thank you for your patient hearing to my summing- up.




P Kumararatnam
JUDGE

At Suva
15/10/2014