

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No: HAC 66 of 2013

BETWEEN:

THE STATE

AND:

DANIELE NAULUVULA

Counsel: Mr. S. Vodokisolomone for State
Mr. R. Tagivakatini for Accused

Date of Hearing: 29-30 December 2014

Date of Summing Up: 30 December 2014

SUMMING UP

- [1] Ladies and Gentleman Assessors, it is now my duty to sum up the case to you. We have differing roles in this trial. I have to give you directions on the law and you must accept those directions. You are to decide the facts applying those directions and to give me your opinions as to the Accused's guilt or innocence.
- [2] In going through the evidence I may express an opinion. If you do not agree with that opinion, you are free to ignore it and to form another view of that piece of evidence. I may omit some evidence which you think significant. Nonetheless you may give that

evidence such weight as you consider appropriate. You are free to form your own opinions.

- [3] At the end of this summing up, and after you have given your individual opinions, the final decision on the facts rests with me. I am not bound to conform to your opinions. However in arriving at my judgment I shall place much reliance upon your opinions.
- [4] The burden of proof rests throughout the trial upon the State. In our system of justice there is a presumption of innocence in favour of an Accused. The State brings the charge against the Accused. Therefore it is for the State to prove the charge against the Accused. Each element of the charge must be proved, but not every fact of the story. This burden never changes, never shifts to the Accused.
- [5] The prosecution must prove its case beyond reasonable doubt. That means that before you express an opinion that the Accused is guilty of the charge you must be satisfied so that you are sure of his guilt beyond reasonable doubt. If you consider him innocent of the charge you must give your opinion that he is not guilty. If you entertain a reasonable doubt of guilt, you must also give your opinion that the Accused is not guilty of that charge.
- [6] The Accused elected not to attend his trial. His counsel presented his case to you. You must not assume the Accused is guilty because he has chosen not to attend his trial. The fact that he has chosen not to attend his trial proves nothing, one way or the other. It does nothing to establish guilt. He does not have to prove anything. You will have to decide, whether on the prosecution's evidence, you are sure of the Accused's guilt.
- [7] You must decide this case upon the evidence presented to you. If a witness was not called you must not speculate the reasons why the witness was not called. You must only consider evidence which were led in the trial. It will be your task to discover which witnesses have given honest and accurate evidence and which may not.
- [8] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate amongst yourselves so as to arrive at your opinions. Upon your return to court, when you are ready, each one of you will be required to state his or her individual opinions orally on the charge against the Accused, which opinions will

be recorded. Your opinions need not be unanimous. You will not be asked for reasons for your opinions.

- [9] However it will be helpful to you beforehand in arriving at sound and rational opinions if you ask yourselves why you have come to those opinions.
- [10] Those opinions must be based solely upon the evidence. Evidence consists of sworn testimony of the witnesses, what each witness has told the court in the witness box, as well as the exhibits tendered in court.
- [11] Neither speculation nor theories of one's own constitute evidence. Media coverage, idle talk, or gossip, are similarly not evidence. Put out of your mind when considering your opinions, anything you may have read in the newspapers about this case. Focus solely on the evidence which you have seen, heard, or examined in this court.
- [12] This summing up is not evidence either, nor are counsel's opening or closing addresses. Naturally we hope all of these are of assistance to you, but they do not constitute evidence.
- [13] If a witness is asked a question in cross-examination and agrees with what counsel is suggesting, the witness's answer is evidence. If he or she rejects the suggestion, neither the question nor the answer can become evidence for the proposition put.
- [14] In arriving at your opinions, use the common sense you bring to bear in your daily lives, at home and at work. Observe and assess the witnesses' evidence and demeanour together with all of the evidence in the case. You can accept part of a witness's testimony 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 be wide of the mark about another.
- [15] You heard evidence that the complainant is a single mother of three children and the allegations arose when she was drunk. If you have formed a moral opinion on the conduct alleged in this case, put that to one side. Consistent with your oath, you should put away both prejudice and sympathy. Approach your assessment of the evidence dispassionately. Bring a cool detachment to your task of examining whether

the case against the Accused has been proved before you, proved with evidence led by the State.

- [16] I turn now to deal with what the prosecution must prove. The Accused is charged on two counts. But you must consider each count separately, when you examine the case in your deliberations. You are not obliged to find the Accused guilty either on both counts or not guilty on both. Look at the evidence as it affects each count separately. Your opinions about the charges could differ from one to the other, depending on the view you took on each count and the evidence available on each count.
- [17] On count 1, the Accused is charged with the offence of assault occasioning actual bodily harm. The offence of assault occasioning actual bodily harm involves proof of the following elements:
1. The Accused committed an assault or battery,
 2. That occasioned i.e. caused the complainant actual bodily harm.
- [18] Both elements are disputed by the defence in this case. An assault is an intentional or reckless act that causes another to apprehend immediate and unlawful violence. For example, if I intentionally swing a stick at you that cause you to feel threatened although the stick does not touch you, I have committed an assault.
- [19] A battery requires intentional or reckless unlawful application of force upon the victim. For example, if I intentionally swing a stick at you and you are hit by the stick, then I have committed a battery.
- [20] The words assault and battery at times are used interchangeably. Although I have explained you the legal distinction between an assault and a battery, the distinction is not relevant in this case. In this case the prosecution alleges the Accused punched or hit the complainant with his hand. If this is what happened then the first element is proved.
- [21] The second element requires prove of actual bodily harm. Actual bodily harm means any injury which is calculated to interfere with health or comfort of the victim and which includes minor cuts and bruises. So you must be satisfied beyond reasonable

doubt that the Accused punched or hit the complainant, causing an injury that interfered with her health or comfort.

[22] That explains you the elements of the offence of assault occasioning actual bodily harm.

[23] On count 2, the Accused is charged with rape. To prove rape, the prosecution must prove three elements.

[24] First it must be proved beyond reasonable doubt that the Accused had unlawful carnal knowledge, that is, unlawful sexual intercourse with the complainant, Alisi Rarawa. I shall refer to her throughout as the complainant. The physical act of intercourse must be proved, that is that the Accused's penis penetrated the complainant's vagina. The slightest penetration is sufficient. It is not necessary to prove ejaculation.

[25] Second, it must be proved that when the Accused had unlawful sexual intercourse with the complainant he did so without her consent. This includes where intercourse is consented to by the complainant but who only consents because she is forced to do so, or is threatened or intimidated to submit to the act, for fear of bodily injury.

[26] Third, it must be proved that the Accused either knew that she did not consent or was reckless as to whether she consented. The Accused was reckless as to whether the complainant consented to sexual intercourse if you are sure that he realised there was a risk that she was not consenting and carried on anyway when in the circumstances known to him it was unreasonable to do so. The resolution of all three elements is dependent upon whether you accept the complainant as a truthful and reliable witness.

[27] I turn now to summarise the evidence. In doing this it would be tedious and impractical for me to go through the evidence of every witness in detail and repeat every submission made by counsel. I will summarize the salient features. If I do not mention a particular witness, or a particular piece of evidence or a particular submission of counsel that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case.

[28] The first prosecution witness was the complainant. She gave evidence that she has known the Accused for four years. He is married to her aunt and they lived in the same village. On the date of the allegations, she was in the company of the Accused and some other friends. They had consumed considerable alcohol. She left the group and while walking the Accused approached her. She accompanied him to a spot on the beach upon his request to drink more alcohol. When they arrived at the spot, the Accused forcefully grabbed her arms and forced her on the ground. When she struggled, he punched her in the right side of her neck. He threatened to kill her if she shouted. He undressed her from waist down and penetrated her vagina with his penis. She said she did not consent. When he got distracted by a mobile ringtone, the complainant managed to escape and flee the scene. When she returned home by foot, she did not complain to anyone because she was ashamed of village rumours that might follow after the incident will come to light. She complained of rape when she spoke to WPC Maria two days later.

[29] Evidence was led from WPC Maria regarding the complaint the complainant made to her. In a case of sexual offence, recent complaint evidence is led to show consistency on the part of the complainant, which may help you to decide whether or not the complainant has told you the truth. It is for you to decide whether the evidence of this compliant helps you to reach a decision, but it is important that you should understand that the compliant is not independent evidence of what happened between the complainant and the Accused, and it therefore cannot itself prove that the complaint is true. The evidence of the complainant is she did not immediately complain to anyone regarding the sexual assault because she was ashamed of village rumours. On 20 August 2013, she made to a report of rape to WPC Maria. WPC Maria confirmed receiving the complainant's report of rape. The defence says the report of rape to WPC Maria was not made voluntarily but by prodding of the police officer. My direction to you is that while the compliant evidence is before you, the evidence is of very little assistance in deciding whether the complainant has told you the truth.

[30] I turn now to the medical report of the complainant which is not in dispute. The complainant was examined on 20 August 2013 by Dr Lingam, that is, two days after the alleged sexual assault. The medical examination revealed bruising in the complainants both arms and neck. The injuries noted were consistent with

considerable application of force. What weight you put to the medical evidence is a matter for you bearing in mind the medical evidence alone does not prove that the Accused committed the alleged offences. The defence says the alleged assault and rape never occurred. In other words, the defence is one of denial of the charges.

[31] The prosecution's case wholly rests on the complainant's evidence. The defence cross examined her regarding the inconsistency in her police statement. In the police statement, the complainant said the Accused grabbed her from the front before forcing her on the ground and that he threatened her four times. In her evidence, the complainant said she was grabbed from behind and threatened three times by the Accused. As a matter of law, I must direct you that what a witness says on oath are evidence. What a witness says in her previous statement out of court is not evidence. However, previous statements are often used to challenge a witness's credibility and reliability because a previous inconsistent statement may indicate that a witness has told a different story previously and are therefore not reliable. It is for you to judge the extent and importance of any inconsistency. If you conclude the complainant has been inconsistent on an important matter, you should treat both accounts with considerable care. If, however, you are sure that the evidence of the complainant is true in whole or in part, then it is evidence you are entitled to consider when deciding your opinions.

[32] On count 1, if you believe the complainant is telling you the truth that the Accused assaulted her and if you feel sure that the complainant received injuries as a result of that assault, then you may find the Accused guilty of assault occasioning actual bodily harm. On count 2, if you believe the complainant is telling you the truth that the Accused penetrated her vagina with his penis without her consent, and knowing she had not consented or was reckless as to whether she was consenting, then you may find the Accused guilty of rape. But if you do not believe the complainant's evidence regarding the alleged assault or rape, or if you have a reasonable doubt about the guilt of the Accused, then you must find the Accused not guilty of that charge.

[33] On each count, your opinions would be either guilty or not guilty. When you are ready with your opinions, please advise my clerk and the court will reconvene to receive them.

[34] Please now retire to deliberate on your opinions.



Daniel Goundar

JUDGE

At Labasa

30 December 2015



Solicitors:

Office of the Director of Public Prosecutions for State

Office of the Director of Legal Aid Commission for Accused