

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 124 OF 2016

STATE

-v-

OSEA CAWI

**Counsel : Ms S Navia / Ms S Alagendra for State
Ms K Vulimainadave for Accused**

Dates of Trial : 13th to 17th September, 2018

Date of Summing Up : 17th September, 2018

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

SUMMING UP

Lady 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 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. 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 given 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. I now wish to direct you on recent complaint evidence. You heard that when LV's mother Mariana questioned about the blood stains she had noted on LV's panty, LV had told her mother that "*Koko Osea poked his finger inside her vagina*". However, Mariana was not present when the alleged incident happened and therefore, she is not capable of giving evidence as to what actually happened between the victim and the accused. Therefore, what Mariana heard from the victim is not evidence as to what actually happened between the victim and the accused. Recent complaint evidence is led to show consistency in the conduct of the victim and is relevant only in assessing her credibility. If you find Mariana to be a credible witness than you may use her evidence to test the consistency and credibility of the victim.
16. Police interviewing officer read the caution statement of the accused in evidence. I now direct you as to how you should approach caution statement evidence. The Defence says that the caution interview was conducted in Nadroga dialect but the accused had to sign the record of interview that was in English and therefore he could not understand its content. Defence says that the accused was thereby prejudiced. They also say that certain questions and answers have been fabricated by the interviewing officer and therefore it should not be relied upon as a true statement of the accused. Prosecution on the other hand says that the accused had received English education up to Form 4 and he preferred to be interviewed in English and he signed the record of interview voluntarily adopting its contents. Police officers deny that they had fabricated the interview.

17. If you are satisfied that the accused had given those answers in his interview, it is for you to assess what weight you should give to answers given by the accused. It is your duty to consider the caution statement as a whole and other evidence led in trial in deciding where the truth lies. If you are not sure, for whatever reason, that the confession made by the accused is true, you must disregard it. If, on the other hand, you are sure that it is true, you may rely on it.
18. 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.
19. In this case, the doctor Rohitesh 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 his reasons are convincing and acceptable to you; and, if his 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 victim's story that she was digitally raped.
20. 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.
21. 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.

22. The agreed facts of this case are:

1. The accused Osea Cawi is 31 years old.
2. The accused and the complainant resided at Malevu Village, Sigatoka in 2016.
3. The matter was reported to the *Turaga ni Koro* and the Police on the same day (7/6/16).
4. On the above same day (7/6/16), Doctor Rohitesh Kumar medically examined the complainant at the Sigatoka Hospital.
5. The Police arrested the accused and the accused was interviewed under caution at the Sigatoka Police Station on the 08th of June, 2016.
6. Later the accused was charged.
7. The birth certificate of the complainant.

23. 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:

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

OSEA CAWI on the 07th day of June, 2016 at Sigatoka in the Western Division penetrated the vagina of **LV** a child under the age of 13 years by inserting his finger into the vagina of the said **LV**.

24. 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.

25. 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 victim in this case was 4 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 victim because law says that she, in any event, cannot consent.

26. The elements of the offence of Rape in this case are that:
 - a. the accused, Osea Cawi
 - b. penetrated the vagina of the victim, with his finger.

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

28. 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.
29. 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.
30. You saw victim give evidence hiding behind a screen so she could not see the accused. The screen was put up because the victim in this case is an underage vulnerable witness. By looking at this special arrangement, you must not draw any negative inference against the accused.
31. 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.
32. 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.
33. Please remember, there is no rule in Fiji for you to look for corroboration of victim'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.

34. 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

LV (Victim)

35. In the process of testing the competency of the child victim to give evidence the court asked LV as to why she came to court, she first said "I don't know" then she said "*Osea used his finger to poke my vagina*".
36. You heard what LV, the victim in this case, had told police on the 8th of June, 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 victim had given to police as evidence before this court for all purposes and you may give such weight to it as you think appropriate.
37. According to her statement, LV was 4 years of age when she gave her statement to police. Her date of birth was 13th January, 2012. She was staying in Malevu village with her father Sevani and mother Mariana. On 7th of June, 2016 when

she went to Sila or Rusila's house after breakfast to get some sugar for Tai Marawa, Osea inserted his finger in her vagina. It was paining. Osea did not take off her clothes. Osea called her inside the room and pushed his finger inside and left out.

38. Under Cross-examination LV said that she is currently staying at Malevu Village in Sigatoka. Rusila's or Sila's house and Tai Marawa's house are also at Malevu in Sigatoka. Rusila's house is far from Tai Marawa's house. She usually goes to Rusila's house to watch movies. She could not remember one boy by the name of Mesa who was staying with Tai Marawa.
39. She said that on 7th of June, 2016 she went to Tai Jo's house where Osea was staying. She saw Osea in that house. When it was put to her that she was not telling the truth when she said that Osea used his finger to poke her vagina, LV said '*I am telling the truth*'. When it was put to her that Osea never did that, she said "*he poked my vagina*".

PW 2 Dr. Rohitesh Kumar

40. Dr. Rohitesh said that in 2016 he was attached to the Sigatoka Hospital as a general practitioner. On 07th of June, 2016, she examined LV and recorded his findings in a Police Medical Examination Form (PE2).
41. He said that the patient was quite inquisitive and joyful and was playing around. There was a bit of tenderness just above her genital area. Dry blood stain was noted around the superior region of the vagina from 10 to 2 o'clock positions. A whitish discharge was noted around the vulva area. A small laceration of 1 to 2 mm was noted at 6 o'clock position. The hymen was not present in this patient. When he examined inside the vagina he noted some blood around the vulva and the membrane that is usually present in the entry of the vagina wasn't present.

42. From the history he gathered and the examination conducted, the doctor's conclusion was that there was a blunt trauma to the patient's vagina; however, it does not rule in or rule out penetration. He further said that as a result of the alleged sexual act performed on her by consent or without consent; this blunt trauma would have caused her to lose her virginity. Doctor said that a blunt trauma could be a result of a punch or by an object like a finger, a penile shaft being used to apply pressure on this area. But he specifically stated he could not say who is responsible for this act.

43. Under Cross-examination, the doctor said that the history was related by the child and her mother and that it did not necessarily imply that the account given by them was true and that's why he had conducted the examination and sent the blood samples to Lautoka. Even by looking at the result of blood test he still could not determine as to who had caused this blunt trauma to this patient. The doctor further said that dancing, horse riding; strenuous physical activity could lead to the damage to the hymen but not necessarily a blunt trauma to the vagina.

44. Answering a question posed by court, the doctor said that the laceration that he had seen at 6 o'clock position would mean that a force applied had caused the vaginal walls to go apart leading to that laceration at 6 o'clock position. The laceration was noted in the lower vaginal wall and he could not definitively say if there was a penetration or not.

PW 3 Mariana Ranadi Radave

45. LV's mother Mariana gave evidence next. On 7th of June, 2016, she was at home. Her daughter LV at around 10 o'clock, wanted to go to her cousin sister Rusila's place which she allowed. LV came back again and went to Saimoni's house next to which is the house occupied by Tulia, Jolame and Osea.

46. When LV came back to the shop, she didn't know that something had happened to her and went home to prepare for the prayer. She took LV to the bathroom.

When she took off her panty, she could see a blood stain on LV's panty. She was shocked and just asked her, '*what happened?*' LV told straight away that *Koko Osea put his fingers inside her vagina and it's very painful*. Koko means uncle. She then told LV not to have a bath and put on her panty again. Then they went looking for Osea. Osea was at the community hall. Osea denied that he had done that. She informed Osea that she is going to police station because her daughter already mentioned his name. Before going to the police station, she first went to *Turaga ni Koro* and then went to the police station. After lodging a report, she took LV to the hospital on that same afternoon.

47. Mariana said that she had known Osea very well for 10 years; Osea is related to her husband as a cousin and he always used to come to her village; LV knew Osea very well. He is the only Osea she knew in the village. Osea was at Tai Jolame and Tulia's house.
48. Under Cross Examination, Mariana said that LV told her that it was Koko Osea who had done it. She admitted that in her statement to police it is not stated that her daughter referred to Osea as 'Koko Osea'. Mariana said that LV had told her that Koko Osea did it.
49. Mariana admitted that she did not like Osea after this incident; but she said that before the incident, Osea used to come home and she prepared food for him. She denied that LV had not mentioned Osea's name but she had made it up. She admitted that she wanted to chop Osea on that same day with a cane knife even after the matter was reported to *Turaga ni Koro* and that Osea did not do anything to her when she tried to attack him. She denied that the injuries to her daughter were caused by one Semesa.
50. Under re-examination, Mariana said that she was afraid when she saw Osea in a facebook post having *kava* at Malevu after the incident and that she had called the police to inform his presence in the village.

PW 3 PC Trevor

51. PC Trevor said that he was the witnessing officer for the caution interview of Osea Cawi that was conducted by WDC Kelera at Sigatoka Police station on the 8th of June 2016. He said that Osea was cooperative, fit and healthy and no complaint was received from him before, during and after the interview. The interview was conducted in English because he preferred to be interviewed in English. At the end of the interview Osea read the interview for 20 minutes and signed.

52. Under cross examination, PC Trevor denied that before the interview he had spoken to Osea in Nadroga dialect and that the interview was also conducted in Nadroga dialect. He admitted that Osea had talked about an old injury caused to his hip in 2009 and the fact that Osea was medical assisted is not recorded in the interview. Witness denied that Osea gave answers in Nadroga dialect and answers to question 28 onwards were fabricated by the interviewing officer.

PW 4 WDC Kelera Ulumatua

53. WPC Kelera said that she was the investigating officer in this case and that she conducted the interview of Osea on 8th of June, 2016. Osea was corporative. No injuries noted on his body and no complaints received from him. The interview was conducted in the English language because Osea opted to be interviewed in English.

54. WPC Kelera recognized the record of original hand written interview 4(B) and the English translation 4(A) she produced at the interview and tendered them in evidence. Witness said that all 50 questions were posed to the accused by her and all 50 answers were given by Osea Cawi voluntarily and he signed to acknowledge the same. She said that no one fabricated the answers. Osea was given an opportunity to read through his interview and to alter or correct.

55. Under cross examination the witness denied that she had spoken to Osea in the Nadroga dialect before the commencement of the interview. She said that the Osea indicated to her that he went up to Form 4 Kavanagasau Secondary School where the medium of instruction is English. Witness admitted that Osea informed of the history of an old injury but he wished to continue with the interview.
56. Witness denied that some of the questions and answers from question 28 onwards were fabricated by her. She also denied that some leading questions she had put to the accused were not based on what the victim had told police.

PW 5 Actg. Cpl. Misidomo Baseisei

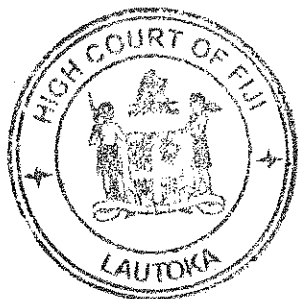
57. Witness Baseisei said that he charged Osea on 09th of June, 2016. Osea was normal and in good health. No complaint was received. The charge was conducted in English language because Osea wished to be charged in English language and agreed it to be recorded in English language.
58. Under cross examination witness denied that the charge was conducted in the Bauan dialect.
59. After the Prosecution had closed its case, you heard me explain the accused his rights in defence; his right to remain silent, right to give evidence and call witnesses on his behalf.
60. You know that the accused elected to exercise their 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.

Analysis

61. Lady and gentlemen assessors, the accused is charged with one count of Rape. To find the accused guilty of rape in this case, you must be satisfied that the prosecution had proved beyond a reasonable doubt that the accused penetrated victim's vagina with his finger.
62. Prosecution called five witnesses, including the victim and her mother. Prosecution's case is substantially based on the evidence of the victim. The prosecution says that victim's evidence was further bolstered by the confession of the accused to police, recent complaint evidence and the medical evidence of the doctor.
63. If you are satisfied that the evidence victim gave in court is truthful and believable, then you can safely act upon her evidence in coming to your conclusion. No corroboration of her evidence is required.
64. If you find that the victim has been digitally raped, you must be sure that it was the accused Osea Cawi and nobody else that had committed this crime. You have to be satisfied beyond reasonable doubt as to the identity of the accused before coming to the conclusion that he is guilty.
65. Prosecution says that the victim is consistent in her conduct because she had promptly informed her mother Mariana about the incident. LV made the complaint when she was questioned by her mother after she had seen the blood stains in LV's panty. Defence says that Mariana made up this allegation. The victim was 4-year old student at the time of the offence. You consider if the victim or her mother had made up this allegation against the accused who is related to the victim as her uncle. You had the opportunity to observe the demeanor of the victim and her mother. You decide if you could accept victim's evidence.

66. The victim had blood stains in her panty soon after the alleged incident. She was medically examined by Dr. Rohitesh on the same day. Prosecution says that the medical evidence is consistent with victim's evidence about the allegation of digital rape. You decide what weight you should give to doctor's evidence and whether it boosted the credibility of prosecution's version of events. As I already said, doctor's evidence does not implicate the accused.
67. At questions 28, 32, 33, 34, 40 and 41 in his caution interview the accused had confessed to the crime. If you are satisfied that accused had given those answers and that he had told the truth to police you can act upon his confession. If you are not sure that accused had given those answers or that he had not told the truth, you may disregard it.
68. Defence case is one of denial. Defence Counsel argues that the victim did not tell the truth in court. She wants you to disbelieve the witnesses called by the prosecution. She wants you to believe that victim's mother had made up this story and falsely implicated the accused for a crime somebody else had committed.
69. 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. Even if you reject the version of the Defence, still the Prosecution should prove their case beyond reasonable doubt.
70. If you believe that the victim is telling you the truth when she said that the accused poked his finger inside her vagina, you should find the accused guilty of Rape. But if you do not believe victim's evidence regarding the alleged offence, 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.
71. 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.

72. Any re-directions?



Aruna Aluthge

Judge

AT LAUTOKA

17th September, 2018

Solicitors: Office of the Director of Public Prosecution for State

Legal Aid Commission for Defence