

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 91 OF 2011

STATE

-v-

SENIRUSI RAUQE

Counsels : Ms. L. Latu for the State
The accused in person

Date of Trial : 16 February 2015 to 17 February 2015

Date of Summing Up : 18 February 2015

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

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. 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.
6. 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.
7. 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.
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 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.
9. 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.
10. 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.
11. In assessing 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.
12. 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.

13. 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 (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of the offence

SENIRUSI RAUQE between the 30th of April 2011 and 1st of May 2011 at Vatutavui Village, Tavua in the Western Division had carnal knowledge of AS without her consent.

14. 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.

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

16. 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 above 13 years of age at the time of the incident and therefore, she had the capacity under the law to consent. So, the prosecution has to prove the absence of consent on the part of the girl and the accused knew that she was not consenting. Further, bear in mind submission without physical resistance by a person to an act of another person shall not alone constitute consent.

17. A person's consent to an act is not freely and voluntarily given if it is obtained-
- (i) by force; or
 - (ii) by threat or intimidation; or
 - (iii) by fear of bodily harm; or
 - (iv) by exercise of authority; or
 - (v) by false and fraudulent representations about the nature or the purpose of the act.
18. 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 vagina is not necessary and that the complainant did not consent to that act and the accused knew that she was not consenting.
19. 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 have 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.
20. 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.
21. 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.
22. 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 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.
23. 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.

24. 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.

25. 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.
26. I will now deal with the summary of evidence in this case.
27. Prosecution called complainant as the first witness. She was 14 years old at the time of the incident. On 30.4.2011 around 7.00 p.m. she was sleeping at her house alone. Her mother had gone to sea. While she was sleeping the accused came and undressed her. He touched her body. She was told to touch her penis. Then he spit on his penis and put his penis into her vagina for about a minute. He closed her mouth with a pillow. She could not scream. She was held tightly. She identified the accused with the aid of the light from his mobile phone. She smelt liquor on him. Then he went away. She had not given permission to the accused to do this. The accused broke into the house through the door. She had told Luke Peniloa about what accused did to her. She was only covering herself with a bed sheet after the incident. She told her mother when she came back from sea. She identified the accused in Court.
28. Under cross examination by the accused she told the accused undressed her and inserted his penis into her vagina. She denied it was a false statement.
29. 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.

30. The second witness for the prosecution was Doctor Yogeshni Chandra. She is a doctor with 5 years' experience. She had examined the complainant on 1.5.2011 at 6.35 p.m. at Tavua hospital. She tendered the Medical Examination Form marked PE1. The complainant gave a history of being raped by a Fijian male around midnight previous day when she was alone at home. She appeared distressed. Medical findings were the redness around vulva and hymen being not intact. This indicated recent forceful sexual penetration. The findings were consistent with the history given by the complainant.
31. Under cross examination she admitted that she could not tell that the accused did this. Only thing she can tell is that her findings are consistent with the history given.
32. The Doctor is an independent witness. She had examined the victim on the next day. She had observed the redness around vulva and hymen being not intact. These finding were consistent with the history given by the complainant according to her professional opinion. You have to decide whether that evidence is confirming the evidence of the victim or creating any reasonable doubt in the prosecution case.
33. The third witness for the prosecution was Luke Peniloa. He had come to the village from the sea around 4.00 a.m. on 1.5.2011. The complainant had called him. He had met the accused at the door of the house of the complainant. When asked the accused had told him that he went looking for matches. He smelt liquor on accused. He wanted to do something to the accused but thought twice. Accused denied the allegation. He identified the accused in Court. He was not cross examined by the accused.
34. The fourth witness for the prosecution was the mother of the complainant. She told that she went to sea leaving the complainant alone at home. When she came back around 4.00 a.m. the complainant came crying to her. She was only covered herself with a bed sheet. When they went home complainant told her about the incident. She saw accused's flip flop. Next morning she had told the village headman about the incident and matter was reported to police. She too was not cross examined by the accused.
35. The fifth witness for the prosecution was Joseva Sadulu. He is the village headman for 10 years. On 1.5.2011 when he came home after church service the complainant and her mother came to his house and mother reported that accused forced the complainant to have sex when she was alone at the house. When asked, the complainant told him it is true. He rang the police station and accompanied them to the police station. He too was not cross examined by the accused.
36. These witnesses were called by the prosecution to establish that the complainant made a recent complaint. Such complaint is not evidence of the facts complained of and cannot be

regarded as corroboration, but goes to the consistency of the conduct of the complainant with her evidence given at the trial. It is up to you to decide whether evidence of these witnesses is consistent with the evidence of the complainant or creating a reasonable doubt in the prosecution case.

37. The last witness for the prosecution was Waisake Tokamalua. On 1.5.2011 he was returning from the sea around 4.00 a.m. with Samu Kava. When they reached village he heard someone screaming when he was passing Sera's house. He had gone and stand at one door while Samu was standing at the other door. The accused came out from the house. He flashed the torch at him. Accused swear at him to switch off the torch. Then the accused went away. The complainant was crying and he told her to go to Luke's house. She was covering herself with a bed sheet. He identified the accused in Court.
38. The accused in cross examination suggested that he came out from the other door which was open and then the witness flashed a torch at him. The witness denied this.
39. This is an independent witness. It is up to you to decide whether evidence of this witness is consistent with the evidence of the complainant or creating a reasonable doubt in the prosecution case.
40. After the prosecution case was closed you heard me explaining the accused his rights in defence.
41. The accused gave evidence. He stated that he drank Grog that night and consumed Alcohol. There were no matches. He went to the house of the complainant in search of matches. The door was open. He entered the house. There was no light. He switched on his mobile phone light. He saw the complainant lying on the bed. He woke her up. She got angry and she shouted. Samu and Waisake were outside the house coming back from sea. After a while complainant went to Luke and they came back and talked to him. Luke asked him what he was doing there. He told that he came looking for matches. He denied the allegation when police arrested him.
42. Under cross examination he admitted entering complainant's house around 4.00 a.m. He denied that he broke into the house. He said that he took off his flip flop and entered the house. He denied that he entered the house to rape the complainant. He was drinking at the father's elder sister's house on rail way beside the house. He asked for matches from the aunt. She refused to give the lighter as he will lose it. He was looking for matches to light a cigarette. He had no idea whether he told police that the aunt refused to give the lighter. He only touched the back of the complainant to wake her up. He had hit a pig owned by complainant's mother with a knife in his farm. He did not tell this to police. He admitted entering the house but denied the allegation.
43. 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 was not put to 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 it's case beyond reasonable doubt.

44. 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.
45. 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.
46. 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.
47. 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.
48. 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.

49. 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.

50. Your possible opinions are as follows:


Charge of Rape

Accused Guilty or Not Guilty

51. 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.

52. Any re-directions?




Sudharshana De Silva
JUDGE

At Lautoka
18th February 2015

Solicitors: Office of the Director of Public Prosecution
The Accused in person