

IN THE HIGH COURT OF FIJI
AT LAUTOKA
IN THE WESTERN DIVISION

CRIMINAL CASE NO.: HAC 07 OF 2014

STATE

V

AMI CHAND

Counsel: Mr. A. Datt for the State
Mr. W. Pillay for Accused

Dates of trial: 12th, 15th 16th and 19th June, 2017

Date of Summing Up: 19th June, 2017

SUMMING UP

Madam and Gentlemen Assessors,

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 Defence made submissions to you about the facts of this case. That is their duty as 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 Court room. 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.
13. 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 offence with which the accused-person is charged, in a short while.
14. It would be understandable if one or more of you came to this trial with certain assumptions as to what constitute rape, what kind of person may be the victim of rape, what kind of person may be a rapist, or what a person who is being, or has been, raped will do or say. It is important that you should leave behind any such assumptions about the nature of the offence because experience tells the courts that there is no stereotype for a rape, or a rapist, or a victim of rape. The offence can take place in almost any circumstances between all kinds of different people who react in a variety of ways. Please approach the case with open mind and dispassionately, putting aside any view as to what you might or might not have expected to hear, and form your opinion strictly on the evidence you have heard from the witnesses.
15. I must emphasize that the assessment is for you to make. However, it is of paramount importance that you do not bring to that assessment any preconceived views or stereotypes as to how a Complainant in a rape case such as this should react to the experience. Any person who has been raped, will have undergone trauma whether the accused were known to her or not. It is impossible to predict how that individual will react, either in the days following, or when speaking publically about it in Court or at the Police Station. The experience of the Courts is that those who have been victims of rape react differently to the task of speaking about it in evidence.
16. I now turn to elements of the offence with which the Accused is charged. The count against accused is as follows:

Statement of Offence

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

Particulars of Offence

AMI CHAND on the 31st day of December 2013 at Veisaru, Ba in the Western Division, penetrated the vagina of **RESHMI MONIKA**, with his penis, without her consent.

17. I will now deal with the elements of the offence of Rape in this case. A person rapes another person if the person has carnal knowledge with or of the other person without other person's consent.
18. Carnal knowledge is to have sexual intercourse with penetration by the penis of a man of the vagina of a woman to any extent.
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. Consent as defined in Section 206 of the Crimes Act, means the consent freely and voluntarily given by a person with a necessary mental capacity to give such consent.
21. Prosecution needs to prove that Ami Chand had sexual intercourse with the Complainant Reshmi Monika without her consent. What is consent? It's a legal term, I will try and explain to you what consent is in simple terms. It means to agree to something. saying yes, doesn't end there. Consent needs to be given, freely and voluntarily and it must be an informed one. The person who is saying 'yes' must know what he is getting into. Consent has to be genuine.
22. Consent is not freely and voluntarily given when it is obtained by force, or by threat or intimidation or, by fear of bodily harm or, by exercise of authority etc. Definition of consent further says, submission, or giving in to something without physical resistance to an act of another person shall not alone constitute consent. Simply put, if somebody does not resist physically it does not necessarily mean that she or he had given consent. Different people react differently to situations.

You don't necessarily need violence, kicking, and shouting etc. to show that one is not consenting.

23. When you evaluate evidence of witnesses, please bear in mind their intellectual capabilities, their personal circumstances, their level of education and maturity, and then try and look at things from their perspective. If it appears reasonable from their perspective, then you might think he or she is reliable and believable.
24. 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 Complainant who saw, heard and felt the offence being committed. In this case, for example, the Complainant was a witness who offered direct evidence as to what she saw, heard or felt.
25. Documentary evidence is also important in a case. Documentary evidence is the evidence presented in the form of a document.
26. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether the witness is consistent in his or her own evidence or with his or her previous statements or with other witnesses who gave evidence. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same tests and standards in evaluating evidence.
27. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in Court. You have seen how the witnesses' demeanor in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers or were they evasive? How did they conduct themselves in Court? In general, what was their demeanor in Court? But, please bear in mind that many witnesses are not used to giving evidence and may find Court environment distracting.
28. You must bear in mind that the evidence comes from human beings. They cannot have photographic or video graphic memory. The witness can be subjected to the same inherent weaknesses that you and I suffer insofar as our memory is concerned.
29. In testing the credibility of a witness, you can consider whether there is delay in making a complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. 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.

30. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. It is a matter for you to determine whether, in this case, complaint Complainant made to police is genuine and what weight you attach to the complaint she eventually made.
31. In testing the consistency of a witness you should see whether he or she is telling a story on the same lines without variations and contradictions. You should also see whether a witness is shown to have given a different version elsewhere and whether what the witness has told Court contradicts with his/her earlier version. You must however, be satisfied 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.
32. 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.
33. 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.
34. You may also see whether there is a motive or obvious reason to fabricate a false allegation against the Accused. If there is an obvious reason to make up a case, then you may attach less weight to Complainant's evidence.
35. Please remember, there is no rule in Fiji for you to look for corroboration of Complainant's story to bring home an opinion of guilt in a case of sexual nature.

The case can stand or fall on the testimony of Complainant, depending on how you are going to look at her evidence.

36. The offence charged requires proof that the Complainant did not consent. The offence may or may not be accompanied by force or the threat of force, but please note that it is no part of the Prosecution's obligation to prove that the accused used force or the threat of force.
37. I will now deal with the summary of evidence in this case. In doing this I do not propose going through all the evidence. It should still be fresh in your minds. If I refer to only some aspects of a witness's evidence it does not mean that the rest is unimportant. You must weigh up and assess all the evidence in coming to your decision on this case.

CASE FOR PROSECUTION

PW 1 Mr Prem Chand

38. Prem Chand is a sugar cane cutter. In December 2013, he was residing in Veisaru with his wife and two daughters. He had been living together with his wife for about 13 years after a love marriage. He knew Ami Chand who was staying alone in the house adjacent to his house which was separated from his house by a partition. His family moved to that place on a request by Ami Chand's brother Ganga.
39. His wife is a quiet and a bit slow person with her household work. One day, when he came back from work, his elder daughter Preetika Chand informed him in the presence of her mother that, when her mummy was making roti, Ami Chand was trying to hold her.
40. On the following day, Complainant told him that Ami Chand wrapped a small rope on her waist and took her to his house. Complainant was crying as she was telling him all these. After listening to the Complainant, he reported this incident to police the day he was informed.
41. After reporting this matter to Police he went with Ami Chand's brother Ganga to inform Ami Chand that he will be moving away from that place. At that time, Ami Chand was locked up at the Police Station.
42. After the incident, he, with his family, moved from there and went to cut sugar cane for one Ramesh in the same village while staying at Ramesh's house. On 16th January 2014, a man named Anil Chand approached him on behalf of Ami

Chand and informed him to stop going to court and asked for reconciliation. Anil told him, because of this, his children's education would be affected; he will be running around and won't be able to work, running out of money.

43. Anil had a rental car with him and invited him to go to town to have a talk. Then he went with his wife in his car to a big house in Ba Town. His wife went inside with Anil, while he was sitting on a bench. From that big house three of them went to another place. Anil went inside with his wife while he was waiting outside.
44. Under cross examination, Prem Chand said that his wife informed about the incident only after his daughter had told him. He did not report to police that Anil Chand took them to Ba town. He admitted that he and his wife went with Anil on their own free will.

PW 2 Preetika Chand

45. Preetika is 12 years old and only 9 years old at the time of the alleged incident. She was allowed to give evidence under oath when the Court was satisfied that she understood the nature of oath.
46. In 2013 December, she was residing in Weisaru with her family. On 31st December 2013, around 7.00 am, she was watching TV inside the house with her small sister while her mother was making roti outside, at the porch where the kitchen was.
47. She saw from the window that Ami Chand was touching her mother's breast from behind. She informed her dad about this incident a bit later when he returned from work.
48. Under cross examination, Preetika said that she did not see her mother shouting or protesting when Ami Chand was touching her mother's breast.

PW 3 Reshmi Monika Prasad (Complainant)

49. In December 2013, Reshmi was residing at Veisaru with her husband, two kids and her father. Ami Chand was staying in his house that is joined together with her house.

50. On 31st December 2013 around 7.00 am, she was making roti in the kitchen. Her two daughters were watching movies inside the room. Her husband had gone to a vegetable farm and her father had gone to town.
51. Ami Chand came to the kitchen and started touching her breast. She said she didn't like it. She was trying to free herself. Her daughter Preetika Chand had seen this from the window. Her daughter Preetika said that she will inform this to her papa.
52. After that, Ami Chand wrapped a rope around her waist and took her to his part of the house and to his bed. He opened his pants and lifted up her skirt. Then he made her lie down and came on top of her. Then he inserted his penis into her vagina and started having sex with her. She did not like it. She was scared.
53. After that, he stood up and informed her not to say this to anybody. If she were to tell this to anybody, then he will press her neck, he warned. She felt scared. Then he went away.
54. She came inside her house, crying. Two daughters were watching movies inside the room. She did not tell her daughters about what had happened because she was scared of Ami Chand. Her husband came to know about this incident when Preetika Chand informed him. Her husband reported the matter on the next day.
55. He didn't tell husband about the incident because she was scared. She thought that Ami Chand would press her neck.
56. After this incident they left Ami Chand's house and were staying at Ramesh's place except her father who had gone to stay with her brother.
57. While staying at Ramesh's house, one Anil from New Zealand came and wanted her and her husband to go to town with him. Anil first took them to an office of a lawyer in town. The lawyer asked her whether it was done consensually. She said that she was raped.
58. Then they were taken to an advisory in another place. Anil told them not to fight the case. He also said that they will incur more expenses fighting the case and she will be called again and again. Then Anil took her inside Advisory Yogesh's officer while her husband was sitting on a bench outside. Yogesh asked her to sign a document. Only Anil and Advisory Yogesh were inside the office when Yogesh told her to sign the paper.

59. Reshmi identified the document she signed and read it in evidence. The document states that she consented to have sex with Ami Chand on the 31st and wished to withdraw the complaint against Ami Chand. Reshmi said that she did not know the meaning of the word 'consented'. She was not able to pronounce the heading of the document and did not know the meaning of 'Statutory Declaration'. After she signed, Yogesh took the paper away. Then Anil dropped her at home.
60. She denied that she had consented to have sex with Ami Chand on 31st December, 2013. She said that she signed that document because she was informed that expenses will occur and, her character will be spoiled.
61. Reshmi said that her family came to reside at Ami Chand's place on 01st December 2013. She admitted, under cross examination, that her husband reported the matter to the Police on the 06th of January 2014, six days after the incident, and that on the same day she gave a statement to the Police. She also admitted that on 20th of March 2014, she gave another statement to the Police relating to the Statutory Declaration that she had signed.
62. Reshmi described her relationship with her husband as of December 2013 being good.
63. She had a rolling pin in her hand when Ami Chand started touching her breasts. When asked why she didn't use it to hit the Accused, she said that she wanted to do that but didn't use it because she did not want to be in a big problem having caused serious injuries to him. He was also holding her tightly while she was trying to free herself. She pushed him and managed to free herself. Then he wrapped the rope around her waist.
64. Reshmi said that she was shouting and telling him not to do it when she was being taken to his room. She could not shout louder to get the attention of her children because he closed her mouth tightly.
65. She got hurt in the struggle. There were some scratch marks on her leg and feet. There is still a scar of it. There was a pain on her hips, back and neck. She was taken to the hospital where she was prescribed some tablets and given an injection. The medical report was blown away during hurricane.
66. When she was taken to his room, his hands were not on her mouth but she did not shout for help because Ami Chand had threatened that he will press her neck. She was scratching and hitting him. She did not tell police that she got hurt as she was not able to recall everything to tell police.

67. Her father returned from town around 5.00 pm. and her husband around 7 pm. He didn't tell her father, husband or Police because she was scared. Police would have protected her. But she was not able to understand that. She also had no money.
68. When Complainant was asked if she had told about the alleged incident to anybody before her daughter told Prem Chand, she said that she had informed her daddy regarding the incident and he had got angry on him. She further said that her father had informed her husband regarding the incident and that they were talking among each father. Both of them were angry. She said that she told police that she had informed about the incident to her father. She admitted that police had not recorded it in the statement.
69. Under re-examination Reshmi said that she had never agreed to have sexual intercourse with the Accused.
70. That is the case for the Prosecution. At the closure of the Prosecution case, 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.
71. As you are aware, Accused elected to remain silent. That is his right under the Constitution. You must not draw a negative inference that Accused did not give evidence under oath because he is guilty. Accused need not prove his innocence or prove anything at all. Burden of proof remains with the prosecution throughout.

CASE FOR DEFENCE

72. Defence called one witness, Yogesh. His evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
73. Yogesh is a Justice of Peace and the Advisory Counsellor for Ba area. He attested the Statutory Declaration of Reshmi Monika (DE1) on 16th January, 2014 at his office in Ba. Reshmi came to her with her husband, Peter, and another man from New Zealand who is a relative of Ami Chand.
74. Reshmi understood the content of the Statutory Declaration when it was read and explained to her in Hindi. She did not make any complaint and signed the

Declaration on her own free will without any hesitation. He did not see any pressure being applied to her by anybody.

75. Yogesh admitted that he was aware of the seriousness of a rape case with which Ami Chand was charged, nevertheless, he did not inform police about the Statutory Declaration because his duty as a JP was only to explain and attest documents. He however admitted that he neglected his duty in his capacity as the Advisory Counsellor of his community.

ANALYSIS

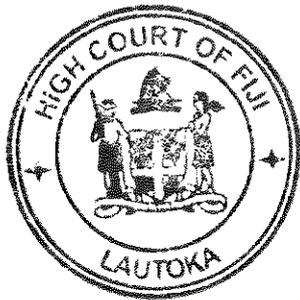
76. Lady and gentlemen assessors, the Accused Mr. Ami Chand is charged with one count of Rape. Before you could find the Accused guilty, you must be satisfied beyond reasonable doubt that he penetrated the Complainant without her consent.
77. Defence Counsel cross- examined the Complainant on the basis that the Accused had had sexual intercourse with Complainant with her consent. Therefore, there is no dispute as to the identity of the Accused and as to the act of sexual intercourse by the Accused. What is in dispute in this case is consent. Therefore you must decide whether Complainant agreed to have sexual intercourse with the Accused.
78. Prosecution says that the Accused used force and violence and the sexual intercourse took place without Complainant's consent. Defence denies the allegation and says that the sexual intercourse took place with her consent. Conflict is dramatic and turns on one word against the other.
79. Prosecution called three witnesses, the Complainant Reshmi Monika, her husband Prem Chand and daughter Preetika. Prosecution based its case substantially on the evidence of the Complainant.
80. First, you have to be satisfied that the evidence Complainant gave is truthful and believable. If you are satisfied that the evidence she gave is truthful and believable, you can safely act upon her evidence in coming to your conclusion. No corroboration is required from an independent source.
81. You must decide whether you are sure the Complainant did not consent to sexual intercourse with the Accused. That will require an assessment by you of the Complainant's evidence.
82. Prosecution says that Complainant made a complaint to police because she had not consented.

83. Defence says that Complainant did not make any complaint about the alleged incident to anybody until her daughter Preetika informed her father Prem Chand six days after the incident because she had consented to sexual intercourse and the Complaint she ultimately made to police is a fabrication. Defence also argues that the facts that she had not shouted in protest; had received no injuries and had made a statutory declaration stating that she consented indicate that the sexual intercourse took place with her consent.
84. Complainant gave number of reasons why she failed to report the matter promptly at the first available opportunity. She said that she was scared of the Accused who had threatened to press her neck if she were to tell the incident to anybody. She also said that she was scared to tell her husband due to fear that he will assault her.
85. Complainant later said that she in fact informed her father even before Preetika informed Prem Chand about the incident. However, she had not stated in her statement to police that she had informed her father. She said later that she could not recall everything to tell the police. It is a matter for you to determine whether, in this case, complaint Complainant made to police is genuine and what weight you attach to Complainant's evidence.
86. Complainant said that she shouted and wanted to shout louder to alert her daughters but Accused closed her mouth tightly. She also said that she was trying to shout but could not and was scared of the Accused. During the course of Complainant's evidence, it was suggested to the Complainant that she could have shouted loudly and otherwise objected to what the Accused was doing. It was also suggested that she could have hit the Accused with the rolling pin. You heard the Complainant's explanations. In his closing argument Defence Counsel submitted to you that her failure to protest and react positively demonstrates that she was not telling the truth and that she had consented. This is an argument which you should consider with care when you do, 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 nonconsensual sexual activity may respond in variety of different ways.
87. Defence is heavily relying on DE.1 (Statutory Declaration) which the Complainant had signed before Yogesh to prove that she had consented. Prosecution says that she was made to sign this Declaration under circumstances of undue influence and misrepresentation of facts by Anil Chand and that she had signed it without understanding its true content and consequences. Complainant had made a second statement to Police in March, 2014 about this Declaration and maintained in Court that she was raped and did not want to

withdraw the complaint. She also said that she was forced to sign the Declaration. You heard evidence from Prem Chand, Complainant and Yogesh about this Declaration and circumstances under which it was signed. You decide whether she had signed this document on her own free will with full understanding of the content and consequences of it and what weight you should attach to this document.

88. You decide what version you accept and what version you reject. 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.
89. The Accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty.
90. If you accept the Prosecutions' version of events, and you are satisfied that the Prosecution has proved the case beyond reasonable doubt, so that you are sure of Accused's guilt you must find him guilty of the charge.
91. 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
19th June, 2017

Solicitor: Office of the Director of Public Prosecution for State
Gordon and Company for Accused