

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 159 of 2017

STATE

v.

APISAI RAKAVONO

Counsel: Ms. S Serukai for State
Mr. F. Vosarogo for Respondent

Date of Hearing: 12th to 14th March 2018

Date of Summing Up: 15th March 2018

SUMMING UP

1. The name of the Complainant is suppressed. She is referred to as "AB".
2. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. You will then retire to consider your respective opinions.
3. Our functions are different. 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.
4. You are to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. 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.

5. 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 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 any comment I make about facts, unless it coincides with your own independent opinion.
6. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box and the documents tendered as exhibits. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The opening address made by the counsel for the prosecution is not evidence. The purpose of the opening address is to outline the nature of evidence intended to be put before you. The closing addresses of the counsel of the prosecution and the defence 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.
7. 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 put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. 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 I will give the greatest possible weight on your opinions when I form and deliver 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.

Burden and Standard of Proof

9. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused is guilty for the offence.
10. The burden of proof of the charge against the accused is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.
11. 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’s guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused 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 and the Elements of the Offences

12. The accused is charged with one count of Rape, contrary to Section 207 (1) (2) (a) and (3) of the Crimes Act. The particulars of the offence are before you. Therefore, I do not wish to reproduce them in my summing up.
13. The main elements of the offence of Rape as charged are:
 - i) The Accused,
 - ii) Had carnal knowledge with the Complainant.

14. The carnal knowledge means that the accused had penetrated the vagina or vulva of the Complainant with his penis. For the purpose of convenience, I refer the vagina and the vulva of the Complainant as the vagina.
15. The Complainant was eleven years old at the time of this offence took place. The defence has not disputed the age of the Complainant. Hence, she is incapable of giving consent to any kind of carnal knowledge.

Agreed Facts

16. I now take your attention to the agreed facts. They are the facts that the Prosecution and the Defence agreed on without any dispute. Hence, you are allowed to consider the agreed facts as proven facts beyond reasonable doubt by the Prosecution.

Penetration

17. I will now explain you the element of penetration. Evidence of slightest penetration of the vagina or the vulva of the Complainant by the Accused with his penis is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

Alternative Counts

18. If you find the accused did not penetrate the vagina or vulva of the Complainant with his penis as charged, you are then allowed to consider a lesser alternative count of "Attempt to Commit Rape, though it is not formally charged in the information. The main elements of the offence of "Attempt to Commit Rape" are that:
 - i) The accused,
 - ii) Attempt to penetrate the vagina or the vulva of the Complainant with his penis.

19. In respect of the element of attempt, you have to consider two things. First is that whether he intended to penetrate the vagina of the Complainant with his penis. The second is that, with that intention, whether he did something which was more than mere preparation for committing that offence. It is for you to decide whether what he did was more than mere preparation.
20. Accordingly, you have to be satisfied that the accused had an intention to penetrate the vagina or the vulva of the Complainant with his penis and with that intention he tried to penetrate the vagina or the vulva of the Complainant with his penis.
21. If you find that the accused is neither guilty for the offence of Rape nor the offence of Attempt to Commit Rape, you are still allowed to consider another alternative count, that is Sexual Assault though it is not formally charged in the information. The main elements of the offence of Sexual Assault are that:
 - i) The accused,
 - ii) Unlawfully and Indecently,
 - iii) Assault the Complainant.
22. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act as indecent. It is your duty as Assessors to consider and decide whether the acts of rubbing and trying to penetrate the vagina of the Complainant by the Accused with his penis is an indecent act, making it a sexual assault.

Evidence of Corroboration

23. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. It means that if you are satisfied with the evidence given by the Complainant and accept it as reliable and truthful; you are not required to look for any other evidence to support the account given by the Complainant.

24. 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, a rapist or a victim of rape.
25. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety 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 of the hearing.
26. It is your duty as judges of facts to assess the evidence in order to determine whether the prosecution has proven the charges beyond reasonable doubt. In doing that, 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. Demeanours of the Complainant in the court while giving evidence is not necessarily a clue to the truth of the Complainant's account.

Evidence of Prosecution

27. Let me now remind you briefly the summary of the evidence presented by the prosecution during the course of the hearing. This is a very short hearing with three witnesses giving evidence. Therefore, I trust that you can properly and correctly recall all of the evidence adduced during the hearing.
28. The Complainant could recall that she went to fetch firewood with her step-father, who is the accused and two of her siblings on the 5th of May 2017. They crossed the river using a bamboo craft. The accused had then sent the two siblings of the Complainant to another side of the bush to collect firewood. He then asked the Complainant to follow him. While she was following the accused, he holds her both hands and made her lie

down on the trunk of a fallen tree. He then took his penis out and put it into her female private part. You may recall that she then explained that she referred her vagina as female private part. He rubbed his penis on her vagina and tried to put it inside her vagina, but he couldn't do it as it was sore. The Complainant said that when he was putting his penis inside her vagina, she felt the soreness. He held his penis in his hand and tried to put it inside her vagina. The accused had done it for five minutes. The Complainant then saw water coming out from his penis.

29. The Complainant in her evidence said that she was scared and did not call out for any help. There were no nearby houses. The place was only surrounded by the bush. After this incident, the accused had asked her to dress up her pants. He then called out the two siblings who went to another direction to collect firewood. When they did not respond, the accused asked the complainant to go and look for them.
30. The Complainant had not told anyone about this incident until she related this matter to her Aunty on the Sunday. On that Sunday, the accused was getting ready to go back to Ra with the Complainant and her family. She then told her aunty that she could not go back to Ra as the accused had done something bad to her while they went to fetch firewood. Her Aunty had told this to her uncle. They then reported this incident to the Police. Thereafter, the Complainant was taken to the hospital for medical examination.
31. The Complainant had grown up with her aunty until she became five years old. She then moved to her parents in Ra. The Complainant had not told this incident to her mother as she felt ashamed. The Complainant had thought that, if she tells her mother, the mother will tell others about this.
32. The Aunty of the Complainant in her evidence said that the Complainant started to cry, when she was getting ready to go back to Ra. The Complainant then told her about this incident. The Aunty said that she could not believe it, when she heard it. She had felt ashamed to hear this. On the same day, she had informed this to the mother of the Complainant. The Aunty then told them to leave the Complainant with her as she did not trust the accused anymore after hearing this allegation. The Aunty then took sometimes to think about this and then decided to report it to the Police. The Aunty in

her evidence said that she had to think about the relationship between her family and the Complainant's family before she made a decision to report this matter to the Police.

33. You may recall that Doctor Elvira Ongbit in her evidence explained the medical findings that she found during the medical examination of the Complainant on the 10th of May 2017. Doctor Elvira explained that she found the hymen of the Complainant was intact. She has further found superficial abrasions and bruises on the inner side of the left *labia minora*. According to the opinion of the Doctor Elvira, one possible cause of such injuries would be an erected penis applying force or rubbing on the area. She further said that any other reasons, such as scratching or unprotected horse ridings could cause such injuries. According to the evidence given by the Doctor Elvira, it is possible to have a slightest penetration into the vagina without damaging the hymen. Having considered the nature of the injuries found in the vulva, Doctor Elvira said that she could not rule out a penetration into the vulva.

Evidence of the Defence

34. At the conclusion of the prosecution's case, the accused was explained about his rights in defence. The accused opted not to give evidence.
35. The accused does not have to give evidence. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing. It does nothing to establish his guilt.

Analysis

Presentation of the Evidence of the Child Complainant

36. You have seen that the Complainant gave evidence from a special room via Skype. She was accompanied by one of the court staff, who assisted her in giving evidence. Giving of evidence in this way is perfectly normal in cases like this. It is designed to enable the witness to feel more at ease when giving evidence. It is not intended to prejudge the evidence which the witness gives. The fact that the evidence has been given in that manner, must not in any way be considered by you as prejudicial to the accused.

Expert Evidence

37. It is the general rule that witnesses are normally not allowed to give opinion and only allow to give evidence on what they have seen, heard, or felt by their physical sense. However, the exception is that the evidence of expert witnesses. Expert witnesses are those who are learned and experts in a particular subject or field with relevant experience. Such witnesses are allowed to give evidence of their opinion.
38. In this case you have heard the evidence of Dr. Elvira Ongbit. She is a medical doctor and gave her professional opinion about the injuries sustained by the Complainant.
39. Expert evidence is permitted in a criminal trial to provide you with scientific and professional information and opinion, which is within the witness expertise, but which is likely to be outside your experience and knowledge. It is by no means unusual for evidence of this nature to be called; and it is important that you should see it in its proper perspective, which is that it is before you as part of the evidence as a whole to assist you with regard to the injuries, the physical and medical condition of the Complainant subsequent to this alleged offence.
40. With regard to these particular aspects of the evidence you are not experts; and it would be quite wrong for you as assessors to attempt to and/or to come to any conclusions on those issues on the basis of your own observations or experiences. However you are entitled to come to a conclusion based on the whole of the evidence which you have heard, and that of course includes the expert evidence. You should bear in mind that, having carefully considered, if you do not accept the evidence of the expert, you do not have to act upon it.

Evidence of Recent Complaint

41. You have heard the evidence that the Complainant has told her Aunty about this incident. Aunty of the Complainant in her evidence said that Complainant told her about this incidence when she was getting ready to go back to Ra with the Accused and her family.

42. This form of evidence is known as evidence of recent complaint. It is not an evidence as to what actually happened between the Complainant and the Accused. Aunty of the Complainant was not present and witnessed what happened between the Complainant and the Accused.
43. You are entitled to consider the evidence of recent complaint in order to decide whether or not the Complainant has told the truth. The Prosecution proposed you that Complainant's complaint to her Aunty is consistent with her account of this alleged incident and therefore she is more likely to be truthful. It is for you to decide whether the evidence of recent complaint 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 between the Accused and the Complainant. It therefore cannot of itself prove that the complaint is true.

Evaluation of Evidence

44. Ladies and Gentleman assessors, I now kindly request you to draw your attention to the directions on evaluation of evidence. It is your duty to determine this case based on the evidence. In doing that, you are required to evaluate the evidence in order to determine the credibility, reliability and truthfulness of them. That will assist you to determine what evidence you may accept and what part of the evidence you may refuse. In doing that, 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 she has testified.
45. Moreover, you must bear in your mind that a witness may tell the truth about one matter and lie about another; he or she may be accurate in saying one thing and not accurate in another thing.
46. 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 should then 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 her own evidence but also with other evidence presented in the case.

47. It is your duty to consider the demeanour of the witnesses, how they react to being cross examined and re-examined and were they evasive, in order to decide the credibility of the witness and the evidence.

Evidence of the Child Complainant

48. The most important part of your task is to judge whether the child witness has told the truth, and has given a reliable account of the events that she was describing. Some of you will have children and grandchildren who are of a similar age to the complainant. If so, I think you will recognize the sense of the advice I am going to offer you about your judgment of the evidence of the child complainant, but remember that I am speaking only about an approach to consider the evidence. Still the evaluation of the evidence is your responsibility. You do not have to accept my advice and if you do not agree with it you should reject it.
49. 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 etc. Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult. 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.
50. Experience has shown a number of things. A child may not fully understand the significance of sexual activities and that may be reflected in the way they remember it or describe it. A child's perception of the passage of time is very likely to be different from that of an adult. A child's memory can fade even in the short term. When recounting events later, even a fairly short time later, a child's recall of when and in

what order events occurred may not be accurate. She may well not be able to speak of the context in which those events occurred. A child may have particular difficulty dealing with conceptual questions such as how she felt some time ago, or why she did or did not take a particular course of action.

51. Remember how you normally talk to children of this age. You should bear those difficulties in mind when you consider the answers given by the child complainant. All decisions about the evidence are for you to make.

Delay in Reporting

52. You may recall that the learned counsel for the Defence suggested to you to consider the two days of delay in reporting this matter to the police could make less likely that the complaint made against the accused was true. It is a matter for you to consider and resolve. However, it would be wrong to assume that every person who has been the victim of a sexual assault or close family member of such a victim, will report it as soon as possible. The experience of the courts is that victims of sexual offences and their relatives can react to the trauma that they have faced 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. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response. A late complaint does not necessarily signify a false complaint; likewise an immediate complaint does not necessarily demonstrate a true complaint.

Caution Interview of the Accused

53. I now draw your attention to the caution interview of the accused, which is tendered by the prosecution with the consent of the defence as prosecution exhibit number two.
54. According to the agreed facts, the prosecution and the defence do not dispute the making of the caution interview by the accused. Therefore, it is your duty to determine whether the contents of the caution interview are truthful, and what weight you give them as evidence. It is for you to decide whether you consider the whole of the caution

interview or part of it or none of it as truthful and credible. You must consider all other evidence adduced during the course of the hearing in deciding the truthfulness and the reliability of the confessions and its acceptability.

Final Directions

55. Ladies and gentleman, I now take your attention to the final directions of the summing up.
56. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged, you can find the accused guilty for the said offence of Rape.
57. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged, you must find the accused is not guilty for the said count of Rape.
58. If you find him not guilty for the offence of Rape, you are then allowed to consider the alternative count of Attempt to Commit Rape. If you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Attempt to Commit Rape, you can find him guilty of the alternative count of Attempt to Commit Rape.
59. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Attempt to Commit Rape, you must find the accused is not guilty for the said count of Attempt to Commit Rape.
60. If you find him not guilty for the offence of Rape and Attempt to Commit Rape, you are then allowed to consider the second alternative count of Sexual Assault. If you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has

committed the offence of Sexual Assault, you can find him guilty of the second alternative count of Sexual Assault.

61. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault, you must find the accused is not guilty for the count of Sexual Assault.

Conclusion

62. 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. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.
63. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?




R.D.R.T. Rajasinghe
Judge

At Suva
15th March 2018

Solicitors
Office of the Director of Public Prosecutions for the State.
Mamlakha lawyers for Defence.