

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 112 OF 2013

BETWEEN : STATE

AND : PECELI TAUBULA SENIBUA

Counsel : Ms. J. Fatiaki for State
Ms. Ratu for the Accused

Date of Hearing : 31st of May - 1st of June 2016

Date of Closing Submissions : 1st of June 2016

Date of Summing Up : 2nd of June 2016

SUMMING UP

1. It is my duty to sum up the case to you. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
2. You are to determine the facts of the case, based on the evidence that has been placed before you during the course of the hearing. That involves deciding what

evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

3. I may comment on the facts if I think it will assist you when considering the facts. While you are bound by directions I give you as to the law, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard it unless it coincides with your own independent opinion. I say so because you are the sole judges of the facts.
4. You all have been chosen from the community and represent a pool of common sense, knowledge and experience of the conduct of human beings in our community. Accordingly, you are required to use your experience, common sense and knowledge of the community and the human conduct in your deliberating of facts of this case.
5. You must reach your opinion on evidence. Evidence is what the witnesses said from the witness box, documents and other materials received as exhibits and agreed fact. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The opening address of the learned counsel of the prosecution is not evidence. The purpose of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. The closing addresses of the counsel of the prosecution and the accused are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.

6. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony, agreed facts and the exhibits put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation.
7. As judges of facts you are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own conclusion or form your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that your opinion will assist me in reaching my judgment.
8. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.
9. Matters which will concern you are the credibility of the witnesses, and the reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.

10. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking in the evidence. You then should consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with his own evidence but also with other evidence presented in the case.
11. It is your duty as judges of facts to consider the demeanor of the witnesses, how they react to being cross examined and re-examined, where they evasive, in order to decide the credibility of the witness and the evidence. Moreover, you have to consider the knowledge of the witness on the facts that he testifying, his disinterestedness, his integrity, and his veracity in order to determine the credibility of the witness and his evidence.

Burden of Proof and Standard of Proof.

12. I now draw your attention to the issue of burden and standard of proof. The accused person is presumed to be innocent until his is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused person is guilty for the offence.
13. The burden of proof of the charge against the accused person is on the prosecution. It is because the accused person is presumed to be innocent until he is proven guilty. Accordingly, the burden of proof rest on the prosecution throughout the trial and it never shifts to the accused person. In other words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.

14. The standard of proof in criminal trial is "proof beyond reasonable doubt". It means that you must be satisfied in your mind that you are sure of the accused person's guilt. If there is a riddle in your mind as to the guilt of the accused person after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused person beyond reasonable doubt. If you found any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

Information

15. The Accused person is charged with one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Decree. The particulars of the offence are before you. Hence, I do not wish to reproduce it in my summing up.
16. The prosecution alleges that the accused person came to the victim, while she was weeding at their cassava plantation on the morning of 15th of May 2013. He punched on her face and grabbed the cane knife that she was holding. He then punched on her tights. She fell down on the ground. He threatened her that he will chop her neck if she shouted. He then removed her skirt and undergarment. Having done such, he inserted his penis into her vagina and had a sexual intercourse. She could not shout as she was threatened by the accused. It lasted for about two to three minutes. He then got up and walked away.
17. The accused person denied the allegation and contended that at the time of this alleged incident took place, he was hunting pigs at the mountains with a group of people.

18. The main elements of the offence of rape as charge in the information are that;
 - i) The Accused,
 - ii) Penetrated into the vagina of the victim with his penis,
 - iii) The victim did not consent to the accused to penetrate into her vagina with his penis,
 - iv) The Accused knew or believed that the complainant was not consenting for him to insert his penis in that manner or was reckless as to whether or not she was consenting,
19. The first element of the offence is the identity of the accused person. It is the onus of the prosecution to prove beyond reasonable doubt that it was the accused person who inserted his penis into the vagina of the victim without her consent.
20. The second element is the penetration into the vagina of the complainant. Evidence of slightest penetration of the penis of the accused is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.
21. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of rape, the victim consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. A submission without physical resistance by the victim to an act of another person shall not alone constitute consent.

22. If you are satisfied, that the accused had inserted his penis into the vagina of the victim and she had not given her consent, you are then required to consider the last element of the offence, that is whether the accused honestly believed that the victim was freely consenting for this alleged sexual intercourse. I must advise you that belief in consent is not the same thing as a hope or expectation that the victim was consenting. You must consider whether the accused knew either that the victim was not in a condition or a position to make a choice freely and voluntarily, or the victim had made no choice to agree to sexual intercourse. If you conclude that the accused believed that the victim was consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that was prevailed at the time of the alleged incident took place.
23. You must bear in mind that offences of sexual nature do not need the evidence of collaboration. It means that if you are satisfied with the evidence given by the victim and accepts it as reliable and truthful, you are not required to look for any other evidence to support the account given by the victim.
24. I now kindly request you to draw your attention to the agreed fact, which are before you. They are the facts that the prosecution and defence have agreed without dispute. Hence, you are allowed to consider them as proven fact by the prosecution beyond reasonable doubt.
25. One or more of you may have assumptions as to what constitutes rape, what kind of person may be the victim of rape, what kind of person may be the rapist or what a person who is being or has been raped will do or say. Though such assumptions are natural in ordinary life, it is important that you must leave

behind such assumptions as there is no stereotype of circumstances for a rape or a rapist or a victim of rape.

26. Offences of this nature can take place in any circumstance between any kinds of persons, who act in varieties of ways. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgment strictly on the evidence that you have heard from the witnesses and the exhibits during the course the hearing.
27. You must be mindful that not to bring in to the assessment of the evidence any preconceived views as to how a victim of rape in a trial such as this should react to the experience that the victim had gone through. Every person has his or her own way of coping with such incident. Some may display obvious signs of distress and others may not. Demeanor of the victim in the court while giving evidence is not necessarily a clue to the truth of the victim's account.
28. Let me now remind you the evidence presented by the prosecution and the defence during the course of the hearing.
29. The first witness of the prosecution is Merelita Senicui. She is the victim of this matter. She was seventeen years old in 2013. She was staying with her mother at Waicoba village in May 2013. She recalls that she went to their cassava planation in the morning of 15th of May 2013. She met one Peceli, the accused person on her way to the cassava plantation. While she was walking along the foot path, she saw Peceli was standing near his house. Peceli has greeted her for good morning and then asked her where was she going?. He has then told her that he will come later. She stated that she did not response to Peceli.

30. Merelita stated in her evidence that she felt a punch on her face little above her left cheek while she was weeding at the cassava plantation. Time was around 9 o'clock in the morning. She then turned back and saw that it was Peceli who punched her. He then grabbed her cane knife and squeezed her hand. He has threatened her that if she shouted, he will chop her neck. Peceli has punched on her thighs several times, that made her weak. She then fell on the ground. He tore her skirt and took out her red short and under garments. He then unzipped his trouser and took out his erected penis. Peceli inserted his penis into her vagina and had sexual intercourse with Merelita. She said that he did that for about 2 to 3 minutes. She could not shout because she was threatened by Peceli. He then got up and went away, leaving her lying on the ground. After a while, she got up and went to a nearby creek to clean herself. She then went home and told her mother about what Peceli did to her. Her grandfather called the police and they then went and reported the matter.
31. Merelita stated in her evidence that Peceli was dressed in a trouser. It was a sunny morning. She had been in Waicoba village for about two months by the time this incident took place. Her house is at the top of the hill and Peceli's house is at down below. He is related to her from her mother's side. She had met him before at her step- father' place, though she had not spoken with him before. Merelita stated that his face was very close to her while he was on top of her. He has told her that what she was showing off to the boys are his now in Waicoba dialects.
32. During her cross examination Merelita stated that she did not asked Peceli about his brother or a phone of Kalesi. She further stated that she did not tell the village nurse that she does not know the person who raped her. She stated that she saw

the face of Peceli and it was him that raped her on that morning. She further stated that he came with his dogs.

33. The second witness of the prosecution is Sereana Kale. She is the mother of Merelita. She recalls that Merelita went to the cassava plantation on the morning of 15th of May 2013. She noticed that Merelita was hurt when she returned home from the plantation. She had a black eye and her tights were injured. She told Sereana what Peceli had done to her. Sereana stated in her evidence that Merelita told her the person who raped her was Peceli.
34. The third witness of the prosecution is Dr. Amos Gibran. He has conducted the medical examination of Merelita on the 15th of May 2013 at the Sigatoka Hospital. He explained the history that was related him by the victim. Dr. Gibran then explained the specific medical findings that he found in the victim. He then tendered the medical report of the victim as an exhibit of the prosecution.
35. At the conclusion of the prosecution case, the accused person was explained about his rights in defence. The accused person opted to give evidence on oaths and also called one witness for his defence.
36. The Accused person stated in his evidence that he woke up in the morning and met Asaeli Nayaya. He asked the accused to go for pig hunting. Thereafter he met Merelita in front of his house. He has greeted her and asked her where she was going. When she replied that she was going to weed the cassava plantation, he had told her that she should go and see the owner of the farm, so the owner could accompany her to the farm.

37. Merelita has then asked the accused about his brother's phone. His brother were using Kalesi's phone. Peceli had told her go and ask his brother at home. Merelita went to the house and talked to his brother. She then went to Kalesi's house. While she was at Kalesi's house, Peceli and others went for pig hunting. They left the village about 7.30 a.m. and reached to their destination by 9.a.m. They then dispersed to their separated spots. He went down to the creek and met Alipate, Viliame, and Rupeni. He came back to village around 7.30 p.m. He straight away came back to home. All of his family members were sitting inside the house because of what happened to Merelita. He denied that he did that. He then went to Lawaqa police station He met police officers at the village as they came to inspect the scene of the crime. They told him to wait until they conclude the inspection. He reached to police station at about 9. At the police station Peceli has asked them to get evidence from him. The police then took saliva from him for testing.
38. During the cross examination, Peceli stated that his house is about 15 meters away from the house of Merelita. Sereana, mother of the victim is related to his as a daughter. He said that everyone in the village knows about everyone. Peceli said that he took his dogs with him when he went for pig hunting. He took his dogs, knife and spear with him. Merelita had a cane knife when he saw her on the morning. He knew where the farm of Merelita is and she was alone at that time. Peceli walked behind the others, who were on horseback when they were going to pig hunting. They had to pass through some farms in order to get up to the hilltop. But he said that Merelita's farm was not in between his house towards the hilltop. He was dressed in a long grey trouser, one 3/4 pants on top of that trouser, black hat and a blue t - shirt.

39. Peceli said that he neither punched on Merelita's face nor on her thighs. He further stated that he did not threaten her with her cane knife that if she shouted, he will chop her neck. He said that he did not insert his penis into the vagina of Merelita. Peceli stated that he was arrested by the police on the following day. He said that it was a lie that he went to the police on the same day of the incident. Peceli stated that he came to court with Alipate Vivoli. Alipate is not from his village.
40. During his reexamination Peceli stated that he walked about 500 meters behind the horseback when he was walking to pig hunting.
41. Alipate Vivoli is the second witness of the defence. He stated in his evidence that he together with some other men went to pig hunting on the 15th of May 2013. Peceli was one of them who accompanied him for pig hunting. They have left the Waicoba village at around 7.30 a.m. and reached to the destination after 8.a.m. They then dispersed to their respective spots and Peceli had to take his dogs to the creek and chase the pig up to the hills. Alipate has seen Peceli bringing down the dogs to the creek.
42. During his cross examination Alipate stated that he spoke to the brother of the accused before giving evidence in court. That conversation was about just coming to court proceedings. He stated that he told the police that he saw Peceli came down with dogs to the creek. He further said that he told the police what had happened on that day. The police had written it down. Hence he does not know whether the police had actually written it down or not. He said that all of them were on horseback while Peceli was walking behind them. They were

following each others. He was just behind about the length of the court room and not about 500 meters behind to them.

43. I have summarised the evidence presented during the cause of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence and reminded yourselves of all of them. What I did only to draw your attention to the main items of evidence and help you in reminding yourselves of the evidence.
44. The accused person's defence is alibi. He claims that he did not go to the farm while Merelita was weeding the cassava plantation. He further denies that he punched her and had sexual intercourse without her consent. He stated that he was in the mountains, hunting wild pig with a group of people at that material time. You must be mindful that though the accused person raised a defence of alibi, the burden of the proving the charge against the accused person beyond reasonable doubt still remains on the prosecution. The prosecution must prove so that you are sure that the accused person was correctly identified by the victim and therefore that his alibi is untrue.
45. The Accused person gave evidence and called Mr. Alipate to support his assertion that at the time of this alleged incident took place, he was away on the hills with Alipate and some other men, hunting wild pigs. The accused person and Mr. Alipate were cross examined by the learned counsel for the prosecution about the alibi. The learned counsel for the prosecution proposed you to conclude that the accused and his alibi witness were lying.

46. If you conclude that the alibi defence of the accused person is true or may be true, then he cannot have gone to the farm of Merelita and commit this offence as charged. You must then find him not guilty.
47. If, on the other hand, you are sure, having considered the evidence carefully, that the alibi defence of the accused person is false, that is a finding of fact which you are entitled to take into account when judging whether the accused person is guilty. I must caution you that, do not promptly conclude that because the alibi put forward is false, the accused must be guilty. You must be mindful that sometimes an alibi is invented because the accused thinks it is easier than telling the truth, or perhaps to bolster a genuine defence. The main question for you to consider is; are you sure that the victim has correctly recognised the accused person as the person who committed this offence.
48. The case of the prosecution against the accused person is mainly founded on the correctness of recognition of the accused person by the victim. I must warn you of the special need for caution before convicting the accused person in reliance on the evidence of recognition. A witness who is convinced in his/her own mind may, as a result, be a convincing witness, but may nevertheless be mistaken of recognition of even a known person.
49. You should therefore examine carefully the circumstances in which the recognition was made by the victim. How long did the victim have the person under her observation? At what distance? In what light? Did anything interfere with the observation? Had the victim ever seen the accused before? If so, how often? If only occasionally, had she any special reason for remembering him?

50. Let me now draw your attention to the circumstances where the victim made her recognition of the accused person.
51. Merelita stated in her evidence that the accused is related to her from her mother's side. She had seen him before at her step- father's place. He lives close to her mother's house. The accused has greeted her when she was passing his house on her way to the farm on that morning. He then asked her where she was going. He told her that he will come later. The accused in his evidence did not dispute that he met Merelita on that morning in front of his house and greeted her. Merelita then stated that she turned back when she felt a punch on her face while she was weeding at the cassava plantation. She recognised that it was the accused who punched her. He was with his dogs. The accused person in his evidence stated that he went to pig hunting with his dogs. His face was very close to her while he was on top of her having this alleged sexual intercourse with her. It lasted for about two to three minutes. Merelita said that it was sunny morning.
52. The learned counsel for the accused person suggested to Merelita during her cross examination that the accused could not have been committed this crime as he was hunting wild pigs. Merelita answered that it was Peceli as she saw his face. The learned counsel then put to Merelita that she made this allegation that it was Peceli who raped her because he was the last person she spoke with before she was punched on her face. Merelita again answered that she saw his face and it was Peceli.
53. You have heard the evidence that soon after this alleged incident took place, Merelita has informed her mother Sereana about what has happened to her at the

cassava plantation. On the same day Merelita has informed the doctor about what happened to her when she was medically examined by the doctor. This form of evidence is known as evidence of recent complaint. It is not an evidence as to what actually happened between Merelita and the accused person. Neither Sereana nor the doctor were present and witnessed what happened at the cassava plantation on the morning of 15th of May 2013.

54. You are entitled to consider the evidence of recent complaint in order to decide whether or not Merelita has told the truth. It is for you to decide whether the evidence of recent complain helps you to reach a decision, but it is important that you must understand that the evidence of recent complaint is not independent evidence of what happened at the cassava plantation on that morning. It therefore cannot of itself prove that the complaint is true.
55. I now draw your attention to the issue of consent. The victim did not specifically stated in her evidence that she did not consent to the accused person to insert his penis into her vagina. Hence, it appears that the prosecution relies on circumstantial evidence in order to prove the element of consent.
56. Merelita stated that Peceli came behind her and punched on her face. He then punched on her tights and squeezed her hand. He grabbed the cane knife from her and threatened her that he will chop her neck if she shouted. When she fallen on the ground, he tore her skirt and removed her undergarments. He then inserted his penis into her vagina and had sexual intercourse. She could not shout as she was threatened by the accused.

57. If you decide the evidence given by the victim as reliable and credible, then you can consider whether you accept them as proven facts. It is permissible to draw an inference of the existence of another fact from the facts that you consider as proven. It is the process of drawing inference from the proven facts.
58. Drawing of inference is a process by which you find from evidence which you regard as proven, that you are driven to a further conclusion of the existence of another fact. You need to be careful to ensure that the evidence really leads to the conclusion, that the prosecution proposes you to reach.
59. If you consider the evidence given by the victim has proven that the accused punched on her face and tights. He then threatened her with the cane knife and tore her cloths. He then had sexual intercourse with her by inserting his penis into her vagina. She could not shout as she was threatened. You are then allowed to conclude or infer that she did not consent to the accused to insert his penis into her vagina.
60. What conclusion or inference you reach from the evidence is entirely for you to decide. However, in considering what inference you should draw or what conclusion you should reach in respect of the issue of consent, it is important to be mindful that speculation has no part in this process. Speculation in a case amounts to no more than guessing, or making up theories without good evidence to support them. The conclusion or the inference must be the only and certain rational conclusion or inference. If the evidence that you accepted or considered as proven, suggest you some other probable inferences or conclusions about the consent of the victim, which suggests the innocence of the accused or

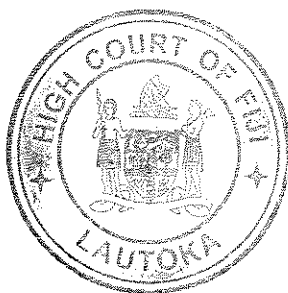
create a doubt as to the guilt of the accused, you are then not entitled to draw any inference or form any conclusion that the victim has not given her consent.


61. You heard the evidence presented by the accused, where he denied this allegation. If you accepted the version of the accused person as reliable and truthful, then the case of the prosecution fails. You must then acquit the accused from this charge.
62. If you neither believe nor disbelieve the version of the accused, yet, it creates a reasonable doubt in your mind about the prosecution case. You must then acquit the accused from this charge.
63. Even if you reject the version of the accused person that does not mean that the prosecution has established that the accused is guilty for this offence. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the accused has committed this offence as charged in the information.
64. Upon consideration of all evidence, if you believe that the count of rape is proved beyond reasonable doubt, you can find the accused is guilty of the charge. If you believe that that charge is not proved beyond reasonable doubt, then you must find the accused not guilty.
65. Madam and gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions on the charge against the accused person. You will be asked individually for your opinion and are not required to give reasons for your opinion. Once you have

reached your opinion, you may please inform the clerks, so that the court could be reconvened.

66. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?

At Lautoka
2nd June 2016




R. D. R. Thushara Rajasinghe
Judge

Solicitors : Office of the Director of Public Prosecutions
Office of Legal Aid Commission