

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 196 OF 2013

STATE

-v-

SERUVI RALIVANAWA

Counsel : Ms. S. Naibe with Mr. S. Babitu for the State
Mr. M. Fesaitu for the Accused

Dates of Hearing : 24th and 25th May, 2016

Date of Summing Up: 26th May, 2016

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. 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. The counsel for Prosecution and the accused made submissions to you about the facts of this case. That is their duty as the Counsel. But it is a matter for you to decide which version of the facts to accept, or reject.
6. 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.
7. 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.
8. 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.
9. 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 it to you to the evidence you have heard in the course of this trial.
10. 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.
11. 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.

12. 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.
13. Incidents 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 incidents. 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.
14. 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 time of this court.
15. The Agreed Facts are as follows:
 1. It is agreed that Seruvi Ralivanawa is the accused in this case.
 2. It is agreed that the victim in this case is Kelerayani Drodoro.
 3. It is agreed that the accused and the victim are from the same village, which is Kese Village.

4. It is agreed that between the 1st of June 2013 and the 30th of June 2013, the accused person had sexual intercourse with the victim.
5. It is agreed that the victim was medically examined on the 12th of October 2013 by Doctor Sugun Khan and a report made accordingly.
16. According to the amended Information, charge against the accused is as follows:

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

SERUVI RALIVANAWA between the 1st of June, 2013 and 30th of June, 2013 at Lautoka in the Western Division, inserted his penis into the vagina of **KELERAYANI DRODRO**, without the consent of the said **KELERAYANI DRODRO**.

17. I will now deal with the elements of the offence.

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.
18. Carnal knowledge is to have sexual intercourse with penetration of the woman's vagina by the man's penis to any extent. So, that is Rape under Section 207 (2) (a) of the Crimes Decree.
 19. So, the elements of the offence of Rape in this case are that:

- (a). the accused
- (b). penetrated the vagina of complainant to some extent with his penis
- (c). without her consent

20. Other parts of the offence are irrelevant to the facts of this case.
21. Consent as defined in Section 206 of the Crimes Decree, means the consent freely and voluntarily given by a person with a necessary mental capacity to give such consent and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.
22. 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 complainant was a witness who offered direct evidence, if you believe her as to what she saw, heard and felt.

I will now deal with the summary of evidence in this case.

Case for the Prosecution

Complainant, Kelerayani Drodro

23. In June 2013, Kelerayani was residing at Kese Village in Yasawa with her parents and siblings. She was a 17 years old, Form 5 student at that time.
24. In one night in June 2013, she was home sleeping with her 12-year-old small sister. She heard Seruvi calling her. She opened the door. Seruvi told her that her mom is at his place and she was calling her. She opened the door. When she came outside, she was afraid of him. He took her beside the house, told her that he wanted to have sexual intercourse with her. He tied her. When she tried to scream he blocked her mouth with his hand. She tried to escape but could not. He tried to insert his penis into her vagina. She pushed him but he kept on doing it and managed to insert his penis into her vagina. She felt unconscious. When she regained consciousness Seruvi was still there. He told her to go back and sleep. She felt tired. Blood was coming out.

25. She did not inform the incident to anyone because she was scared. She was afraid of her family members that she will get beaten up. Seruvi used to call her 'mother'. Seruvi's dad is her cousin. The incident came to light when her mother noted that she was four months pregnant. Being questioned, she told her mother what Seruvi did to her. She told mother that, Seruvi is the father of the baby. She did not have any relationship with Seruvi before this incident.
26. When she was asked how she reacted to the accused's invasion, she said 'no reaction'. Her mother reported the matter to police. Police then questioned her and took her to a doctor for examination.
27. Under Cross-examination, Complainant admitted that she had already turned 17 when the incident happened. She denied having often visited Seruvi's house before June 2013 to watch movies. At times, she would attend church devotions at Seruvi's house and Assemblies of God Church.
28. She denied that Seruvi was in a boyfriend-girlfriend relationship with her in 2012 and being visited by Seruvi at night.
29. When she heard the voice she knew it was Seruvi who was calling her. She denied walking to the breadfruit tree beside her house with Seruvi and talking and kissing each other on the lips. She also denied parting her legs when he lay on top of her. She felt Seruvi's penis entering her vagina. She could not feel Seruvi's penis continuously rubbing inside her vagina because she was unconscious. She did not tell him to stop because became unconscious. She denied agreeing to have sexual intercourse willingly.
30. She had never had sexual intercourse before. She denied Seruvi having sexual intercourse with her sometime in January 2013 in the vacant house near her house.
31. She gave birth to a child who is 2 years old now. She admitted that, when the child was born, Seruvi supported the child by supplying food and money for a short period. She denied having continued to have sexual intercourse with him during pregnancy.
32. She wanted to hide her pregnancy when she first got to know about it. Her mother was angry when she told her that she is pregnant. She denied making up the story that Seruvi

raped her because she was frightened of her mother and also denied having lied to her mother because she wanted to save herself from trouble.

33. She did not go to the Police post within walking distance at Kese village to complain. In June 2013, she was still schooling. She stopped schooling after the incident in August. She did not complain to her teacher or principal what Seruvi had done to her.
34. She denied that she did not go and report the matter although she had the opportunity to do so because Seruvi did not forcefully have sexual intercourse. She also denied that her mother or the Police officer who took down the statement pressured her to give a statement to Police.

Venina Masei

35. Venina is the mother of the Complainant. Kelerayani used to ask for pads from her during menstruation periods. Starting from the month of July till the month of October she did not ask for pads from her. She asked Kelerayani whether she was pregnant. Kelerayani told her that she was not having her menses in those four months. When questioned, Kelerayani started to tell her the story. Kelerayani told her that Seruvi came and called her, pulled her hand, took her beside the house; sat on her lap, blocked her mouth, punched her thighs and raped her. She felt unconscious. Kelerayani was scared when she relayed the story to her. She went to police with Kelerayani and reported the matter.
36. Venina knew Seruvi very well. Kelerayani is the cousin of Seruvi's father. The reason why Kelerayani was not informing her was that she was scared that she would get beaten or being punched by her brothers.
37. Under Cross-examination Venina said that Kelerayani is closely related to the accused. However, before this incident she was not aware if Kelerayani was in a boyfriend-girlfriend relationship with Seruvi.

SGT Ana Nai

38. When SGT Ana was attached to Lautoka Police station in June 2013 she received instruction to conduct the investigation in relation to the accused in this case. She

recorded the statement of the victim, Kelerayani Drodro, and took her to the hospital for medical examination. She visited the crime scene and also conducted the investigation.

Victim's mother, Venina reported the matter to police. Allegation of rape against Seruvi Ralivanawa was recorded. Accused was arrested on 17th day of October 2013.

That is the Prosecution case

39. You heard me explain to the accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or he could give evidence in which case he would be cross-examined.
40. As you are aware, accused elected to give evidence. That is right. Now I must tell you that the fact that an accused gives evidence in his own defence does not relieve the Prosecution of the burden to prove their case to you beyond reasonable doubt. Burden of proof 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. Even if you don't believe a single word the accused person says, you must still be sure that he is guilty of the crime that he is charged with.

Case for the Defence

Seruvi Ralivanawa

41. Seruvi knew Kelerayani since she was a young girl. She is closely related to her. In addition to that she was her girlfriend.
42. He came to Kelerayani's house in June 2013 and called her. They went to breadfruit tree just outside her house. That is the place where they always tell stories in the night. They sat down to share the relationship with each other. He asked her if he can kiss her. She liked it and started kissing. There was no place for her to lie on. He took off his sarong and laid it on the ground. She laid down on it. They started kissing each other. He approached her and asked her if he can have sex. She said 'yes, we can have sex'.

43. He denied sitting on her thighs, and having blocked her mouth with his hand to stop her screaming. There was no reaction from her. After having had sexual intercourse, they talked to each other. Then he dropped her back at her home. He went to his place.
44. He said that Kelerayani was lying about her being unconscious as two of them were having sexual intercourse. That was not the first time they had sex. He had sexual intercourse with Kelerayani in the same year somewhere in mid- January, during day time on the beach. She informed him that she was pregnant when she was 3 months pregnant.
45. Under cross examination, he said that he used to call Kelerayani her aunty. He denied grabbing her hand and pulling her to the breadfruit tree. He also denied having forced her to have sexual intercourse with him that night.
46. At the time of the offence he was 26 years old. He did not know her age but knew she was still schooling. He admitted that he was having a relationship with Kelerayani whom he was supposed to call 'mother'. He, being an adult, knew what he did was wrong.

Analysis

47. There is no issue in this case with regard to the identity of the accused. Accused admitted that he had sexual intercourse with the Complainant. Only issue to be resolved in this case is whether the sexual intercourse took place without Complainant's consent.
48. First, you have to be satisfied that the evidence Complainant has given is truthful and believable. If you are satisfied that the evidence she gave in court is truthful and trustworthy you can safely act upon her evidence in coming to your conclusion.
49. Please remember, there is no rule for you to look for corroboration of Complainant's story to bring home an opinion of guilty in a case of sexual nature. The case can stand or fall on the testimony of Complainant alone depending on how you are going to look at her evidence. You may, however, consider whether there are items of evidence to support the complainant's evidence if you think that it is safe to look for such supporting evidence.

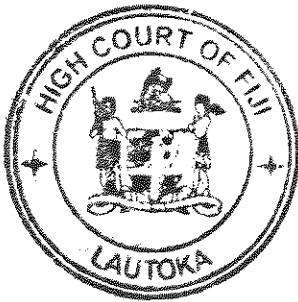
50. If you are satisfied that Complainant told the truth and her evidence is believable, then you have to consider whether the Prosecution had discharged its burden and proved each element of the offence of Rape.
51. In evaluating Complainant's evidence, you may want to consider whether what she was talking about in her evidence is probable in all the circumstances of the case.
52. Complainant did not complain the incidents to anyone until her mother discovered that she was four months pregnant. Contention of the Defence is that she did not complain because she had nothing to complain and sexual intercourse happened with her consent. It has also been suggested on behalf of the accused that the fact that Complainant did not report what have happened to her as soon as possible makes it less likely that the complaint she eventually made to police was true.
53. Failure on her part to complain soon after the incident is not necessarily consistent with consensual sexual intercourse. It is only a matter of evaluating consistency of her evidence and credibility. You have to see whether she had given an acceptable and legitimate explanation for her failure to complain at the first available opportunity.
54. Complainant's explanation was that she was scared that she will get beaten up by her family. She was seventeen years old when the alleged incident occurred. In light of the direction I give shortly with regard to late complaints by rape victims, you consider if her explanation is probable in all the circumstances of this case. It is up to you to form your own opinion on her explanation. Whether that is so in this particular case is a matter for you to consider and resolve.
55. It would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible. The experience of the Courts is that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others would react with shame, or fear or shock or confusion, do not complain or go to Police or any other authority for some time. It takes a while for self confidence to re-assert itself. There is, in other words no classic or typical response.

56. A late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complain. It's a matter for you to determine whether, in the case of this particular Complainant, the lateness of the complaint, such as it is, assists you at all and, if so, what weight you attach to it. You need to consider what the complainant herself said about her experience and her reaction to it.
57. You also consider if the Complainant had any motive to make up a case against the accused. Defence Counsel suggested that she made up a story because she was frightened of her mother and wanted to save herself from trouble.
58. You consider that argument is logical in the circumstances of this case. Accused is admittedly closely related to the Complainant's family. He calls her 'aunty' or 'mother'. Furthermore, he is the father of the child she gave birth to. He had even provided money and food to raise the child even after a serious allegation against him had been made. In this context, you consider whether she would make up a story to put the accused in trouble so that she can save her skin from her family.
59. You watched Complainant giving evidence in court. What was her demeanor like? How she reacts to being cross examined and re-examined? Was she evasive? How she conducted herself generally in Court? It is up to you to decide whether you could accept her version.
60. During the course of cross examination, it was suggested to her that she could have struggled, shouted or otherwise objected to what the accused was doing. In his closing argument Defence Counsel submitted that her 'no reaction' was consistent with her consent. This is an argument which you should consider with care when you do your final assessment. You should not assume that there is any classic or typical response to an unwelcome demand for sexual intercourse. The experience of the Courts is that people who are being subjected to non-consensual sexual activity may respond in variety of different ways.

61. According to her version, he tied her. When she tried to scream he blocked her mouth with his hand. She tried to escape but she could not. When he tried to insert his penis into her vagina she pushed him. She became unconscious with 'no reaction'.
62. According to him, she consented to kissing and sexual intercourse. To have consensual intercourse, they go outside the house near a breadfruit tree in the night although there is no one, except her younger sister who is at sleep, is home. There is no proper place for her to lie down near the breadfruit tree. He takes off his *sulu* and lays it on the ground for her to lie down. It was not the first time he had sexual intercourse with her. She had earlier consented to him to have sexual intercourse in the beach during day time.
63. His Counsel cross examined her on the basis that her first encounter was in a vacant house, not in the beach. State Counsel argued that the version of the Defence is not consistent. It is up to you to decide which version you accept and which version you reject.
64. You watched accused giving evidence in court. You can apply the same tests and your common sense to evaluate the evidence of the Accused. Was he consistent in his evidence? What was his demeanor like? How he reacted to being cross examined and re-examined? Was he evasive? How did he conduct himself generally in Court? 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 must find him not guilty. Even if you reject his version still the prosecution should prove its case beyond reasonable doubt.
65. If you accept the evidence presented by the Prosecution, you must also be satisfied that each element of the offence had been proved beyond reasonable doubt.
66. Accused admitted that he penetrated her vagina with his penis. If you believe the Complainant's evidence that she did not consent to sexual intercourse, you can find the accused guilty of Rape as charged. If you believe the evidence of the accused, then you must find him not guilty of Rape.

67. 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.
68. 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.

Any re-directions?



Aruna Aluthge
Judge

AT LAUTOKA
26th May, 2016

Solicitors for State:

Office of the Director of Public Prosecution for State

Solicitors for Accused:

Office of the Legal Aid Commission for Accused