IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No : HAC 19 of 2015

STATE

V

DAVID JOSAIAH BROWN

Counsels : Ms A.Vavadakua for the State
Accused in person

Date of Hearing : 9, 10 May 2016
Date of Summing Up : 10 May 2016

SUMMING UP

Ladies and Gentleman:

[I use the fictitious name Ana for the complainant to give her anonymity]

[1] The time has now come for me to sum up the evidence in this case and to direct you on the law. When I do so, you must accept what I say about the law and apply it to the facts.

[2] You are the Judges of the facts and whatever you say about the facts is paramount and I must give your opinions the greatest amount of weight when I come to consider the final judgment of

the Court. If in the summing up I express an opinion on the facts, then you can reject my opinions unless you agree with me and come to your own opinions. I have no right to usurp your view of the facts. On assessing the evidence of witnesses, you may accept all of what a witness says, you may reject all or you may reject or accept part of the evidence.

[3] It is for you to tell me what you believe the facts of this case are by applying the law as I direct you and then by telling me if in your opinion the accused is guilty or not guilty of these charges, Of course you are aware that the accused has been charged with five counts. You will look at each count separately because the evidence in respect of each is different. Just because you may think that the accused is guilty of one count, it does not necessarily mean that he is guilty of every other count.

[4] You will judge this case solely on the evidence that has been heard in this Courtroom and nothing else. Similarly you will not let any sympathy or prejudice play a part in your deliberations. You must not be swayed by the tragic evidence of the young complainant: you must look at the evidence dispassionately and with the wisdom of your experience of the community and the Fijian lifestyle.

[5] I make no apologies for repeating to you what I said at the beginning, because it is important. That is that you can only find the accused guilty if you have been made sure by the State prosecutor that he is guilty of each count– that is you are certain beyond reasonable doubt. Reasonable doubt is not any little niggling doubt – your doubt must be reasonable and anything. The burden is on the State to make you sure of the guilt of the accused, no matter what they say in evidence.

[6] The first count that is on the Information is one of indecent assault. An indecent assault is an assault or threatened assault on a person which the average person would regard as morally reprehensible. You will recall that Ana said that in the school holidays in 2008 she went to stay with her parents and her father used to touch her breasts and her vagina.

[7] To find this count proved, so that you are sure you must find:

1) that is was indeed this accused, who
2) did something to another's body, that
3) the average person would consider indecent.

[8] The second count is one of sexual assault. Sexual assault is committed when a person either intentionally or recklessly sexually assaults another or caused another to apprehend immediate sexual attack. The State in this case are saying that in 2012 when the family was staying in Auntie's house , the times that her father touched her breast and vagina and put his penis in her vagina is sexual assault. The latter action is rape but the State is relying on the evidence to charge the accused for sexual assault which if you believe Ana it certainly is.

[9] The third, fourth, and fifth counts are counts of rape. In our law and for the purposes of this trial rape is committed when a man penetrates his penis into the vagina of a woman without her consent. The law also says that a female under the age of 13 is not able to give consent so all you have to find in each of the rape counts is:

1) that it was this accused, who
2) penetrated the vagina of Ana with his penis.

[10] There is no need for you to consider consent until you come to the fifth count on which I shall direct you later.

[11] You will note on the Information or Charge sheet that the fourth count is a representative count. What this means is that for the period stated, that is for the whole year of 2013, there were multiple instances of rape. How you should look at this however is to decide if there was at least one rape in that period. If you decide that Ana was raped just once then you can find the

accused guilty. There is no need for you to decide that there were more than one.

[12] At one time it was necessary to look for supporting evidence of a complaint of rape, such as a doctor's report or other evidence that would back up the complaint but the law now says that that is no longer necessary. You are to decide the case on the evidence of Ana alone.

[13] Ana was born on the 22nd of August 2001 which means that for the third and fourth counts she was under the age of 13 and therefore unable to consent to the rapes. On the 22nd August 2014 she would have turned 13 which means that if the rape alleged in the fifth count was before her birthday then consent was not an issue. However if it was after the 22nd then it is a consideration. You will bear the evidence of Ana in mind when deciding the issue and you will decide whether she was consenting to this rape or not. You may be helped by another law of rape that says if the victim gives in to the rape by somebody in authority over her then there can be no consent on her part.

[14] Well, that is all I wish to say about the Law and it is my duty to remind you what the evidence is. I know that you heard the

case only yesterday and it will be fresh in your mind but it is my judicial duty.

[15] Ana told us that she is now 15 and that the accused is her biological father. She has 3 brothers who lived usually with her parents but she has always lived with and been brought up by her maternal grandparents.

[16] In 2008 she was at school in Batinivuriwai and her parents were living in a house just a few minutes walk away. In that year her father used to do bad things to her. In the school holidays she went to stay in her parent's house. One day her mother had gone to the creek to wash clothes and she was sleeping. Her father came in, pulled off her clothes and started touching her. He touched her breasts and vagina. She didn't scream or shout because she was scared. He told her to keep quiet. She didn't tell mum when she came home because she was afraid of her father.

[17] In 2012 when she was in Class 5 at Adi Eleni School the family went on holiday to Bua and again her father "did bad things". Her mother would go to work and Dad would stay home. It was her Aunty's place and she would move around the village. Dad would take off her clothes, touch her breast and vagina and he would put his penis inside her vagina. Mum would leave at 4.40am and not come back until 7pm. The assaults would happen in the bedroom, sometimes in the morning and sometimes at lunchtime. There was nothing she could do. He used to say that he would kill her if she told anybody.

[18] In 2013 when she was in Class 6 she was still in Batinivuriwai and her parents were in Nawailevu because her mother was working there. Again her father repeated his assaults - he would

lick her breasts, touch her vagina and put his penis inside her vagina. She was scared. He used to do this sometimes in the morning and sometimes at lunchtime. Mum was working, her grandparents were in Batinivuriwai and her brothers were out in the village. He did this three times a day nearly every day and "plenty of times" he would put his penis in her vagina. It was in the school holidays.

[19] In 2014 when she was in Class 7 her parents were staying in Waibunabuna and she visited them. Mum was working and again dad would touch her and put his penis into her vagina. He would tell her brothers to go outside and play.

[20] If she tried to walk away he would get angry. He would slap her and talk to her in a harsh way. She eventually told her aunty about the abuse and then eventually the Police got to know.

[21] Well Ladies and Sir, that was the one and only witness for the prosecution. You heard me tell the accused what his rights in defence are. He could give evidence under oath in the witness box and be cross-examined or he could remain silent. I gave him 40 minutes to think it over and after the break he decided he would give evidence.

[22] Now I must tell you this. He did not have to give evidence but he has. Nevertheless you must still judge this case on the strength of the prosecution case. That is the burden on the State throughout. If you think what the accused tells you is true or maybe true then it will make you unsure of the Prosecution case and you will find him not guilty.

[23] The accused told us that he works as a farmer and a labourer. He is now 43 years old. He said that in 2008 he was living with

his wife and sons in Batinivuriwai. His daughter Ana lived with her grandparents but she used to come to his house to visit. He said that he "was not admitting to" her allegations relating to 2008. He had a wife and he couldn't commit such a thing. In any event the creek was nearby and therefore his wife was not far away at the time.

[24] He says that in 2012 he was in Tailevu. He went there at the end of 2011 (Christmas) and stayed there for the whole of 2012 returning in the first part of 2013. He had gone there with a lady from a neighbouring village but she had left him after a week and he was too ashamed to go back to face his people and her people. He stayed there diving for mussels. He did not admit to the rape alleged to have occurred in 2013.

[25] Ana did not visit in August 2014 because his wife had just given birth to another child. He did not admit that August rape.

[26] Because of the affair his wife's family had turned against him. He had reconciled with his wife but there was "bad blood" especially between him and his mother-in-law's sister. Because of that he thinks that Ana was being used to make up these stories.

[27] Well that was the extent of his evidence and it is evidence for you to evaluate and give whatever weight you think fit.

[28] And that is all I have to say to you. Remember to look at each count separately and remember for the fourth charge of rape in 2013 you need only to find one episode of rape although the State is alleging many.

[29] You may retire now to consider your opinions. Please let a member of my staff me know when you are ready and I will reconvene the Court.

[30] Redirections Counsel?

P.K. Madigan

Judge

At Labasa

10 May 2016