

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 130 OF 2016

STATE

v

SAMUELA TAWANANUMI

**Counsel : Ms S Navia / Ms S Naibe for State
Ms V.Narara for Accused**

Dates of Trial : 27, 28 November, 2018

Date of Summing Up : 29 November, 2018

(Name of the victim is suppressed. She is referred to as AK)

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 facts. 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 the 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. 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 opinions 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. You are free to draw inferences from proved facts if you find those inferences reasonable in the circumstances. 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 facts in a 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 gives evidence. Was he or she evasive? How did he or she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable. But, please bear in mind that many witnesses are not used to giving evidence and may find Court environment distracting.

13. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether witness is consistent in his or her own evidence and with his or her previous statements or with other witnesses who have gave evidence in court. It does not matter whether that evidence was called for the

Prosecution or for the Defence. You must apply the same test to evaluate evidence.

14. 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.
15. You can consider whether there is delay in making a prompt 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 there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. 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 for such delay.
16. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. Victims of rape can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. Victim's reluctance to report the incident could also be due to shame, coupled with the cultural taboos existing in her society in relation to an open and frank discussion of matters relating to sex with elders. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response by victims of rape. It is a matter for you to determine whether, in this case, complaint the complainant had made to police was genuine and what weight you attach to the complaint she eventually made.
17. Evidence was led that the complainant looked distressed when she arrived at her grandmother's place to spend her school break after the alleged incident and also at school. This is how you should approach the evidence of distress if you believe distress evidence to be true. You must be satisfied beyond a reasonable doubt

that complainant's distressed condition was genuine and that there was a causal connection between the distressed condition and the alleged rape. The distress evidence is only relevant in assessing whether the alleged sexual incident occurred. The distress evidence must not be used to connect the accused to the alleged offence. Before you use the evidence of distress, you must be sure that the distressed condition was not artificial and was only referable to the alleged rape and not any other cause. In deciding these matters, you must take into account all relevant circumstances. If you are so satisfied then you may give such weight to the evidence of distress as is appropriate. But if you are not so satisfied then you must disregard the evidence of distress.

18. In this case the Prosecution called complainant's Grandmother Ana to show that complainant had made a complaint nearly six months after the alleged incident. Prosecution says that the complainant is consistent in her conduct because she had relayed the same story to her grandmother sometimes after the alleged incident. Defence argues that the complainant had not made a prompt complaint because the alleged rape and sexual assault never happened.
19. If you consider this complaint to be a recent complaint in the circumstances of this case, I will direct you as to how you should deal with recent complaint evidence. Grandmother Ana told us in her evidence what she heard from the complainant. Ana was not present when the alleged incident occurred and therefore, she is not capable of giving evidence as to what actually happened between the complainant and the accused. Therefore, what Ana heard from the complainant is not evidence as to what actually happened between the complainant and the accused. Recent complaint evidence is led to show consistency in the conduct of the complainant and is relevant only in assessing her credibility. If you find Ana to be a credible witness then you may use her evidence to test the consistency and credibility of the complainant.
20. I will now direct you as to how you should deal with evidence presented by the doctor as an expert witness. Usually, witnesses are not allowed to express opinions. They are allowed to give evidence on what they have seen, heard or felt by physical senses only. The only exception to this rule is the opinions of experts. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their

opinions expressed on a particular fact to aid court to decide the issues/s before court on the basis of their learning, skill and experience.

21. In this case, the doctor Konrote gave evidence as an expert witness. Doctor's evidence is not accepted blindly. You will have to decide the issue of rape before you by yourselves and you can make use of doctor's opinion if her reasons are convincing and acceptable to you; and, if her opinion had been reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence led in the case. You have to bear in mind that the expert evidence does not implicate the accused or link him to the alleged offence even if you decide to rely on it. You can only use doctor's opinion to test the constancy of complainant's story that she was raped.
22. You may consider whether there is a reason or motive on the part of the witnesses to make up an allegation against the accused. If the witnesses had such a motive, then you may think that this allegation has been fabricated.
23. 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.
24. The agreed facts of this case are that:
 - i. The accused is Samuela Tawananumi.
 - ii. The accused is the biological father of the complainant.
 - iii. The complainant was medically examined on the 29th of April, 2016 at Lautoka Hospital by Dr. Tieri Konrote Waqanicakau.
25. I have given you a copy of the information which contains the charge against the accused. Please refer to it. The information reads as follows:

First Count

Statement of Offence

Sexual Assault: Contrary to Section 210 (1) (a) of the Crimes Act of 2009.

Particulars of Offence

SAMUELA TAWANANUMI between the 1st of November, 2015 and 30th of November, 2015 at Lautoka in the Western Division unlawfully and indecently assaulted AK by touching her vagina.

Second Count

Statement of Offence

Rape: Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act, 2009.

Particulars of Offence

SAMUELA TAWANANUMI between the 1st of November, 2015 and 30th of November, 2015 at Lautoka in the Western Division penetrated the vagina of AK with his penis, a child under the age of 13 years.

26. I will now deal with the elements of the offence of Rape. 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.
27. Consent as defined by 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. A person under age of 13 years is considered by law as a person without necessary mental capacity to give consent. The complainant in this case was 9 years of age at the time of the alleged offence and therefore, she did not have the capacity under the law to consent. So, the Prosecution does not have to prove the absence of consent on the part of the complainant because law says that she, in any event, cannot consent.

28. The elements of the offence of Rape in this case are that:
 - a. the accused, **SAMUELA TAWANANUMI**
 - b. penetrated the vagina of the complainant- AK, with his penis.

29. Other parts of the offence are irrelevant to the facts of this case.

30. I will now deal with the elements of the offence of Sexual Assault. A person commits the offence of Sexual Assault if he,
 - (a). Unlawfully and indecently,
 - (b). Assaults another person.

31. For the assault to be indecent it must be accompanied by a circumstance of indecency. A conduct is unlawful when it is done without a lawful excuse. A conduct is indecent when it is as such that ordinary people would so describe it, in light of prevailing standards of morality and, more specifically, in light of whether the victim has consented to the conduct in question. However, Prosecution is under no burden to prove that the particular assault took place without the consent of the victim so long as it constitutes an unlawful and indecent act.

32. Apart from the elements of the offence, the identity of the person who is alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the accused-person that connects him to the offence that he is alleged to have committed.

33. 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 victim was a witness who offered direct evidence, if you believe her as to what she saw, heard and felt.
34. Documentary evidence is evidence presented in the form of a document. In this case, the medical report is an example if you believe that such a record was made. You can take into account the contents of the document if you believe that contemporaneous recordings were made at the relevant time upon examination of the complainant.
35. You saw complainant give evidence standing behind a screen so she could not see the accused. The screen was put up to protect the complainant because she is an underage vulnerable witness. By looking at this special arrangement, you must not draw any negative inference against the accused.
36. You will appreciate that children do not have the same life experience as adults. They do not have the same standards of logic and consistency, and their understanding may be severely limited for a number of reasons, such as their age and immaturity. Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult. You have to be mindful about that.
37. Children may not fully understand what it is that they are describing, and they may not have the words to describe it. They may, however, have come to realize that what they are describing is, by adult standards, bad or, in their perception, naughty. They may be embarrassed about it, and about using words they think are naughty, and therefore find it difficult to speak. Bear in mind that they are being asked questions by an adult they see as being in a position of authority—the policeman in the interview, or a counsel in Court. That can make it difficult for them.

38. 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.
39. I will now remind you of the Prosecution and Defence cases. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the salient features. If I do not mention a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your decision in this case.

Case for the Prosecution

AK (Complainant)

40. Madam and Gentlemen assessors, you heard what LK, the complainant in this case had told police on the 26th April, 2016. Her statement was read in evidence in court. Generally a statement given by a witness to police is not admissible in evidence unless it was used to test the credibility or consistency of his or her evidence in court. There are exceptional cases where the law permits the courts in the interest of justice to allow such statements to be read in evidence. This is one such case and therefore you can consider the statement the complainant had given to police as evidence before this court for all purposes and you may give such weight to it as you think appropriate.
41. In her statement, AK states that sometimes in November 2015, she was residing in a two bedroomed house in Natokowaqa with his biological father Samuela Tawananumi, her mother Lusua, her baby brother, aunt and 3 cousins.

42. In November 2015, at one night, she was sleeping alone in the bedroom. Her parents were sleeping in the other bedroom and her cousins were sleeping in the sitting room. Her aunt was still at work and had not returned home.
43. While she was still sleeping she felt someone taking off her long pants and panty. Then she looked up and saw her father. When she looked up to him he then told her to sleep. She closed her eyes. She felt her father touching her *mimi* (vagina). After that he went back to sleep. She was so scared of him. She never told anyone what happened as her father told her not to tell mummy what happened, and if she did, he will kill her.
44. The next day at night she was sleeping with her cousins in the second bedroom. Her mummy was sleeping in the other bedroom. While she was sleeping, her father came and woke her up and told her to go with him to the sitting room. She then went to the sitting room with father where no one was sleeping. Then he made her lie down, took off her pants and panty and then he put his *mimi* (penis) into her *mimi* (vagina). She felt pain inside her, it was only a short time. Then he told her not to tell mummy what happened and then he made her wear her clothes and then he went back to sleep and she went back inside the bedroom.
45. The next morning when she went to the toilet she then saw blood in her *mimi* and wiped it with the toilet paper. She never told anyone what happened until yesterday (25th April 2016) when she told her grandmother what happened.
46. AK further states that her dad did this to her more than twice but it all happened in November 2015 before the school holidays. When school finished for the third term in 2015, she went to her mother's village in Wayalevu, Yasawa to spend the Christmas Holidays.

47. Under cross-examination AK confirmed that the statement read in evidence is the one she gave to police on 26th April, 2016. She admitted that in 2015 she was in Class 4 attending Lautoka Methodist Primary School. AK denied that she was sleeping with her aunt and her two children in the night the first alleged incident happened.
48. AK said that she did not wake her mother up. Her mother was fast asleep at that time. She could not scream or yell to alert somebody because her father had blocked her mouth. She said that she told police that he had blocked her mouth. She told father not to do it but he still did it.
49. AK admitted that she relayed these incidents to her grandmother on the 25th of April, 2016, which is 5 months after the incidents when her father was separated from her mother and her father was not staying with her any longer.

PW 2 Dr. Tieri Margaret Konrote

50. Dr. Konrote medically examined AK at the Lautoka Hospital on 29th April, 2016. Doctor tendered in evidence the medical report (PE.2) she had prepared after the medical examination. Doctor's initial impression was that the patient was timid and she did not make eye contact; she preferred to look at the ground when she was relaying the history.
51. Upon general physical examination, the doctor had not detected any abnormalities. The patient was generally in good health. Her genitals were clean with no external bruising or laceration.

52. Upon examination of the vagina of the patient, the doctor found that AK's hymen was not visualized or intact. She said that rarely there are genetic syndromes in which children are born without a hymen. Apart from genetic syndromes, trauma or penetration could have been among the possibilities that could cause hymen being not present. Anything, including penis, that penetrates the vagina could tear the hymen. She said that her finding is consistent with the history given by the patient.
53. Under Cross-examination, the doctor said that if there were tears on the vaginal area, they would have been obvious only if they had happened within a recent period. She said that in the majority of the cases where a child is alleged to have been abused, there was no physical abnormality found. The doctor agreed that it is also possible that her finding could have been inconsistent with the history given by the patient. Doctor admitted that she could not say for sure what caused the patient to lose her hymen because she wasn't present during the alleged event.

PW 3 Ana Nayate

54. Ana is the grandmother of the complainant. She said that her daughter, Luisa Dawai, was married to Samuela and AK is their daughter.
55. Ana told us what she heard from her granddaughter AK. AK told her that in the month of November, 2016, on a Sunday night, she was lying down alone in the room. She could feel that somebody removed her long pants and her panty. She could feel that somebody was touching her private parts. When she opened her eyes she saw her father. Her father told her to go back to sleep.

56. On Monday, (that was on the following day) she was sleeping with other sisters and brother who are the daughters and son of her big aunty. They were all sleeping in that same room. Her father came and woke her up for them to sleep in the sitting room. He removed her long pants and her panty and put his penis into her vagina. When she wanted to speak to the father, he blocked her mouth. She said it was painful to her but the act only happened in a short period of time. On the next morning when she went to the toilet, she found blood coming out from her private part.
57. Then Ana described what she observed in AK during her school break in November 2015 and what prompted her to inquire about the incidents. Ana said that she took AK and her other grandchildren to Waya Island in Yasawa for them to spend the holidays with her. AK was quite active girl. On this particular school break she observed AK going to the extension of the house, staying there alone and crying. Whenever she found AK there, she always called her and asked her what's wrong with her. She had attended a lot of workshops regarding child abuse. By looking at AK's unusual behaviour during school break, it came in to her mind to ask her.
58. Ana further said that when they had come back in January for her to start school, the teachers had reported to her eldest sister that they had seen a change in AK and that she was not interested at all in her studies. She urged AK and asked her if she could tell what happened. AK told her, *"grandma, dad informed me if I mentioned this to anyone, he will kill me"*
59. Under cross-examination, Ana agreed that during this 8 weeks holiday, AK did not complain to her. By the time she arrived with AK at Natokowaqa, Lautoka, Samuela had left and was no longer residing at home. She heard that AK's mother Lusua was living with another man in Nadi.

60. She said that when she returned to Natokowaqa, in the month of March 2016 she came to know about the incidents and the matter was first reported to Welfare and the Welfare had reported it to police.
61. AK's teacher reported that AK was not concentrating on her education recommend if she could be enrolled at "Sunshine Special School". AK was enrolled at the Sunshine Special School after the complaint was lodged with the police.
62. That is the case for Prosecution.
63. After the Prosecution had closed its case, you heard me explain to the accused his rights in defence; his right to remain silent, right to give evidence and call witnesses on his behalf.
64. You know that the accused elected to exercise his right to remain silent. That is his right. You should not assume that he remained silent because he is guilty. He has nothing to prove and is under no obligation to prove his innocence. In the process of cross-examination, the Defence Counsel put defence's case to the witnesses for Prosecution in order to impeach their credibility. You must consider the version of the defence in coming to your conclusions.

Analysis

65. Lady and gentlemen assessors, the accused is charged with one count of Rape, and one count of Sexual Assault. To find accused guilty of Rape in this case, you must be sure beyond reasonable doubt that the accused penetrated complainant's vagina with his penis. To find the accused guilty of Sexual Assault, you must be sure beyond reasonable doubt that the accused touched complainant's vagina.

66. Prosecution called the complainant, her grandmother Ana and doctor Konrote. Prosecution says that the complainant is a reliable witness and her evidence is further bolstered by the recent complaint evidence, distress evidence and the medical evidence of the doctor.
67. If you are satisfied that the evidence complainant gave in court is truthful and believable, you can safely act upon her evidence in coming to your conclusion. No corroboration of her evidence is required.
68. Defence case is one of complete denial. Defence Counsel argues that the complainant did not tell the truth in court. She wants you to disbelieve the witnesses called by the prosecution.
69. The complainant had complained to her grandmother nearly 5 months after the alleged incident. AK had made the complaint when she was questioned by her grandmother after noticing AK's abnormal behaviour. Complainant said that her mouth was blocked; that she was scared of her father; that she was warned not to tell the incident to her mother and if she did he will kill her. AK had complained to her grandmother when her father had left the house. Prosecution says that there is a reasonable explanation for the delay in reporting the incident.
70. Defence on the other hand says that this rape incident never happened and that is why AK had not made a prompt complaint to anyone. You had the opportunity to observe the demeanor of the complainant. Having considered the directions I have given, you decide if the complaint she ultimately made is genuine and the version of the Prosecution is acceptable.
71. Prosecution says that the medical evidence and distress evidence is consistent with complainant's evidence about the allegation of rape. You decide what weight you should give to medical and distress evidence and whether they boosted the credibility of Prosecution's version of events.

72. It is up to you to decide which version is to believe and whether you could accept the version of the Defence. If you accept the version of the Defence you must find the accused not guilty on each count. Even if you reject the version of the Defence, still the Prosecution should prove their case beyond reasonable doubt.
73. If you believe that the complainant is telling you the truth when she said that the accused put his *mimi* or penis into her *mimi* or vagina, you should find the accused guilty of Rape. If you are satisfied that accused touched complainant's vagina, you should find the accused guilty of Sexual Assault. But if you do not believe complainant's evidence regarding the alleged offences, or if you have a reasonable doubt about the guilt of the accused, then you must find the accused not guilty. Your possible opinion is either guilty or not guilty on each count.
74. You may now retire to deliberate on your opinions. Once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.
75. Any re-directions?



Aruna Aluthge

Judge

AT LAUTOKA

29th November, 2018

Solicitors: Office of the Director of Public Prosecution for State
Office of the Legal Aid Commission for Accused