

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 149 of 2018

[CRIMINAL JURISDICTION]

STATE

V

ASHOK NARAYAN

Counsel : Ms. K. Semisi for the State
Ms. A. Singh with Ms. S. Hazelman for the Accused

Hearing on : 10 - 12 June 2019

Summing up on : 13 June 2019

[The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "AN". No newspaper report or radio broadcast of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification of the said complainant.]

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. Please remember that you should accept the directions on law that I will be giving you in this summing up and should apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine

on the facts of this case unless you agree with that opinion. You are the judges of facts.

2. As I have told you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.
3. Evidence you should assess in this case is what the witnesses said from the witness box inside this court room, the admitted facts and the exhibit tendered. A few things you heard inside this court room are not evidence. This summing up is not evidence. Arguments raised by the lawyers for the prosecution and the defence during the proceedings, their questions and comments are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only if you agree with them.
4. A police statement of a witness can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of the evidence.
5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion.

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

6. The complainant said she is 14 years old. She gave evidence about events that had taken place between March 2015 and April 2016. You may have come across children of this age. You will have an idea of the way a child of a particular age behave, think, talk and the way they describe things.
7. Children can be confused about what has happened to them. Sometimes children do not speak out for fear that they themselves will be blamed for what has taken place, or through fear of the consequences should they do so. They may feel that they may not be believed. They may fear they will be punished. They may be embarrassed because they did not appreciate at the time that what they were doing was wrong. They may be embarrassed because they found that some aspects of the attention they were getting from the individual concerned were enjoyable.
8. I mention these possibilities because experience shows that children do not all react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned. What happened in this particular case is, however, a decision for you to make.
9. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.

10. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes when recalling past events.
11. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies when you compare the evidence given by witnesses on the same issue. This is how you should deal with any inconsistency you may come across. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. In this regard, you may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next.
12. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide.
13. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.

14. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
15. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proven facts and reasonable inferences. However, you should bear in mind that the inference you draw should be the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.
16. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
17. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
18. In order to prove that an accused is guilty of an offence, the prosecution should prove all the elements of that offence beyond reasonable doubt. If you have a reasonable doubt in respect of any element of an offence the accused is charged with,

as to whether the prosecution has proved that element, then you must find the accused not guilty of that offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in a short while.

19. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charges have been proved.
20. Please remember that you will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
21. Let us now look at the Information. It contains three counts. However, as I informed you after the prosecution case, there was no evidence adduced on the second count. Therefore, you are required to give your opinion on the first count and the third count only. The said charges reads thus;

COUNT ONE

Representative Count

Statement of Offence

Rape: contrary to section 207(1) and (2) (a) and 3 of Crimes Act of 2009.

Particulars of Offence

ASHOK NARAYAN between the 1st day of March 2015 and the 5th day of April 2016 at Nasinu in the Central Division had carnal knowledge of **AN**, a child under the age of 13 years.

COUNT THREE

Statement of Offence

Sexual Assault: contrary to section 210 (1) (a) of Crimes Act of 2009.

Particulars of Offence

ASHOK NARAYAN between the 1st day of March 2015 and the 31st day of March 2015 at Nasinu in the Central Division unlawfully and indecently assaulted **AN**, a child under the age of 13 years, by rubbing her vagina.

22. Please remember that you should consider each count separately though the accused is charged with more than one count. You must not assume that the accused is guilty of the other count just because you find him guilty of one count.
23. You would also notice that the first count in the Information says that it is a representative count. When an accused is charged with a representative count, the prosecution alleges that the relevant offence was committed on more than one occasion during the period given as the time of offence in the that particular count. However, to prove a representative count, it is sufficient for the prosecution to prove beyond reasonable doubt that the offence of rape as in this case, was committed at least once during the time period provided in the count.
24. To prove the offence of rape in this case in relation to the first count, the prosecution should prove the following elements beyond reasonable doubt.
 - a) the accused;
 - b) penetrated the vagina of the complainant with his penis;
 - c) without the consent of the complainant; orthe complainant was below the age of 13 years at the time of offence.

25. The first element is concerned with the identity of the accused. The prosecution should prove beyond reasonable doubt that it was the accused who committed the offence and no one else.
26. The second element involves the penetration. 'Carnal knowledge' in the context of this case is penetrating the vagina with the penis. The law says that this element is complete on penetration to any extent. Therefore, it is not necessary to have evidence of full penetration or ejaculation. A slightest penetration is sufficient to satisfy this element.
27. The third element of the first count involves consent. In this case, the prosecution alleges that the complainant was below the age of 13 years at the time the offences were allegedly committed. Law says that 'a child under the age of thirteen years is incapable of giving consent'. It is an admitted fact in this case that the complainant was 11 years old at the time of the alleged incident. Therefore, you should consider that the third element above is proven beyond reasonable doubt.
28. To prove the offence of sexual assault, the offence which the accused is charged on the third count, the prosecution should prove the following elements beyond reasonable doubt;
 - a) the accused;
 - b) unlawfully assaulted the complainant; and
 - c) the said assault is indecent and sexual.
29. The first element involves the identity of the offender who committed the offence. The prosecution should prove beyond reasonable doubt that it was the accused who committed the offence.

30. Assault is the use of unlawful force. A touch constitutes an assault if it is done without a lawful excuse.
31. The word “unlawfully” simply means without lawful excuse.
32. An assault is indecent, if it has some element of indecency and a right-minded person would consider such conduct indecent. You should also ask yourself, firstly, whether you consider that indecent assault could also have been sexual because of its nature; and if the answer is ‘yes’, whether, in view of the circumstances and/or the purpose in relation to the force used, that using of force is in fact sexual.
33. Now let us look at the evidence. The complainant (PW1) said in her evidence that;
- a) *She is 14 years old and the accused is her father. In March 2015 she and three of her brothers were living with the accused at Narere. She has two sisters and six brothers.*
 - b) *She said that the accused did ‘unwanted things’ with her in March 2015. She said that the accused used to put his spit on her vagina using his fingers and then rub it on her vagina. This happened inside the room and her three brothers were there when this happened.*
 - c) *On one night in March 2015 the accused woke her up when she was sleeping in the sitting room and told her to sleep in the room because it was cold. So she went to the bed and slept there. The accused then came to her and woke her. Thereafter the accused came on top of her and moved up and down on top of her.*
 - d) *The accused then got off the bed, took his clothes off and came back to the bed. The accused removed her clothes. Then the accused spat on his hand and rubbed it on her vagina. Thereafter the accused inserted his penis into her vagina. She said that the accused was putting his penis in and out of her vagina. Thereafter the accused told her not to tell anyone and he went to sleep.*
 - e) *She said that it was painful when the accused inserted his penis inside her vagina and he was inserting the penis for a long time. She said that it was one hour or so.*
 - f) *She said that when the accused was rubbing his spit on her vagina, she felt awkward and she told him not to do that. The accused did not say anything and continued with what he was doing. She said that the accused kept on inserting his penis into her vagina. After the accused inserted his penis inside her vagina he sat on the bed and then got off the bed to wear his clothes. She wore her clothes. Then she lied to the accused that she wants to go the washroom. She went to the washroom and stayed*

there for a long time. When she came back from the washroom, the accused was sleeping. Then she went to the sitting room and slept with her brothers.

- g) She said that when this happened her mother had left the house.*
- h) She said that she did not tell her brothers about this because the accused told her that he will kill her. She said that he told this to her the same night he punched her. She said that the accused punched her when he was inserting his penis into her vagina and when she was about to scream. She said the accused punched her on the side of her mouth.*
- i) She said that when the accused did this she did not see his face. She said she knew that it was the accused because the accused was standing near the door and she could see the accused from the light coming from the kitchen. The accused stood there before he came inside the room. The light was bright enough to see him clearly.*
- j) She said the accused continuously did this to her between March 2015 to 5th April 2016. The accused also tried to insert his penis into her 'bum', but he could not insert it.*
- k) She said she told her mother's sister's daughter about what the accused did to her when she was staying at her mother's sister's house for two days. The daughter told her aunt (mother's sister) and then the aunt told her mother. Thereafter she went with her mother to the Navua Police Station to report the matter. She said that she was examined by a doctor.*
- l) During cross examination she agreed that her mother and the accused got separated in March 2015. She agreed that she did not tell her brothers or anyone in her school about the incidents. She agreed that she had spoken to her mother on the phone during the period between March 2015 and April 2016 but she had not told her mother about the incidents.*
- m) She agreed that if the accused punched her face she would have received injuries and her brothers would have seen that. She agreed that the house they lived in March 2015 was a one bedroom house. She agreed that if the accused did something bad to her, her brothers would come to know of it. When she was asked whether she saw any blood come out when she felt the pain she said 'no'. When she was asked whether she found it difficult to walk after the accused inserted his penis for one hour as she said in her evidence, she said 'no'.*
- n) She agreed that she loves her mother and that she wants to stay with her mother. She also agreed that she would do anything her mother would tell her to do. When she was asked whether she would agree that whatever she said in court was what her mother has told her to say, at once she said 'no'.*
- o) She said that her mother had signed her statement to police and she had written her name on top of the statement. She agreed that she had told the police that her brother was sleeping in the room when the accused inserted his penis inside her vagina. She*

further agreed that her brother was on the bed while the accused was inserting his penis for one hour. When it was suggested that her brother would have woken up if the accused had inserted his penis inside her vagina for one hour, she said that the brother was in deep sleep.

- p) When it was pointed out that in her police statement she has not mentioned the fact that the accused told her that he will kill her, she said she told that to police. It was pointed out to her that it is stated in her police statement that the accused was going to punch her. She denied saying that. She said she told the police that the accused punched her. She agreed that the police officer read the statement to her.*
- q) During re-examination she said that she did not tell her brothers and anyone in school about what the accused did to her because the accused had told her that he is going to kill her. She said she did not tell her mother when she was talking to her mother on the phone because the accused used to be just beside her when she spoke with the mother.*
- r) She said that she did not receive any injuries when the accused punched her. She said that her brothers were sleeping when the incidents happened. She said she was scared of the accused because of the way the accused used to hit her mother and that was the reason she did not tell anyone about the incidents over the one year period from March 2015 to April 2016.*
- s) She said that one brother was sleeping with the accused and the two other brothers were sleeping in the sitting room when the incident happened.*

34. The second prosecution witness was WPC Sereima Radrodoro (PW2). She said that;

- a) She was the Investigating Officer in this case. She said that the complainant's mother had lodged the report on 06/04/16. The accused was arrested on 11/04/16. He was interviewed and then was released to seek clarification regarding the case.*
- b) The clarification was sought because there were no findings in the medical report. She received the file again in April 2017 and the accused was charged on 07/03/18.*

35. The third prosecution witness was Dr. Bandana Priya Dharshani Prasad (PW3). She said that;

- a) She graduated from the Fiji School of Medicine in 2013. She is currently serving in the Emergency Department at the Colonial War Memorial Hospital. She is working there for the last 05 months. She worked at Naqali Health Centre for 01 year in 2015 and then at the Nausori Health Centre from 2016 to 2018. She had just started to specialize in the field of emergency medicine.*

- b) *She said she medically examined the complainant on 06/04/16. She tendered the medical report as PE1. She said that the consent was given by the complainant's mother for the medical examination.*
- c) *She had noted that the complainant was not in distress. She did not find any injuries in the complainant's 'external vagina'. There were no hymenal injuries. She then examined the anal area and she did not find any injuries.*
- d) *She said she was informed that the last sexual encounter was approximately 3 weeks prior to the examination. She said that studies have shown that there was healing of the hymen in 96% of penetrative sexual encounters mostly of pre-pubertal girls where the age range is 11 to 14 years. She said that puberty is the age when a person is capable of sexual reproduction.*
- e) *She said that the complainant can have penetrative sexual intercourse but still have normal medical findings. She said that this is possible because of the study which is available on American Academy of Paediatrics.*
- f) *During cross-examination she agreed that she cannot confirm that the complainant was sexually abused based on her medical findings.*
- g) *When questions were put to her from the court, she said that she was not part of the study which she was referring to and it is found online. She said she has not studied forensic medicine and agreed that she cannot give an expert opinion on the subject matter discussed in the study she was referring to.*

36. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving the accused's guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to remain silent. That is his right. You should not draw any adverse inference against the accused due to the fact that he decided to exercise that right and remained silent.
37. Please remember that I have only referred to evidence which I consider important to explain the case and the applicable legal principles to you. If I did not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.

Medical opinion

38. When a doctor gives a medical opinion, you are not bound to accept that evidence. You will need to evaluate that evidence for its strengths and weaknesses, if any, just as you would with the evidence of any other witness. It is a matter for you to give whatever weight you consider appropriate with regard to the observations made and the opinion given by a doctor. Evaluating such medical evidence will therefore include a consideration of the witness' expertise, the findings and the quality of the analysis which supports the opinion.
39. The third prosecution witness gave her evidence based on what she said she observed. She said that the opinion she gave was based on a study she found in the internet. She said that she had not studied forensic medicine and agreed that she cannot give an expert opinion on the subject matter of the study she was referring to. According to PW3 she has only 5 years of experience as a medical doctor. Therefore, you may disregard her opinion given on the observations made by her when she examined the complainant.
40. According to her she did not find any injuries on the complainant's vaginal area and the anal area. According to PE1, the doctor had been informed that the accused had had sexual intercourse with the complainant both anal and vaginal, nearly every day from March 2015 till 3 weeks before the medical examination.

Late Complaint

41. In this case, there was a delay of about 01 year for the complainant to make a complaint regarding the alleged incidents. As I have already highlighted, experience has shown that victims of sexual offences may react in different ways to what they went through. Some, in distress or anger may complain to the first person they see. Some, due to shame, fear, shock or confusion may not complain for some time or


may not complain at all. However, if there is a delay, that may give room to make-up a story, which in turn could affect the reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay in making a complaint, you should see whether there is a reasonable explanation to such delay. Ultimately your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offences the accused is charged with.

42. In relation to the first count, the prosecution is relying on the complainant's evidence where she said that the accused inserted his penis inside her vagina. The complainant said that the accused continually did this from March 2015. According to PE1 the doctor had been informed that the last incident had taken place 3 weeks before the examination. The accused denies this allegation. According to the medical report, PW3 had not observed any injuries on the complainant's vaginal area, including the hymen.
43. In relation to the second count the prosecution is relying on the complainant's evidence where she said that the accused spat on his hand and then rubbed her vagina. The accused denies this allegation.
44. It is an agreed fact that the accused and the complainant's mother are separated. It was suggested during cross-examination that whatever the complainant said in her evidence was what the complainant's mother had told her. The complainant denied this suggestion.
45. The defence counsel points out that there were inconsistencies in the evidence given by the complainant. It was pointed out that the complainant initially said in her evidence that there was no one else in the bedroom when the accused had sexual

intercourse with the complainant and later she said that one of her brothers was sleeping on the same bed when the accused did that. It was also pointed out that the complainant had told the police that the accused was going to punch her though she said in her evidence that the accused punched her.

46. I have explained to you how to deal with inconsistencies. You should follow the said directions when you deal with any inconsistency you may come across including the above.
47. The defence had pointed out that the account given by the complainant was not probable. During cross-examination the complainant said that she did not find it difficult to walk after the accused penetrated her vagina for about one hour. She also said that one of the brothers was sleeping on the same bed which the accused penetrated her vagina for about one hour.
48. Considering all the evidence you have to decide whether the prosecution has proved the elements of the offences which I have explained, beyond reasonable doubt. If you have a reasonable doubt regarding any one of the elements you should find the accused not guilty. If you are satisfied beyond reasonable doubt that the prosecution has proved all the required elements, then you should find the accused guilty.
49. Any re-directions?
50. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.

51. Your opinion should be whether the accused is guilty or not guilty on the first and the third counts.



Vinsent S. Perera
JUDGE

Solicitors:

Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the Accused