

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 99 OF 2014

STATE

-v-

RAJENDRA GOUNDAR

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

Date of Trial : **19 January 2015 to 20 January 2015**

Date of Summing Up : **21 January 2015**

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

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 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.
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 offences with which the accused-person is charged, in a short while.

13. 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.

14. The agreed facts of this case are:

It is agreed that the Victim in this matter is VPG, 14 years old, Form 3 student of Colase, Rakiraki.

It is agreed that the Accused in this matter Rajendra Gounder, 36 years old, Labourer of Colase, Rakiraki.

It is agreed that the Victim is the biological daughter of the Accused.

It is agreed that between 5 pm and 6 pm on above date, the Accused told the Victim for them to go and buy tin fish at Johnny's house, so they can have it with rice for dinner.

It is agreed that the Accused took the Victim through the short cut, Accused was leading, the Victim was following from behind.

It is agreed that as the Accused and Victim came close to Panga's house, the Accused then told the Victim to look for a paint that he hid in the nearby bush.

It is agreed that on the 21st day of July 2014, the Accused was caution interviewed in the Hindi language by DC 3237 Aveen with SGT Surendra Prasad as the Witnessing Officer.

It is agreed that on the same date, the Accused was formally charged in the Hindi language by D/SGT 2204 Anoop.

It is agreed that the Victim was medically examined by Dr Alumita Serutabua on the 20th of July, 2014.

15. The information against accused is as follows:

FIRST COUNT
Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

RAJENDRA GOUNDER, on the 20th day of July 2014 at Colase, Rakiraki, in the Western Division, had unlawfully and indecently assaulted **VPG**.

SECOND COUNT
Statement of Offence

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

Particulars of Offence

RAJENDRA GOUNDER, on the 20th day of July 2014 at Colase, Rakiraki, in the Western Division, penetrated the vagina of **VPG**, with his finger, without her consent.

THIRD COUNT
Statement of Offence

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

Particulars of Offence

RAJENDRA GOUNDER, on the 20th day of July 2014 at Colase, Rakiraki, in the Western Division, had carnal knowledge of **VPG**, without her consent.

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

17. The offence of Sexual assault is defined under Section 210 of the Crimes Decree:

A person commits Sexual Assault if:

- (a) Unlawfully and indecently;
- (b) Assaults another person.

18. For the assault to be indecent it must be accompanied by a circumstance of indecency. Conduct is indecent when it is as such that ordinary people would so describe it, in light of

prevailing standards of morality and, more specifically, in light of whether the victim has consented to the conduct in question.

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. If a person penetrates the vagina of another person to any extent with part of that person's body that is Rape under Section 207 (2) (b) of the Crimes Decree. So, the elements of the 2nd charge of Rape are that the accused penetrated the vagina of the victim to some extent with his finger which means insertion of finger fully into vagina is not necessary.

21. 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.

22. So, the elements of the offence of Rape in the 3rd 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.

23. 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.

24. 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.

25. Apart from the elements of the offences, 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 issue/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 complainant as the first witness. She is 14 years old. On 20.7.2014 about 4.00 p.m. she was cooking food at her home. Only her father (accused) was at home. When she cooked rice her father had told her not to cook Dhal and they will go to shop and buy tinned fish. On the way in a jungle area her father had asked her to look for some paints hidden there. Then he held her hand. He had put one hand over her mouth and told her that he want to suck her breast. When he was sucking her breast she fell on the ground. She was told that if she shouts he will kill her. Then he sat on her feet and asked her to pull her pant down. He put his finger into her vagina. She was asked whether it is painful. She said it was painful. Then he inserted his penis into her vagina. She was again asked whether it is painful. She said it was painful. Her coins fell at that place. She was asked to collect those. Then she ran to Mala's house. She had called her mother using Mala's phone and asked her to come and pick her up. She told the mother what the accused did. Mother called the police. That is how the matter was reported. She did not consent for the accused to suck her breasts or put his finger or penis into her vagina. She tried to pull him and run away. She thought that her father will kill her. She identified and tendered her birth certificate marked PE 1. She identified the accused in court.
34. Under cross examination she denied that the accused only pulled her and told her to walk faster. She denied the accused asking her to go to Lolo's place. She admitted that when the police came the accused was at Lolo's house. She said that this was the first time she was only with the accused at home as her brothers and sisters are there in other times. She denied that accused did not rape her. She said that she could run after the incident as the accused did not assault or hit her.
35. You watched her giving evidence in court. What was her demeanour 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? What was her family background? What was 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 VPG beyond reasonable doubt then you have to decide whether that evidence is sufficient to establish elements of all the charges.

36. The next witness for the prosecution was the mother of the victim. On 20.7.2014 around 5.30 - 6.30 p.m. she was at her mother's house. The complainant had called her from Mala's place. She was crying and asking her to come and take her as soon as possible. She had run to Mala's place. Complainant was scared and crying. She had told her that the father did all these things. She reported the matter to police by phone. She identified the accused in Court. This witness was not cross examined by the accused.
37. You saw this witness giving evidence in Court. If you believe her evidence beyond reasonable doubt you have to consider whether her evidence is confirming the victim's evidence regarding 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.
38. The third witness for the prosecution was Sanjeeta Mala. On 20.7.2014 around 6.30 p.m. she was busy cooking in her kitchen. All of a sudden someone pushed the front door and came inside. It was complainant. She was crying and looked very scared. On request of the complainant she dialed her mother's number and gave the phone to her. Mother came 10 minutes later. Mother asked what happened. She told lets go, I will tell. This witness was also not cross examined by the accused.
39. This is an independent witness. You have to decide whether this evidence is confirming the evidence of the victim or creating a reasonable doubt in the prosecution case.
40. Doctor was called as the next witness for the prosecution. She is a doctor with 7 years experience. She had examined the victim on 20.7.2014 at 9.00 p.m. Medical findings were hymen was bruised and small 1 cm laceration at 9 o'clock position. Dried blood noted at the laceration. Hymen was not intact. Possible cause could be forcible penetration into vagina with any object. The findings are consistent with the history. The injury is a recent one. This witness was also not cross examined by the accused.
41. The doctor is an independent witness. If you believe her evidence there is confirmation on penetration to the vagina. This is a fresh injury. You have to decide whether this evidence is confirming the evidence of the victim before attaching any weight to this evidence.
42. The next witness was DC Makitala. She is the investigating and arresting officer in this case. After the report she immediately went to the scene. She interviewed the complainant. The complainant had led her to the scene. She had made a rough sketch plan. This plan was

tendered marked PE3. She had uplifted some coins from there. Then she had gone to Mala's house. The accused was arrested at a house of a taxi driver while drinking Grog. He was cautioned. He was taken to the station and locked in the cell. The complainant was taken for medical examination. This witness was not cross examined by the accused.

43. DC Aveen Kumar was the next witness for the prosecution. He had caution interviewed the accused at Rakiraki police station. It was in Hindi language. It was recorded in the computer. It was printed and given to the accused to read and sign. Surendra Prasad was witnessing officer. He identified and tendered the original Hindi interview marked PE 4A and English translation marked PE 4B. He read the English translation to court. There was no complaint from the accused before the interview. He was not assaulted at the reconstruction. He was not assaulted at the end of the interview. The accused gave answers to all questions asked by him.
44. Under cross examination he denied that another officer assaulted the accused while the interview being taken. He denied that the accused was slapped on the ears. He denied telling that if you don't tell the truth he will break the accused's nose.
45. It is up to you to decide whether the accused made a statement under caution voluntarily to this witness. If you are sure that the caution interview statement was made freely and not as a result of threats, assault or inducements made to the accused by persons in authority then you could consider the facts in the statement as evidence. Then you will have to further decide whether facts in this caution interview statement are truthful. If you are sure that the facts in the caution interview are truthful then you can use those to consider whether the elements of the charges are proved by this statement.
46. The next witness for the prosecution was DS Surendra Prasad. He was the witnessing officer of the caution interview of the accused. There was no other officer present. The accused did not make a complaint before the interview. The accused was not assaulted during the reconstruction. There was no verbal abuse or assault till the conclusion of the interview. The accused was sitting down normally and answering the questions voluntarily.
47. Under cross examination he denied that he is the officer who assaulted the accused. He denied standing behind the accused and assaulting the accused.
48. You have to decide whether this evidence confirms the evidence of DC Aveen Kumar or creates a doubt in the prosecution case.
49. The last witness for the prosecution was DS Anoop Kumar. He had charged the accused on 21.7.2014 at Rakiraki police station. It was in Hindi language. He identified the original and translation of the charge statement and tendered those marked PE 5A and PE 5B. He read the English translation to the court. The accused did not make any complaint before the charge. He was not cross examined by the accused.

50. It is up to you to decide whether the accused made a statement in the charge voluntarily to this witness. If you are sure that the charge statement was made freely and not as a result of threats, assault or inducements made to the accused by persons in authority then you could consider the facts in the statement as evidence. Then you will have to further decide whether facts in this charge statement are truthful. If you are sure that the facts in the charge statement are truthful then you can use those to consider whether the elements of the charges are proved by this statement.
51. After the prosecution case was closed you heard me explaining the accused his rights in defence.
52. The Accused elected to give evidence. He said that he was forced to give evidence. He was told if you don't tell the truth you will be assaulted more. He was threatened. He was beaten on ears. After that he was frightened and he gave evidence so that he will not be assaulted again. He was frightened and scared about further assaults. He never pulled the complainant forcibly to rape. He just pulled her to tell her to go faster. After that daughter ran away. He told her to come to Lolo's place. His medical report is nil. So how can he rape her? The medical report was tendered marked D1.
53. Under cross examination he stated that he was beaten up on ears and also beaten on legs with iron rod. They placed the iron rod between legs and tried to roll it. This happened after the medical. Half of the interview was taken and he was taken to a medical. Then he was interviewed again. He was scared to complaint to Anoop that Surendra assaulted him. He did not complain to the Magistrate. He was scared and not ready to say anything on that particular day. He denied the allegations against him. The only problem he had with the daughter was a guy coming home without his permission. He did not tell that to police.
54. You watched the accused giving evidence in court. What was his demeanour 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 Court is different from his caution interview statement and charge statement. In other words his evidence is inconsistent.
55. 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.
56. 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.

57. 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 offences.
- (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 offences. 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 offences then the proper opinion would be Guilty.

58. 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.

59. 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.

60. 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.

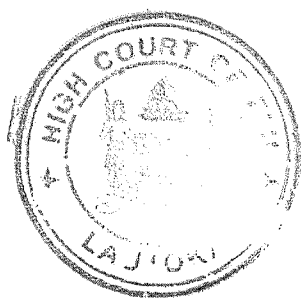
61. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of accused's guilt of each charge you must find him guilty for that charge. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt 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 charges as well.


62. Your possible opinions are as follows:

- | | | |
|-------|--------------------------------|------------------------------|
| (i) | First charge of Sexual Assault | Accused Guilty or Not Guilty |
| (ii) | Second charge of Rape | Accused Guilty or Not Guilty |
| (iii) | Third charge of Rape | Accused Guilty or Not Guilty |

63. 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.

64. Any re-directions?




Sudharshana De Silva
JUDGE

At Lautoka
21st January 2015

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