

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 022 of 2019

STATE

V

NIRBHAI CHAND

Counsel: Mr Tuenuku for the State
Mr Dayal for the Accused

Date of Hearing: 04 and 05 January, 2021

Date of Summing Up: 06 January, 2021

SUMMING UP

1. The hearing of this case has now reached its conclusion. I have to sum up the case now. As I explained to you before the commencement of the hearing, we have different functions. 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 to this action. You must accept the law from me and apply all directions I give you on matters of law.
2. Your function is 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 explain it to you, to the facts as you find them to be, and in that way, arrive at your opinion.

3. I may comment on the facts if I think it will assist you when considering the facts. However, 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 the facts unless it coincides with your own independent opinion.
4. 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 exhibits tendered as evidence. This summing up, statements, arguments, questions, and comments made by the parties' counsel are not evidence. The purpose of the opening address by the learned counsel for the Prosecution is to outline the nature of evidence intended to be put before you. Therefore, the opening address of the Prosecution is not evidence. The closing addresses of the counsel of the Prosecution and the Defence are not evidence either. They are their arguments, which you may adequately consider when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
5. If you heard, 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. Ensure that no external influence plays a part in your deliberation. You are allowed to talk, discuss, and deliberate facts of this case only among yourselves. However, each one of you must reach 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 your opinion does not bind me, but I assure you that I will give your opinions the greatest possible weight when I make my judgment.
6. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether sympathy for or prejudice against the accused, the Complainant, or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. It would be best if you approached your duty dispassionately, deciding the facts solely upon the whole of the evidence. You have 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

7. 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 guilty of the offence.
8. 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 to prove his innocence, as his innocence is presumed by law.
9. The standard of proof in a criminal trial is "proof beyond a 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 about the accused's guilt, that means the Prosecution has failed to satisfy you the guilt of the accused beyond a reasonable doubt. If you find any reasonable doubt about the commission of the offence as charged or any other offence by the accused, such doubt should always favor the accused.

Information and elements of the offences

10. The accused is charged with two counts of Indecently Annoying Any Person, contrary to section 213 (1) (a) of the Crimes Act, one count of Indecent Assault, contrary to Section 212 (1) of the Crimes Act, one count of Sexual Assault, contrary to Section 210 (1) of the Crimes Act and one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offences are in the amended information, which is before you.
11. The main elements of the offence of Indecently Annoying Any person are that;
 - The accused,
 - i) With the intention of insulting the modesty of the complainant,
 - ii) Uttered those words as charged under count one and three,

iii) Intending such words shall be heard by the complainant.

12. The main elements of the offence of Indecent Assault are that;

i) The accused,

ii) Unlawfully and Indecently,

iii) Assault the Complainant,

13. The main elements of the offence of Sexual Assault are that;

iv) The accused,

v) Unlawfully and Indecently,

vi) Assault the Complainant.

14. The word "unlawfully" simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act as indecent.

15. The main elements of the offence of Rape are that;

vii) The Accused,

viii) Penetrated the vagina of the complainant with his penis,

ix) The complainant did not consent to the accused to penetrate her vagina with his penis,

x) The Accused knew or believed or reckless that the complainant was not consenting for him to insert his penis in that manner.

Admitted Fact

16. I now request you to draw your attention to the agreed facts, which are before you. They are the facts that the prosecution and defence have agreed without dispute. Hence, you are allowed to consider them as proven facts by the prosecution beyond a reasonable doubt.

Separate Consideration

17. The accused is charged with five separate counts. You have to consider them separately. If you find the accused guilty of one count that does not automatically make the accused guilty of the other remaining counts. Likewise, if you find the accused not guilty of one count, that does not make him not guilty of other counts. You have to give separate consideration to each of these five counts.

Accused

18. The prosecution has to prove beyond a reasonable doubt that the accused committed these offences to the Complainant. The accused had admitted in the admitted facts he is the father-in-law of the Complainant and known to her. Hence, the identity of the accused is not a disputed issue between the prosecution and the defence.

Penetration

19. The slightest penetration of the vagina with the penis of the accused is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

Consent

20. You need to consider the element of consent in relation to the fifth count. Consent is a state of mind that can take many forms from willing enthusiasm to reluctant agreement.

In respect of the offence of Rape, the Complainant consents if she had the freedom and capacity to make a choice and express that choice freely and voluntarily. A consent obtained through fear, by threat, by the exercise of authority, by use of force, or by intimidation, could not be considered as a consent given freely and voluntarily. A submission without physical resistance by the Complainant to an act of another person shall not alone constitute consent.

21. The Complainant must have the freedom to make a choice. It means that she must not be pressured or forced to make that choice. Moreover, the Complainant must have a mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. It should not be an optional choice. The consent of a person should not be assumed.
22. If you are satisfied that the accused had penetrated the vagina of the Complainant with his penis and she had not given her consent, you are then required to consider the last element of the offence. That is whether the accused honestly believed or knew or reckless that the Complainant was freely consenting for this alleged sexual act. I must advise you that belief in consent is not the same thing as hope or expectation that the Complainant was consenting. You must consider whether the accused knew either that the Complainant was not in a condition or a position to make a choice freely and voluntarily, or the Complainant had made no choice to agree to the sexual act. Suppose you conclude that the accused believed or knew that the Complainant was consenting. In that case, you must then consider whether such a belief of the accused was reasonable under the circumstances that were prevailed at the time of the alleged incident.

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, credible, 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 is being raped will do or say. Though such assumptions are natural in ordinary life, 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 occur in any circumstance between any person who acts in various 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 during the hearing.
26. It is your duty to assess the evidence to determine whether the accused has committed this crime to the Complainant. In doing that, you must be mindful 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 victim's experience. Every person has his or her way of coping with such an incident. Some may display apparent 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 the Prosecution

27. Let me now remind you of the evidence presented by the Prosecution and the Defence during the hearing. This is a very short hearing, where the Prosecution adduced the evidence of one witness and the Defence presented the evidence of two witnesses. I trust that you have heard those evidence and still could recall them.
28. The complainant explained in her evidence that she got married to the eldest son of the accused in 2014. The accused is her father-in-law. She had actually eloped with her husband against the will of her parents. The complainant had then started to live with her husband at the accused's house. During July 2014, the complainant and her husband had some arguments over making a child. The husband wanted to make a child with the complainant, but she failed to get conceived. One of the evenings, while she was at the

living room with the accused, he had invited her to sleep with him and have sexual intercourse with him so that she can get conceived with a child. The complainant was shocked to hear that as she considered him as her father. She did not like what he said and got up and went to her room. The mother-in-law and sister-in-law were at the other end of the porch, waiting for the other two sisters-in-law to return home from work. Her husband had gone to a friend's place while the brother-in-law was not at home. The complainant explained that she did not tell any one of this incident as she thought this would end from there and never thought that this would go this far.

29. One afternoon in July 2014, when she was in the kitchen, the accused came from behind and held her breasts and pressed them. She looked back and found that it was the accused. The complainant did not like what he did. The complainant had complained to her husband about this incident. However, he had not taken any steps against the accused.
30. During the same month of July 2014, the accused had asked the complainant to open the bathroom door, when she was having her shower therein, telling her that he wants to see her naked without clothes. She did not see the accused but recognised him with his voice. The bathroom was situated close to the bedroom of the accused. All other members of the family were in their respective rooms. Her husband was at home that day. She came out of the bathroom when the accused went back to his room. She then told her husband about this incident. Her husband had informed her mother-in-law and sister-in-law about this incident, but nothing happened.
31. Between the 1st of May 2015 and 31st of September 2015, the accused had forced sexual intercourse with the complainant. He had forcefully dragged her from her hands to the visitor's room. He had then locked the door. No one was at home except her little son, who was sleeping in their room. The accused had threatened the complainant, telling her not to tell anyone about this incident. If she does that, then her husband will leave her. He then made her lie on the bed facing upwards. The accused then lifted her dress and removed her undergarment. He then started to fondle her breast using his hands and mouth. Afterwards, the accused had inserted the vagina of the complainant with his penis.

She did not like what he did and told him not to do that as he is like her father. The accused had told her that his wife is not having sexual intercourse with him; therefore, she has to have sexual intercourse with the accused. After having sexual intercourse with her, the complainant then threatened her, telling her not to tell anyone. The complainant, explained in her evidence, that she did not tell anyone at that time. She was scared that her husband would leave her. If then, she had no one to go with her little child. The complainant had finally told her husband in 2018 after she gave birth to her second child. The second child is a daughter, and she afraid that her daughter would face the same fate as she had when she is grown up. Her husband had not taken any steps, so she had discussed this with her sister-in-law. After that, she had reported to the police.

32. You may recall that the complainant said during the cross-examination, that this incident took place when she was pregnant with her first child in 2015. Her child was born on the 13th of August 2015. During the evidence-in-chief, she said that her child was four months old when this alleged incident of rape took place. However, during the re-examination, she said that this alleged incident took place two months after giving birth to her first child. Moreover, you may recall that she explained that some of the information she stated in her evidence is not recorded in the statement she gave to the police because the officer who recorded it never asked her about them.

Evidence of the Defence

33. After the Prosecution's case, the accused was explained about his rights in Defence. The accused opted to give evidence and also called one witness for his Defence. I will now proceed to summarise the evidence presented by the Defence briefly.
34. The accused, in his evidence, denies these allegations. He explained how the complainant eloped with his son, and he organised the wedding. He is a fisherman and most of the weekdays; he was away at sea. The complainant had fought with her husband in 2018. She wanted to take her husband away from the family home and live separately. That is the reasons the complainant had made these false allegations.

35. The second witness of the accused, Mr Nvneel Chand. He explained in his evidence that sometimes in October 2018, the complainant called and informed him that the accused had done something to her. She wanted to report it to the police. Mr Chand had advised her to discuss it with her husband and then decide about reporting it to the police.
36. I have summarised the evidence presented during this hearing. However, I might have missed some. It is not because they are not important. You have heard every item of evidence. I only wanted to draw your attention to the main items of evidence and help you in recalling yourselves of the evidence.

Analysis and Directions

37. The Prosecution alleges the accused had committed these offences as stated under count one to count five. The Defence claims that the accused had never done such crimes to the Complainant.
38. Accordingly, you have to decide whether these alleged incidents took place as claimed by the Prosecution. To do that, you have to determine the reliability and credibility of the Prosecution and the Defence's evidence.

Evaluation of the Evidence

39. I now take your attention to the direction of evaluation of the evidence. The evolution of evidence consists of two main steps, the determination of the reliability and the credibility of the evidence.

Reliability of Evidence

40. You must be satisfied that you can rely on the evidence as reliable evidence. To do that, you have to be satisfied that evidence is free from mistakes, errors, and inaccuracies. If you find the evidence is free from such mistakes, errors, and inaccuracies, you can consider the evidence as reliable evidence.

Credibility of Evidence

41. The assessment of the credibility of evidence does not concern the unintended inaccuracy, mistakes, or errors. It focuses on the lies or inaccurate facts that are intentional and motivated attempts to deceive.
42. Evaluation of the reliability and credibility of evidence will help you 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 decide whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.
43. 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. It would be best if you then considered whether the witness's evidence is probable or improbable, considering the circumstances of the case. Apart from that, you are required to consider the witness's consistency not only with his or her evidence but also with other evidence presented in the case.
44. It is your duty to consider the witnesses' demeanour, how they react to being cross-examined, and re-examined and were they evasive to decide the witness's credibility.
45. Moreover, you must bear in 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.

Case of the Defence

46. Let me now take your attention to the defence of the accused.
47. The accused is not obliged to prove his innocence and also not required to give evidence. However, in this hearing, the accused not only elected to give evidence on oath but also

called a witness to give evidence for the Defence. Therefore, you have to take into consideration the evidence adduced by the accused and his witness when you determine the issues of fact of this case.

48. Accordingly, it is for you to decide whether you believe the evidence given by the Defence. If you consider that the account given by the Defence is or may be true, you must find accused not guilty.
49. If you neither believe nor disbelieve the version of the Defence, yet, it creates a reasonable doubt in your mind about the Prosecution's case. You must find the accused not guilty.
50. Even if you reject the version of the Defence that does not mean that the Prosecution has established that the accused guilty to this offence. Still you have to satisfy that the Prosecution has established on its own evidence beyond reasonable doubt that the accused has committed these offences as charged in the information.

Contradictions, Omissions and Inconstancies,

51. You may recall that the complainant said during the evidence in chief that the incident of the forced sexual intercourse took place four months after she gave birth to her first child. However, during the cross examination, she said yes to the question posed by the learned counsel for the defence, asking her whether she was pregnant when the accused allegedly penetrated her vagina with his penis. During the re-examination, the complainant said this alleged incident of rape took place two months after she gave birth to her first child.
52. Moreover, the complainant explained during the cross examination that certain information she explained in her evidence have not been recorded in the statement she made to the police. It was because the officer who recorded the statement had never asked her about those information.

53. You are allowed to take into consideration about such omissions and inconsistencies when you consider the credibility and reliability of the evidence given by the Complainant. However, previously made statements are not evidence of the truth of its contents. The evidence is what a witness testified in the Court.
54. It is 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. Moreover, as I explained above, the victims of rape react differently to the trauma and the experience they have gone through, especially in revealing those incidents to another person.
55. If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.

Delay

56. You had heard the complainant had reported this matter to the police in 2018, that is three years after the incident of rape. However, she explained in her evidence that she had informed her husband about these incidents, but he did not take any steps. You may recall that the learned counsel for the defence suggested to you to consider the delay in reporting this matter to the police.
57. It is a matter for you to consider and resolve. You have to decide whether it was a delay. If so, then you have to determine whether it was a substantial delay. Then you can proceed to determine whether such a delay would affect the reliability and credibility of the evidence of the complainant.

58. However, it would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible. The experience of the courts is that victims of sexual offences 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.

Final Directions

First Count

59. 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 Indecently Annoying Any Person as charged under count one, you can find the accused guilty of the said offence.
60. If you are not satisfied or have doubt whether the Prosecution has proven beyond reasonable doubt that the accused has committed the offence of Indecently Annoying Any Person as charged under count one, you must find the accused not guilty of the said count.

Second Count

61. If you are satisfied that the Prosecution has proven beyond reasonable doubt that the accused has committed the offence of Indecent Assault as charged under count two, you can find the accused guilty of the said offence.

62. If you are not satisfied or have doubt whether the Prosecution has proven beyond reasonable doubt that the accused has committed the offence of Indecent Assault as charged under count two, you must find the accused not guilty of the said count.

Third Count

63. If you are satisfied that the Prosecution has proven beyond reasonable doubt that the accused has committed the offence of Indecently Annoying Any Person as charged under count three, you can find the accused guilty of the said offence.
64. If you are not satisfied or have doubt whether the Prosecution has proven beyond reasonable doubt that the accused has committed the offence of Indecently Annoying Any Person as charged under count three, you must find the accused not guilty of the said count.

Fourth Count

65. If you are satisfied that the Prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault as charged under count four, you can find the accused guilty of the said offence.
66. 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 as charged under count four, you must find the accused not guilty of the said count.

Fifth Count

67. If you are satisfied that the Prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count five, you can find the accused guilty of the said offence.

68. 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 under count five, you must find the accused not guilty of the said count.

Conclusion

69. 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.
70. Learned counsel of the Prosecution and the accused, do you have any redirections to the assessors?



R. D. R. T. Rajasinghe

JUDGE

Solicitors:

Office of the Director of Public Prosecutions for the State

Messrs Dayals Lawyers for the Accused