

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 177 OF 2016

BETWEEN : **STATE**

AND : **ASISH KUMAR**

Counsel : *Mr. A. Singh with Mr. R. Chand for the State*
Mr. M. Anthony for the Accused

Hearing on : *24th – 25th of August 2020*

Summing up on : *28th of August 2020*

SUMMING UP

Ladies and gentleman assessors;

1. It is now my duty to sum up the case to you. Your opinion is much important to me and I will be considering your opinion to a great extent in preparation of my judgment. In a short while, I will direct you on the law that applies in this case. You must accept my directions on law and 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 it coincides with your own reasoning. You are the assessors of facts.

2. As the representatives of the society, your duty here is sacred. Your role is to assist this legal system to serve justice. In doing so, you are guided by two equally important principals of prudence. To wit;

i) If a person has committed an offence, he should be meted out with an adequate punishment.

In other words, if you are sure that the accused has committed the alleged offence, then it is your duty to find him guilty. If an offender goes scot-free, he'll be ridiculing this legal system. It is your duty to not to let that happen.

ii) An innocent person should never be punished.

There is a saying that it is better to let 100 offenders go free than to punish one innocent person. That is, unless you are very sure that the accused has committed the alleged offence, you should not find him guilty.

If any of the said principles are violated, it would amount to a failure of the system, thus you have failed in your duty to the society. Having reminded you of your duty let me proceed.

3. Evidence in this case is what the witnesses said from the witness box inside this court room and the admissions made. As I have stated to you in my opening address, your opinion should be based only on them. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

4. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the Counsel for the prosecution or for the defense are not evidence. A suggestion made by a counsel

during the examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by counsel in their addresses are not evidence. You may take into account those questions, suggestions, arguments and comments when you evaluate the evidence only to the extent you would consider them appropriate.

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 available 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 anyone else. Your emotions should not influence your decision.
6. 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 behavior when they testified and how they responded during cross-examination. Applying your day to day life experiences 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 none, a part or all of any witness' evidence.
7. 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 that we all may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes a witness may have other concerns when giving evidence. A witness may be worried that the evidence would incriminate him or reveal a safely guarded secret. Or else he/she might honestly forget things or make mistakes regarding what he/she remembers.

8. 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 between the evidence given by different witnesses. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it isn't then you can disregard that inconsistency. 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. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you should not expect a witness to have a photographic memory or every detail to be the same from one account to the next.
9. 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 the witness is a matter for you to decide.
10. 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 provide for the inconsistency and consider him/her to be reliable as a witness.
11. 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.

12. 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 proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that, that inference is the only reasonable inference to draw from the proved facts. If there more than one reasonable inference to draw, against the accused, as well in his favor, based on the same set of proved facts, then you should draw the most favorable inference to the accused.
13. As a matter of law you should remember that the burden of proof always rests on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an 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 a reasonable doubt, for you to find him guilty. That is, you must be sure of the accused person's guilt.
14. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of the offence against the accused, then you must give the benefit of that doubt to the accused and find the accused not guilty. A reasonable doubt is not a mere or an imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in detail in a short while.
15. You are not required to decide on every point the Counsels 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 charge is proved against the accused.

16. 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 a must.
17. Let us look at the Information. The Director of Public Prosecutions has charged the accused of a count of rape.

COUNT 1

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Act of 2009.

Particulars of Offence

Ashish Kumar, on the 11th day of September 2016 at Sigatoka, in the Western Division, had carnal knowledge of Wainikiti Ravaga without her consent.

18. Now I will deal with the essential elements of the offence of Rape alleged in the count. Section 207(1) of the Crimes Act reads as;
207. —(1) Any person who rapes another person commits an indictable offence.
- Section 207 (2) (a) of the Crimes Act reads as;
- (2) A person rapes another person if —
- (a) The person has carnal knowledge with or of the other person without the other person's consent;
19. Accordingly, in this case, to prove the offence of Rape as for the alleged count the prosecution must prove the following elements beyond a reasonable doubt.
- (i) The accused;
 - (ii) penetrated the vagina of Wainikiti Ravaga with his penis,
 - (iii) Without the consent of Wainikiti Ravaga; and
 - (iv) Either the accused;
 - knew or believed that Wainikiti Ravaga was not consenting; or
 - was reckless as to whether or not she was consenting.

20. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence.
21. The second element is penetration of the Wainikiti Ravaga's vagina with the accused's penis. The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration.
22. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated the vagina of the complainant, without the complainant's consent.
23. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact, that there was no physical resistance alone, shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;
 - i) by force; or
 - ii) by threat or intimidation; or
 - iii) by fear of bodily harm; or
 - iv) by exercise of authority.
24. Apart from proving that the complainant did not consent for the accused to penetrate her vagina with the accused's penis, the prosecution should also prove that, either the accused knew or believed that the complainant was not consenting; or the accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.

25. It is not difficult to understand what is meant by the words “the accused knew or believed”. But you may wonder as to how you could determine whether the accused was reckless. If the accused was aware of the risk that the complainant may not be consenting for him to penetrate her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant’s vagina with his penis, you may find that the accused was reckless as to whether or not the complainant was consenting. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not.
26. Please remember that no witness can look into an accused’s mind and describe what it was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused’s state of mind. Knowledge or intention of an accused can only be inferred based upon relevant proven facts and circumstances.
27. If you find a reasonable doubt in respect of any of the above, you shall find the accused not guilty of the count of Rape.
28. The following were recorded as the admitted facts by the prosecution and the defense.
- i) That Wainikiti Ravaga (hereinafter referred to as the ‘Complainant’) at the material time resided at Sigatoka District School Quarters.
 - ii) That Ashish Kumar (referred to as the ‘Accused’) at the material time resided at Barara Settlement, Sigatoka and was 39 years old.
 - iii) That on the 10th of September 2016, Sakenasa approached the accused and asked him to take him to Sigatoka Town.
 - iv) The accused ended up drinking alcohol together with the complainant and Sakenasa at his residence after having grog at Bini’s grog shop.

- v) That the complainant reported the matter to the police and accused was arrested, interviewed under caution and charged accordingly.

These admitted facts need no further proof. You should consider them as already proved. If there happens to be any inconsistency between the admitted facts and the evidence, the admitted facts should prevail.

Summary of Evidence

29. The PW1, Wainikiti Ravaga is the sole witness for the prosecution. The law requires no corroboration. Therefore you can act on the evidence of a sole witness. However, my direction is that if you are to rely on a sole witnesses' evidence you must be extremely cautious of the credibility and the dependability of such evidence. Her evidence is that;

- i) Presently she is 25 years old, married and resides at Waiyavi Stage 2, Savu Street with her child aged 1 year and 7 months and the in-laws.
- ii) In 2016, she was still a student at FNU and was residing with her uncle and aunt at Sigatoka District School Quarters.
- iii) On the 10th of September, 2016 she has gone with her sister to watch a net-ball match. Thereafter they have gone to the Sigatoka town. At Sigatoka, she has met a boyfriend of hers, Sakenasa. He has invited her to play a Billiards game and she has gone and played Billiards.
- iv) Having played Billiards, when she wanted to go home, Sakenasa has asked her to stay. She has told him that she will drop her sister and come and gone home to drop the sister. When at home Sakenasa has called her and asked her to come. She has asked him to come and pick her up. While she waited, Sakenasa has called her to come to the road side. When she went there, Sakenasa was with his Indian friend. Sakenasa has asked whether they can have grog at her place and she declined and asked him to look for some other place.

- v) The name of Sakenasa's friend was Ashish. She identifies the accused as the said Ashish. She has gone with Sakenasa and Ashish to a grog shop and had 3-4 basins of grog there. At the grog shop she wanted to go to the wash room and Sakenasa has taken her there. In the wash room, she has had sexual intercourse with Sakenasa. She has had 5-6 bowls of grog there.
- vi) Then she wanted to leave and go home, but Sakenasa has insisted her to not to go. Then while they were going in Ashish's white twin cab, Sakenasa and Ashish have bought 6 bottles of beer. They have stopped at a hill side and had 3 bottles of beer there. Thereafter from there they have gone to the Ashish's house to drink the rest of the beer. Ashish's house was at Barara Settlement. It was around mid-night when they went to Ashish's house.
- vii) There they sat in the living room and started drinking beer. After drinking a few glasses of beer she has asked Sakenasa whether she could take a little nap as she was so drunk. Then Sakenasa has taken her to a room for her to rest. While she was laying down Ashish has come into the room and was touching her body. When she saw that it was Ashish Kumar, she has pushed him away and come back to the sitting room, looking for Sakenasa. When her body being touched, she has thought it was Sakenasa.
- viii) When she came to the living room, Sakenasa was asleep and she has woke him up and taken him inside the room. She has told Sakenasa what Ashish has done to her and then Sakenasa has stayed with her inside the room. Then she has had sexual intercourse with Sakenasa again. Thereafter she has put on her clothes, a jeans and a t-shirt and slept. She has had her undergarments, a bra and a panty underneath as well.
- ix) While sleeping, she has felt somebody touching her whole body again and her trousers were already removed. It was different from Sakenasa as he was so heavy. Here she states that her trousers were halfway removed

down to her knees. His hands were inside her t-shirt and he was touching her breast over the bra.

- x) That person was sitting on her legs and she was face down on the bed. She has felt his penis moving in and out of her vagina. She has thought that it was her boyfriend Sakenasa, but the feeling was different. So she has turned back and seen with the light of the mobile phone and seen that it was Ashish Kumar. She has pushed him away.
- xi) When asked whether her trousers were at her knee length by then she confirms it. However, when asked whether she was sure of it, she states that her trousers and the panty were fully removed. The pants she wore had a button and a zip. When she wore them after having sexual intercourse with Sakenasa, she has not buttoned it but only pulled up the zip.
- xii) Having pushed Ashish away she has stood up and grabbed her pants and walked out of the room she has seen Sakenasa lying on the bedroom floor. She has kicked him trying to wake him up. Sakenasa has woke up and she has told him everything. But he has not said anything. He has told her for them to move to some other place. Sakenasa, without speaking to Ashish, just grabbed her hand and took her out of the house.
- xiii) When they moved to another place, though she tried she could not sleep and after a while she has come back and damaged the windscreen of Ashish's vehicle with a stone, as she hated what Ashish did to her.

30. In answering the cross examination by the counsel for the accused, the witness states;

- i) By 10th of September 2016, she was living with her Aunty and Uncle. She was supposed to be at home every night.
- ii) She gave her statement to the police just a few hours after the incident and the incident was fresh on her mind by then. Though she asked

Sakenasa to drop her home after the grog session, she has not informed that to the police.

- iii) Before going into the Ashish's house they had beer at the hill side and it was really cold that night. She agreed to go to Ashish's house to finish the beers with Sakenasa and Ashish. At Ashish's house though she went to have a nap, she was not supposed to stay the night there.
- iv) She admits of having sexual intercourse with Sakenasa that night at Ashish's room and putting on her clothes back and pulling up the zip of the pants. Thereafter, she has slept face downwards and Sakenasa has slept next to her. She denies that Ashish came to the room that night to wake them up for her to go home.
- v) She has had a relationship with Sakenasa, for about 3 months, some time back and not immediately before that day. On that day, after the alleged incident, Ashish was not there in the room, when she woke up Sakenasa. After the incident she was scared and frightened of Ashish and left his house. But admits that she walked alone in the dark back to his place to damage his vehicle.
- vi) She denies the suggestion that she damaged Ashish's vehicle because he refused to drop her back at her home that night. She further denies that Ashish warned her of reporting the damaging of the vehicle to the police.
- vii) She states that Ashish was trying to fix her while they were in the grog shop. However, she has not stated that to the police in her statement.
- viii) In response to the question whether she was unsure of this incident happening, she states yes. But in re-examination she states that she is sure that Ashish raped her.

31. With leading the evidence of PW1, the prosecution closed their case. The Court being satisfied that there is sufficient evidence adduced by the prosecution covering the elements of the offence decided to call for defense, acting under the

virtue of section 231(2), of the Criminal Procedure Act, explaining and giving his due rights to the accused.

32. The accused having understood his rights elected to give evidence on his behalf. His evidence was that;
- i) He is a farmer and lives in Barara Settlement in Sigatoka.
 - ii) On the evening of the 10th of September 2016, he was at a prayer function at a neighbors place in Barara. At there, Sakenasa has come to him. He knows Sakenasa from childhood as Sakenasa is his friend and their houses were nearby, beside each other. Later the witness explains that there are two 08 acre plots in between his house and Sakenasa's and it takes about 5 minutes to walk. It should be noted that the age gap between them is about 20 years.
 - iii) Sakenasa has asked him for the phone to call someone. He returned the phone after speaking to someone and after a while asked for it again. Again having talked to someone, he returned the phone and sat at a corner drinking grog.
 - iv) The witnesses' cousin sister was there and she has wanted him to drop her. When he was about to leave to drop her, Sakenasa came and sat in the vehicle and once the cousin sister is dropped, Sakenasa asked him to drop him at the town. On the way to the town too Sakenasa asked for the phone and spoke to his girlfriend. When they reached the Sigatoka town, Sakenasa bought \$10 grog, BH 10, lollipop and some other things. Sakenasa has told him that he is going to his girlfriend's place to drink grog and no one is there.
 - v) On the way Sakenasa has asked him to stop at a junction and called her again. Then Sakenasa's girlfriend had informed him to not to come to her place as her cousin is there and she will come to meet him. Then they have waited by the roadside and she has come and got into the vehicle. She has suggested them to go to the grog shop and they have gone to the grog

shop and since it was full they have gone to the nearby Ravin's Garage to drink grog.

- vi) There they have had grog with the owner and two of his staff of the Garage and they have been there for about 2 hours. In the middle of the session, the girl and Sakenasa went out and came back. The grog session has finished around 11.00-11.30pm. Then he has told Sakenasa to drop the girl at her place and for them to go home. But Sakenasa has asked for \$20 loan from him and bought 6 bottles of beer and gone towards their homes at Barara.
- vii) They stopped at a hillside close to his house and started drinking beer. Since it was cold there Sakenasa forced him to take them and go to his house. Then he, Sakenasa and Sakenasa's girlfriend went to his house. It was a two storied house and his parents lived in the ground floor. Ashish lives with his brother at the upper floor. There three of them sat at the sitting room and started drinking beer. While drinking the beer, the girl wanted to vomit and she went outside and vomited. He asked Sakenasa to let her lay down and rest and when he go, to take her with him. Sakenasa took her to the room and came back alone and drank beer with him. When the beer was about to be finished, Sakenasa went to the room to see the girl and come back.
- viii) Since Sakenasa did not come out after some time he has gone into the bed room switching on the light. He has told them that they'll have to go. They have got mad at him and told him that they want to sleep more. He has said no to it and said that he will report them if they do not leave his house. Then they have asked him to drop them. He has refused as he was drunk and not supposed to drive. Then Sakenasa and his girlfriend walked out and they threw stones. He heard some noises but could not see as it was dark.
- ix) He denies having sex with Sakenasa's girlfriend.

33. In answering the cross examination, posed on behalf of the prosecution, the accused states that;

- i) The prayer ceremony was at his relations place and he went there around 8.00pm that night. Sakenasa came later and asked for his phone as Sakenasa's phone was out of Batteries.
- ii) He has had a good relationship with Sakenasa and they were strongly bonded. When he was about to go to drop his cousin sister, Sakenasa came and sat in his vehicle. If Sakenasa goes anywhere, he goes with him.
- iii) There is a distance of about 6km from his house to Sigatoka town. Later at Ravin's Garage Sakenasa and his girlfriend went to the washrooms.
- iv) When they were drinking beer at the hillside Sakenasa wanted to go to his house as it was very cold there. At his home the sitting room was adjacent to the bedroom that Sakenasa's girlfriend slept in.
- v) When he went into the room switching on the light, Sakenasa was sleeping with the girl. When he went in both of them were sleeping face up. Sakenasa's girlfriend was then wearing a full length tight jeans and not a ¾ jeans.
- vi) The accused denies pulling down Sakenasa's girlfriend's jeans and her panty.
- vii) The following day he saw that three door glasses of his vehicle were broken and not the wind screen.
- viii) The police came in search of him around 8.00-9.00am on the following morning. After about 20-30 minutes from chasing them he heard the sounds of his vehicle being damaged. Sakenasa knew how to drive as he used to drive that vehicle sometimes.

34. That was a summary of the evidence given by the witnesses. Please remember that I have only referred to the 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 appropriate. As I have already explained, which evidence you would accept and which evidence you would not accept is a matter for you and you alone to decide.

35. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proved and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offence has been proved beyond a reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.
36. The Accused has indicated his stance and it was that he did not rape her and there was no sexual contact between them. Even in case you do not accept the accused's stance as true, you should not consider it in-order to strengthen the prosecution case. The accused need not prove that he is innocent. A person may lie as sometimes as it is easier than telling the truth. Therefore even you decide to not to accept the accused's stance, you should not use it to overlook the weaknesses of the prosecution case if any.
37. With the submission of the accused's stance, one of the three situations given below would arise;
 - (i) You may accept his stance and, if so, your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily accepting his stance you may think, 'well what he says could be true'. If that is so, it means that there is a doubt in your mind and if you can reason it out in your mind, and call it a reasonable doubt, again your opinion must be 'not guilty'.

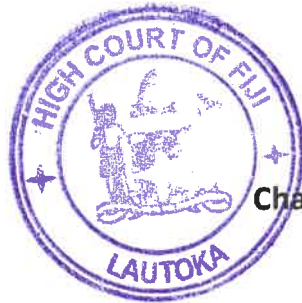
(iii) The third possibility is that you reject his stance. But, that itself does not make the accused guilty. Then the situation would then be that you should consider whether the prosecution has proved all the elements beyond a reasonable doubt. If the prosecution has proved all the necessary elements of the offence and also you reject the accused's stance only, you should find the accused guilty of the alleged count.

38. Any re-directions?

39. Ladies and Gentleman Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. When you have reached your separate opinion, you will come back to court and you will be asked to state your opinion.

40. Your opinion should be;

Whether the accused is guilty or not guilty of the alleged offence of Rape?



Chamath S. Morais

JUDGE

Solicitors for the State : *Office of the Director of Public Prosecutions, Lautoka*

Solicitors for the Accused : *Mark Anthony Law*