

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 132 of 2016

[CRIMINAL JURISDICTION]

STATE

V

INOKE LAGIVERE

Counsel : Ms. S. Serukai for State
Ms. E. Radrole for Accused

Dates of Hearing : 23rd - 25th May 2017

Date of Summing up: 29th May 2017

(The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "VR".)

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the judges of facts.

2. Evidence in this case is what the witnesses said from the witness box inside this court room, the exhibit tendered and the admitted facts. Your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.
3. Please remember that I will not be reproducing the entire evidence in this summing up. I would only refer to the evidence which I consider important to explain the case and the applicable legal principles. If I do not refer to certain evidence which you consider as important, you should still consider that evidence and give it such weight you may think fit.
4. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
5. A statement made by a witness to the police can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of his/her the evidence.
6. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by

emotion. You should put aside all feeling of sympathy for or prejudice against, the accused or anyone else. No such emotion should influence your decision.

7. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.
8. Experience has shown that victims of sexual offences may react in different ways to what they went through. Some, in distress or anger may complain to the first person they see. Some, due to shame, fear, shock or confusion may not complain for some time or may not complain at all.
9. The complainant said she is 16 years old when she gave evidence. You may have come across children of that age. You will have an idea of the way they think, talk and the way they describe things. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case is, however, a decision for you to make. Your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offence the accused is charged with.
10. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes regarding what we remember.

11. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.
12. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by him/her is for you to decide.
13. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of his/her evidence is inaccurate; or you may accept the reason he/she provided for the inconsistency and consider him/her to be reliable as a witness.
14. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what he/she said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
15. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into

account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that that inference is the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.

16. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
17. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of the accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
18. In order to prove that the accused is guilty, the prosecution should prove all the elements of the offence beyond reasonable doubt. If you have a reasonable doubt in respect of any element of the offence the accused is charged with, as to whether the prosecution has proved that element, then you must find the accused not guilty. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in a short while.
19. You are not required to decide every point raised by lawyers in this case. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not that charge has been proved.
20. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.

21. Initially there were two accused persons in this case and now there is only one. After the prosecution case was closed, it was decided not to proceed against the other accused. Please do not assume that the reason to continue the proceedings against this accused is because I have already decided that he is guilty of the offence he is charged with. The decision whether the accused is guilty or not will be made only after I receive your opinion.
22. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offence;

FIRST COUNT

Statement of Offence

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

Particulars of Offence

INOKE LAGIVERE on the 26th day of February 2016, in Naqia Village, Tailevu in the Central Division had carnal knowledge of **VR** without her consent.

23. To prove the offence of rape, the prosecution must prove the following elements beyond reasonable doubt;
- a) the accused;
 - b) penetrated the vagina of the complainant with his penis;
 - c) without the consent of the complainant; and
 - d) the accused knew or believed that the complaint was not consenting; or the accused was reckless as to whether or not she was consenting.
24. The first element is concerned with the identity of the person who committed the offence. The second element involves the penetration of the complainant's vagina. In this case, the accused admits penetrating the vagina of the complainant. You should consider that the first and the second elements of the offence are proven beyond reasonable doubt.

25. The third and the fourth elements are based on the issue of consent. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated the complainant's vagina without her consent.
26. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;
- a) by force; or
 - b) by threat or intimidation; or
 - c) by fear of bodily harm; or
 - d) by exercise of authority.
27. Apart from proving that the complainant did not consent for the accused to insert his penis inside her vagina, the prosecution should also prove that, either the accused knew or believed that the complainant was not consenting; or the accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.
28. What is meant by 'reckless as to whether or not she was consenting'? If the accused was aware of the risk that the complainant may not be consenting for him to penetrate her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant's vagina, you may find that the accused was reckless as to whether or not the complainant was consenting. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not.
29. You should note that you will not find direct evidence on an element of an offence based on the knowledge or intention of the accused. Knowledge and intention of an accused can only be inferred based on the proved facts. In this regard, you should consider the circumstances under which the accused penetrated the complainant's vagina with his penis.

30. In the event you have a reasonable doubt as to whether the prosecution has proven one of the two elements based on consent beyond reasonable doubt and therefore you find that the offence of rape is not established, then you have to consider whether the accused is guilty of the lesser offence of defilement.
31. A person who penetrates the vagina of a complainant who is between the age of 13 and 16 years with his penis is guilty of the offence of defilement under section 215(1) of the Crimes Act. It is a defence to this offence if it appears to you that the accused had reasonable cause to believe, and did in fact believe, that the complainant was of or above the age of 16 years. However, it is not a defence that the complainant consented to sexual intercourse when it comes to the offence of defilement.
32. The prosecution says that the complainant did not consent for the accused to insert his penis inside her vagina. The defence says that the complainant gave her consent for the accused to have sexual intercourse with her. The accused also says that he did not know the complainant's age at the time he had sexual intercourse with her.
33. Now let us look at the evidence.
34. The complainant said in her evidence that;
 - a) *She is 16 years old. Her date of birth is 22/03/01. On 26/02/16, after she came back from church, her mother sent her to her aunt's place around 6.30pm. On her way back from her aunt's house the accused called her. She said, she thought that the accused might tell her to relay a message. Then the accused pulled her inside the house and closed the door. She tried to shout but she couldn't because the accused was covering her mouth with his hand. Then the accused pulled down her skirt along with her underwear. He pulled out his penis and then penetrated her vagina with his penis.*
 - b) *At that time no one else was there inside that house. She said the accused penetrated her vagina for about 30 minutes. After that she told the accused that she wants to go home. But the accused told her to wait for a while because still there were people on the road. She said she tried to look for a way out. At one point when the accused went to get a pot, she went outside and walked towards her house.*

- c) *She went home that day after seven. Her mother was looking for her. So she hid herself under the bed. She was scared that her mother would smack her. Later when her mother found her and asked her where she was, she told her mother that she was at the accused's place. Then her mother tried to smack her but she ran inside the bedroom. She said she knows the accused and they are cousins.*
- d) *During cross examination she agreed that in her statement to the police she had stated that the time she was sent to the village by her mother was at 8pm. She agreed that she mentioned in her police statement that on her return, Tevita was calling her from the accused's house. Subsequently when she was asked, she said the version she gave in court is the correct version. She said 'yes' when it was suggested that she could have called for help if something happened forcefully. Then when it was suggested to her that she did not do so because nothing happened forcefully, she said Tevita was covering her mouth.*
- e) *She agreed that it was the first time she spoke with the accused. She agreed that the accused would not be aware of her age because they met for the first time. She agreed that when they entered the room, the room was dark. When it was suggested that she lay on the mattress that was on the floor and at that point the accused came on top of her and inserted his penis into her vagina she said 'yes'. When she was asked whether it is true that the accused had sex with her for 4 minutes she said 'no'. But again when it was suggested that during that 4 minutes she kept telling the accused to hurry up because she wanted to go home, she said 'yes'. She agreed that she did not push the accused away during sexual intercourse.*

35. Next witness was the complainant's mother. She said;

- a) *Around 6pm on 26/02/16, she sent the complainant to her aunt's place. The complainant did not return by 7.30pm and therefore she started searching for the complainant. She said that the accused said 'no' when she asked the accused whether he saw the complainant. She went back to her house after 12.30am. She found the complainant hiding under the bed. When she asked the complainant, the complainant did not say anything but was shivering. She then pulled the complainant out and asked again, but the complainant did not respond. She noted that the complainant had changed her clothes. She slapped the complainant's right arm because the complainant did not respond. She said she slapped the complainant 4 times. Thereafter the complainant told her that she was with the accused and Tevita. The complainant told her that the complainant had done something bad.*

36. Next prosecution witness was Dr. Joseph Tigarea. He said;

- a) *He had practiced for 6 years. He is currently doing his post graduate diploma in Pediatric. He examined the complainant on 28/02/16 at the CWM hospital. He said the complainant had scratch marks on the right side of the face and there were no other injuries. He said there should be something sharp like a finger nail to cause*

that injury. When he was asked whether those injuries could have been caused if someone had used the hand to cover the mouth, he said 'yes'. He said that it is possible not to find lacerations if there was penetration of the vagina by a penis two days before the examination.

- b) During cross examination when he was asked whether the scratch marks can be a result of the mother smacking the child he said it is possible. He said he would expect to find bruises and lacerations if a person had forceful sex for 30 minutes.*
- c) During re-examination he said one slap on the face would cause the injury he noted.*

37. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving his guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to give sworn evidence and to call one witness.

38. The accused said in his evidence that;

- a) He only visits Naqia village when there is a function. He used to reside at Tamavua and also at Lautoka. Around 7pm on 26/02/16, he called the complainant when he saw her walking in front of his house. He knows the complainant because they are cousins. He said he did not know the complainant's age when he met her. He said they had a conversation in front of the house. Before that, he met the complainant at Nakulakula settlement where they had a conversation. He asked the complainant to come to his house and she said 'no'. Then he told her that he is going home, and left. While he was at home he saw the complainant going past his house several times and he called her. Then they had a conversation inside the room. He said first he went inside the house and then inside the room and the complainant followed him. When they were inside the room the complainant told him that she will be rushing back home. Inside the room he asked the complainant to have sex and she said 'yes'. He said the room was dark.*
- b) He laid the mattress on the floor and the complainant was standing beside him while he did that. Then they undressed themselves. Then the complainant lay on the mattress and he lay on top of her. The complainant did not tell him anything at this point in time. Then they had sex for about 4 minutes. The complainant did not try to push him away. He said he ejaculated outside.*
- c) Around 8 o'clock when he was sitting with his friends, the complainant's mother came. He told her that he does not know where the complainant went. He said he did not apologize to the complainant's mother.*
- d) During cross examination he said he's 27 years old. He agreed that he's 13 years older than the complainant. When it was suggested to him that he had covered the*

- complainant's mouth and that had caused the scratches on her face, he said it is a lie. He said the complainant consented for him to insert his penis into her vagina.*
- e) He said it would take about 5 to 6 minutes to walk from his house to the complainant's house. He said the complainant left his house around 7.55pm. He denied apologising to the complainant's mother and said that two of his friends witnessed that he did not apologise. When it was suggested to him that none of the two friends are there with him to testify, he said one is present.*
- f) During re-examination he said he does not know the complainant's age.*

39. Second witness for the defence was Nemani Ravia. He said that;

- a) On 26/02/16, when he was sitting in front of the accused's house around 8pm, the complainant's mother came and asked them whether the complainant is there. He said the complainant's mother is his uncle's wife. He said he told the complainant's mother that the complainant is not there because he saw the complainant leave. About 1 hour later, the complainant's mother came back and she told him that the complainant had been raped.*
- b) During cross examination he admitted that the accused is his cousin and they are very close. He admitted that he was present in court when the accused gave evidence.*

Analysis

40. Based on the evidence you decide to accept, you should consider the following issues;
- a) Did the accused penetrate the complainant's vagina with his penis without the complainant's consent?*
- b) Did the accused know or believe that the complainant was not consenting? or*
Was the accused reckless as to whether the complainant was consenting or not?
41. If you find that the complainant did consent or you have a reasonable doubt as to whether she did not consent for the accused to penetrate her vagina, then you should find the accused not guilty of rape and consider whether the accused is guilty of the offence of defilement.
42. If you are sure that the accused penetrated the complainant's vagina without the consent of the complainant, but you find that the prosecution has not proven that

the accused knew or believed that the complainant did not consent or that the accused was reckless as to whether the complainant was consenting or not; then again you should find the accused not guilty of the offence of rape as charged and consider whether he is guilty of the offence of defilement.

43. As I have explained to you earlier, if the complainant is between the age of 13 and 16 years, it is not a defence for the offence of defilement that the complainant consented for the accused to penetrate her vagina. However, it is a defence if it appears to you that the accused had reasonable cause to believe, and did in fact believe, that the complainant was of or above the age of 16 years. That is, it should appear to you that the accused had reasonable cause to believe that the complainant is above the age of 16 years and that the accused in fact believe that when he had sexual intercourse with the complainant.
44. The defence says that the complainant's version is not credible and probable and the complainant came up with the allegation that she was raped by the accused because she was afraid of her mother. The accused admits that he knew the complainant because they are cousins but he says that he was not aware of her age.
45. You heard the evidence of the third witness, the doctor who medically examined the complainant. He gave his opinion based on what he observed when he examined the complainant. You are not bound to accept that evidence. It is a matter for you to give whatever weight you consider appropriate with regard to the observations made and the opinion given by the doctor.
46. If you believe the evidence of the second prosecution witness who is the mother of the complainant that the accused said 'no' when she asked the accused whether he saw the complainant and thereby conclude that the accused had lied to the said witness, you should remember not to jump into the conclusion that the accused lied because he is guilty of committing the offence of rape. He would have had other reasons to lie to the complainant's mother at that time. However, the accused


does not admit that he lied to her. He said that he told the complainant's mother that he does not know where the complainant went.

47. Further, if you believe the second prosecution witness' evidence that the accused apologised to her, you should remember that the fact that the accused apologised alone is not sufficient to conclude that he is guilty of the offence of rape. The accused might have apologised for some other reason. The accused says that he did not apologise.
48. You must remember to assess the evidence for the prosecution and defence using the same yardstick but bearing in mind that always the prosecution should prove the case against the accused beyond reasonable doubt.
49. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
50. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise;
 - (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject his evidence. But if you disbelieve him, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether prosecution has proved all the elements beyond reasonable doubt. If you are sure that the

prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

51. Any re-directions?
52. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.
53. Your possible opinion should be as follows;
Rape - guilty or not guilty
If not guilty
Defilement - guilty or not guilty




Vincent S. Perera
JUDGE

Solicitors for the State : Office of the Director of Public Prosecution, Suva.
Solicitor for the Accused : Legal Aid Commission, Suva.