

IN THE HIGH COURT OF FIJI

CRIMINAL JURISDICTION

AT LAUTOKA

CRIMINAL CASE: HAC 06 OF 2013

BETWEEN : STATE

AND : SALMENDRA RATNESH CHAND

Counsel : Mr. A. Singh for State
Ms. P. Chand for the Accused

Date of Hearing : 8th -11th of August 2016

Date of Closing Submissions : 11th of August 2016

Date of Summing Up : 16th of August 2016

SUMMING UP

1. It is my duty to sum up the case to you. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
2. You are to determine the facts of the case, based on the evidence that has been placed before you during the course of the hearing. That involves deciding what evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

3. I may comment on the facts if I think it will assist you when considering the facts. While you are bound by directions I give you as to the law, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard my comments on the facts unless it coincides with your own independent opinion. I say so because you are the sole judges of the facts.
4. You all have been chosen from the community and represent a pool of common sense, knowledge and experience of the conduct of human beings in our community. Accordingly, you are required to use your experience, common sense and knowledge of the community and the conduct of human in your deliberation of facts of this case.
5. You must reach your opinion on evidence. Evidence is what the witnesses said from the witness box, documents and other materials received as exhibits and agreed fact. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The opening address of the learned counsel of the prosecution is 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. The closing addresses of the counsel of the prosecution and the accused are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
6. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimonies, agreed facts and

the exhibits put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation.

7. As judges of facts you are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own conclusion or form your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that your opinion will assist me in reaching my judgment.
8. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

Burden and Standard of Proof.

9. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused is guilty for the offence.
10. The burden of proof of the charges against the accused is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. Accordingly, the burden of proof rest on the prosecution throughout the trial and

it never shifts to the accused. In other words there is no burden on the accused to prove his innocence, as his innocence is presumed by law.

11. The standard of proof in criminal trial is “proof beyond reasonable doubt”. It means that you must be satisfied in your mind that you are sure of the accused’s guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you found any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

Information

12. The Accused person is charged with one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Decree and one count of Criminal Intimidation, contrary to Section 375 (1) (a) (i) of the Crimes Decree. The particulars of the offences are before you. Hence, I do not wish to reproduce it in my summing up.
13. The prosecution alleges that the accused took the victim to Wailoaloa Beach Resort, where he forcefully had sexual intercourse with her without her consent. He then took a kitchen knife and threatened to injure the victim saying that he will remove the letter “s” of the tattoo printed on her shoulder.
14. The main elements of the offence of rape as charged in the information are that;
 - i) The Accused,
 - ii) Penetrated into the vagina of the victim with his penis,

iii) The victim did not consent to the accused to penetrate into her vagina with his penis,

iv) The Accused knew the complainant was not consenting for him to insert his penis in that manner.

15. The main elements of the offence of Criminal Intimidation as charged in the information are that;

i) The accused,

ii) Without lawful excuse,

iii) Threatened the victim with injury that he will remove the tattoo on her shoulder by knife,

16. I kindly 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 fact by the prosecution beyond reasonable doubt.

17. The accused has admitted in the agreed fact that he had a sexual intercourse with the victim. The prosecution alleges that the victim did not give her consent for the accused to have a sexual intercourse with her. However, the accused claims otherwise. Accordingly, the main dispute in this matter is the consent of the victim.

18. In respect of the second count, the prosecution is required to prove beyond reasonable doubt that the accused threatened the victim with a knife that he will remove the tattoo printed on her shoulder.
19. Let me now draw your attention to the issue of consent. It is your duty to decide whether the prosecution has proven beyond reasonable doubt that the victim did not give her consent to the accused to insert his penis into her vagina.
20. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of rape, the victim consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. A consent obtained through fear, by threat, by 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 victim to an act of another person shall not alone constitute consent.
21. The victim must have the freedom to make the choice. It means that she must not being pressured or forced to make that choice. Moreover, the victim must have a mental and physical capacity to make that choice freely. The consent perhaps may be limited to some sort of sexual or intimate activities but not for another form of sexual activity. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given.
22. Sexual Intercourse is normally a mutually agreed recreational and pleasurable act of two persons. Accordingly, the consent for sexual intercourse must be comfortable to the person who made such choice. It should not be an optional choice. The consent of a person for sexual intercourse should not be assumed.

23. If you are satisfied, that the accused had inserted his penis into the vagina of the victim 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 that the victim was freely consenting for this alleged sexual intercourse. I must advise you that belief in consent is not the same thing as a hope or expectation that the victim was consenting. You must consider whether the accused knew either that the victim was not in a condition or a position to make a choice freely and voluntarily, or the victim had made no choice to agree to sexual intercourse. If you conclude that the accused believed that the victim was consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that prevailed at the time of the alleged incident took place.
24. You must bear in mind that offences of sexual nature do not need the evidence of collaboration. It means that if you are satisfied with the evidence given by the victim and accepts it as reliable and truthful, you are not required to look for any other evidence to support the account given by the victim.
25. One or more of you may have assumptions as to what constitutes rape, what kind of person may be the victim of rape, what kind of person may be the rapist or what a person who is being or has been raped will do or say. Though such assumptions are natural in ordinary life, it is important that you must leave behind such assumptions as there is no stereotype of circumstances for a rape, a rapist or a victim of rape.
26. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety of ways. You must approach the case dispassionately, putting aside any view as to what you might or might not have

expected to hear, and make your judgment strictly on the evidence that you have heard from the witnesses and the exhibits during the course of the hearing.

27. It is your duty as judges of facts to assess the evidence in order to determine whether the victim gave her consent to the accused for this alleged sexual intercourse. In doing that, you must be mindful that not to bring in to the assessment of the evidence any preconceived views as to how a victim of rape in a trial such as this should react to the experience that the victim had gone through. Every person has his or her own way of coping with such incident. Some may display obvious signs of distress and others may not. Demeanor of the victim in the court while giving evidence is not necessarily a clue to the truth of the victim's account.
28. Let me now remind you the evidence presented by the prosecution and the defence during the course of the hearing.

Evidence of Prosecution

29. The first witness of the prosecution is Taziana Hanif. She is the victim of this case. She was working as a Sales Executive at Market Gane at Denarau, Nadi in the year of 2012. She was living at Saweni, Lautoka. Taziana was at work on the 8th of December 2012. It was a Saturday and she was dressed in a short, an halter neck top and a cardigan.
30. Salmendra, the accused was her former boyfriend. She first met Salmendra in 2010 when she was working at Voice Net IP. She had been in a relationship with him since 2010. It was an on and off relationship. She broke up with him two weeks before the 8th of December 2012. She sent him a text message saying that

she was breaking up with him. However, he did not let it go. Taziana ended her relationship with him because she heard from his ex-girlfriend that he was a violent person.

31. On the 8th of December 2012, at around 1 p.m. Salmendra came to Denarau Island to meet Taziana. He was waiting for her at the security booth outside of her office. Salmendra contacted her on her mobile phone and told her that he came to Nadi to celebrate her birthday. Taziana then got an early leave from her office and came down to meet him. Salmendra had earlier informed her that he wanted to celebrate her birthday with her and will come to Nadi on the 8th of December 2012. She had told him that she does not want to do it and requested him not to come. However, he has come to Nadi to celebrate her birthday on the 8th of December 2012.
32. When she met Salmendra, he asked her where was she going. She told him that she was going home. He then told her that he was also going to Lautoka and they can go together. They then took a bus to Nadi town. From there, they went to RB Jet Point at Martintar, where he wanted to buy some stuff. He bought chicken. After that they then took a cab and went to Wailoaloa Beach Resort. He then asked her if she could help him to put his stuff in to the room. She then went into room No 411 with Salmendra. She left her belongings on the table and took the chicken to the sink to defrost it.
33. While she was defrosting the chicken at the sink, Salmendra came and grabbed her from her back. He threw her on the bed and started kissing her. Taziana told him to stop and she does not want to sleep with him anymore. She tried to break free. She continuously told him to stop. When she moved her head towards the right side, he bit and punched on left side of her upper chest and he did same on

her right side of the chest when she turned her head towards left side. She was shocked and scared. He pulled her top down. He then pulled her short down with her undergarment. Lifted her legs up. Her knees were closed to her face. He then inserted his erected penis into her vagina. He had sexual intercourse for about a minute. She looked at him and begs him to stop. She cried and was in pain. Salmendra then stopped it. She then got up and pulled up her top back. She tied it back around her neck. Meanwhile, her mobile phone started to ring. It was one of her friends, namely Henry. The accused answered the phone. She did not hear what Henry telling was. Salmendra shouted at Henry and told him not to call this number again. Salmendra then accused her of having an affair with Henry. Taziana tried to explain him that he was just a friend. Salmendra punched her on her tights. He then went into the washroom. Taziana took her phone and called her friend Avnil Deo asking him to come and help her at the Wailoaloa Beach Resort. She was crying and panicked.

34. Salmendra then came out of the washroom. At that time Avnil called on her mobile phone. It was after 20 to 25 minutes after she made the first call. Salmendra answered the call and told him that Taziana has already left the hotel. Few minutes later, Avnil came and knocked on the door. Avnil has found the room from the Receptionist. Salmendra opened the door for Avnil. Salmendra told Avnil that he was joking before, that why he told him that Taziana has already left the hotel.
35. Avnil is her best friend and she knew he was in Nadi on that day. That was the reason she called him. Avnil asked Taziana whether she was all right. She could not tell anything to him as Salmendra was still around. She cried. Salmendra told Avnil that she was having an affair with somebody else. Avnil told him to calm down and he will talk to Taziana. Avnil and Taziana then went to the outside of

the room through the back door. She then told Avnil about what happened. She then took his phone and called Henry. Henry told her that he will send some help and asked her to stay there until the help comes. While she was calling Henry, Salmendra was inside the room. Avnil told her to go back to the room as Salmendra was clam. All of their belongings were inside the room and they could not leave them behind. That was the reason she did not escape from Avnil while they were outside the room.

36. Salmendra came to know that Avnil gave his mobile phone to Taziana to call someone. He became violent again. He pushed her to the bed and held her neck with his hands. She could not breathe. Avnil came and pulled Salmendra away and told him to stop it. She then got up and ran towards back door. Salmendra then told her that she could go but have to give him back what belonged to him. He took a kitchen knife and pushed her against the wall. He was going to remove the tattoo printed on her shoulder. It was a butterfly with a letter "S". He wanted to remove it as he was the one who made it. She could not see the position of his hand and the knife when he pushed her against the wall. She only saw him taking the knife and it was in his hand. She did not receive any injuries.
37. Avnil came and stopped Salmendra. He took the knife from Salmendra. She was shocked and scared of what was going through. Few minute later, there was a knock on the door. She could not recall who opened the door, it was either Salmendra or Avnil. The Receptionist came and told them that Taziana has got a phone call at the front desk and asked Taziana to accompany her to the Reception area. She then accompanied the Receptionist to the Reception area. She was crying at that time. On their way to the Reception, the Receptionist told her actually there was no phone call, but her friend Henry called the receptionist and there was a taxi waiting for her outside. It was a van. She went and got into the

van. It was driven by a middle age i-taukei man, a friend of Henry. She left behind all her belongings at the room. She left without her shoes. Taziana said that she had an intention to come back and collect her belongings later. She first went to Denarau and met Henry. She borrowed a t-shirt and flip flop from him as she wanted to cover the bruises marks on her body and also she was not wearing any shoes. She then went to Nadi police station and reported the matter.

38. Having reported the incident at the Nadi Police Station, she went back to the hotel with the police. She found the hotel room was cleaned and Salmendra and Avnil had gone. She was referred to a doctor at Nadi Hospital for medical examination on the same afternoon.
39. During the cross examination, she explained the nature of her relationship with Salmendra. She was married at that time and had a son from the marriage. Her husband has gone to Australia. According to her evidence her relationship with her husband was not in good terms. Taziana has got a tattoo done on her shoulder on the 30th of November 2012 or sometimes close to that day. Her husband's name is also start with "S". It was her decision to put the tattoo. She gave the design to Salmendra to print it on her shoulder.
40. Taziana made plan to celebrate her birthday on the 9th of December 2012 with her friend Avnil, who came from New Zealand for a vacation. She has told Salmendra that she does not want to celebrate her birthday with him. She told him not to come to Nadi for her birthday, but he has come. When Salmendra came, Taziana took a half day leave from the office and came to meet him.
41. During the cross examination, Taziana further said that she went to RB Jet Point and then to Wailoaloa Beach Resort with Salmendra because he wanted her help

to buy some stuff and put them in the hotel room. He asked her to help him to take those stuff to his room. She had no intention to stay in the room. However, Salmendra asked her to defrost the chicken, that was the reason she went to the sink and defrost it.

42. Taziana said that she did not kiss Salmendra back, when he started to kiss her on the bed. According to the evidence given by Taziana, this alleged sexual intercourse took place about a minute. She was shocked and scared, that was the reasons she did not escape from him while he went to the wash room.
43. Salmendra did not like the call received by Taziana on her mobile phone from Henry . Henry did not call on her mobile phone while they were having sexual intercourse. It was after the incident. Taziana had saved the number of Henry in her mobile phone as "stranger". The Henry's call led to an argument between her and Salmendra. Salmendra accused her of having an affair with Henry. She tried to explain him that Henry was just a friend of her.
44. Taziana did not know how did Avnil find the room. The room was booked under Salmendra's name. There was no plan made by her to celebrate her birthday with Avnil and Salmendra on that evening. Taziana did not try to escape when she was at the outside of the room with Avnil because she was waiting for the help sent by Henry. Taziana only wanted to have a help from a friend to escape from the place. That was the reason she did not call the police. Taziana and Avnil had asked Salmendra that they wanted to leave, but he said no. Salmendra did not threaten them at that time, but he was angry.
45. Taziana explained in her evidence about the surroundings of the room and its back yard. There were passages leading to both sides of the building. Even if she

escaped from back door of the room, she still has to pass the front side of the room to leave the hotel. She was not injured when he suffocated her neck. Taziana did not tell the receptionist the truth because she was still shocked and scared when she was accompanied the Receptionist to the front desk. The Receptionist has told her to wait till the person who called her before to call her back. Henry then called and told her that a friend of him is coming to pick her up. Taziana said that she did not call the police at the reception as she only wanted to escape from the place.

46. The victim was then extensively cross examined regarding the statement she made to the police on the 8th of December 2012. She said that everything took place in the hotel room at Wailoaloa Beach Resort on the 8th of December 2012 were still afresh in her mind when she made her statement to the police. She further said that everything she said in her statement was true. She had an opportunity to correct, to add or to alter anything in the statement. She signed the statement. She has referred Salmendra in the statement as her boyfriend. She said that when she made the statement, she was still scared and shocked. She made that statement five or six hours after the incident. She has told the police that she insisted and requested her boss to give her half a day leave when Salmendra came to Denarau and called her. She has further stated in the statement that she went to Nadi town, came to RB Jet Point with Salmendra. From there she went to Wailoaloa Beach Resort and checked into room No 411 with Salmendra. Fifteen minutes later her friend Avnil checked into the room. She has not mentioned anything about that she was going home and Salmendra joined with her as he was also going to Lautoka. Taziana said that she just wanted to tell the police what he has done to her. Taziana has told the police that she opened the door for Avnil when he knocked on the door. However, in her

evidence in court she said that she could not remember opening the door for him. Moreover, Taziana has told the police that Avnil asked her whether she was alright and she has told him that she was okay. She has further told the police that she went towards the back door to smoke and then her boyfriend told her that if she wants to leave the room she can, but leaving the tattoo belonged to him. Moreover, Taziana has told the police in her statement that her friend held the hands of Salmendra and told him to stop when Salmendra tried to remove her tattoo with a knife. At that time, Taziana opened the door and ran out of the room. Taziana in her evidence in court stated that it was true that she ran out of the room when Avnil stopped Salmendra. She further said that she forgot to tell it in her evidence in chief.

47. Taziana has made another statement to the police on 10th of December 2012. Taziana was given an opportunity to amend, to add or to delete anything of the statement before she signed it. She further said that what she said in the statement made on 10th of December 2012 was also true. Taziana said that she did not lie to the police when she made her first statement on 8th of December 2012.
48. During the re-examination, Taziana stated that it was Salmendra's idea to print the letter "s" on her shoulder with the tattoo design she gave to him.
49. The second witness of the prosecution is Mereoni Adimaiwai. She was working at Wailoaloa Beach Resort as a Receptionist in the year of 2012. She recalls a young Fijian of Indian origin came to the Resort at around 1.30 p.m. and checked in to room 411 on the 8th of December 2012. He inquired from her whether the hotel makes birthday cakes. He wanted a birthday cake to surprise his girlfriend.

He was carrying a bag when he came to the reception area. In a while he went away keeping the key at the reception.

50. Sometimes later, the gentleman came back with a young girl. He was carrying some groceries in his hand. They went into the room. In a while, a visitor came to the reception inquiring the room No 411. Mereoni directed him to the room.
51. Mereoni then received a phone call from a male person, asking her to go and meet the girl in room 411. She then went to the room and knocked on the door. The same gentleman opened the door and called the girl. Mereoni told him that there was a call for the girl. The girl came with her. On their way to the reception, she noticed that the girl looked tired. She further noticed some bruises around her shoulder. The girl came out without her shoes. Mereoni asked her if she was all right. The girl replied and told her that she did not like what her boyfriend had done to her. At the reception, the girl answered the call and then went and sat on a chair at the lounge. In a while, a van came and picked her and went away. Sometime later, the gentleman came to the reception and returned the key. He checked out from the hotel. According to her evidence, he was carrying a bag, which she recalls as the same bag he had when he was checking in. Mereoni then sent one of the house keeping persons to check the room and confirmed that there was no damage to the hotel properties in the room. She also went and checked the room. Mereoni has not seen the visitor leaving the hotel. She could not confirm whether the visitor left the hotel before or after the gentleman left.
52. During the cross examination, Mereoni stated that room 411 could accommodate three adults. The gentleman chose that room. She explained the setting of the room and its surroundings. According to her evidence, only the gentleman was

holding groceries when he came back with the girl. The Resort has facilities to call police if a guest wanted and requested to do so.

53. The third witness of the prosecution is Dr. Jocelyn Balbuena. She is a doctor of medicine. She works at Nadi Hospital. Dr. Joyce has been working in Fiji as a medical officer for the last fifteen years. She has worked at the Ba Sub Division for eleven years before she moved to Nadi Hospital. So far she has conducted around five medical examinations of rape victims at the Nadi Hospital. The victim was medically examined by Dr Joyce on the 8th of December 2012 at the Nadi Hospital. The medical report of the victim was tendered as an exhibit of the prosecution. Dr. Joyce in her evidence explained the medical findings that has been recorded in the medical report. The victim was clam during the medical examination. Her clothes were not stained or tear. The Doctor has found a punctured wound, hematoma and bruise on the right side of the chest. There was no such injuries on the left side of the chest. Dr Joyce did not find any abrasions, lacerations at her vaginal area. According to the evidence given by Dr Joyce, the hymen was not intact.
54. Dr. Joyce in her evidence explained the meaning of punctured wound and hematoma. Punctured wound can be caused by a sharp nail or a tip of a knife or sharp teeth. Hematoma can be caused by a blunt trauma.
55. The last witness of the prosecution is Avnil Deo, who gave evidence via Skype from New Zealand. He is a friend of Taziana. He lives in New Zealand since 2010. He came to Fiji for a vacation in 2012. He recalls on 8th of December 2012. He came to Nadi from Suva on that day. He received a phone call from Taziana on his mobile, when he was at Nadi Town Centre He could not get much of the call and only heard that she was saying Wailoaloa Beach Resort. She sounded

disturbed and hurried. He then decided to go to the Wailoaloa Beach Resort and see what has happened to her. Avnil took a taxi and went to Wailoaloa Beach Resort.

56. Upon reaching the Resort, Avnil gave a call to Taziana's mobile phone. A male person answered the call and informed him that Taziana had already left the hotel. He then waited nearly for five minutes at the reception, wondering what he could do and what has happened to Taziana. He received a call from Taziana's mobile phone while he was waiting at the Reception. The same male person called and told him that he was joking before and Taziana is in the room and told him the room number. Both Salmendra and Taziana greeted him when he came into the room. They were standing together and asked him to sit down. Avnil found that Taziana was quite, so did Salmendra. He has never met or knew Salmendra before the 8th of December 2012. Avnil noticed some bruises around Taziana's chest. He could not ask her why did she call him since Salmendra was nearby. He started a casual talk with her and walked towards the back of the room. She then followed him. He then went outside of the room from the back door. Taziana also came with him. They just talked about their past and how their lives were moving. She then asked him his mobile phone. While giving it, Avnil asked her what happened. She then told her that the man raped her and she needs to escape. She then communicated with someone through his mobile phone. He could not specifically state whether she called or sent text messages to someone. They discussed whether they could escape. They then came back to the room. While they were talking at outside of the room, Salmendra was inside the room. They stayed outside of the room for about 10 minutes.
57. Salmendra asked him whether he gave his phone to Taziana when he came back to the room. Salmendra then became aggressive. He held Taziana's neck by

hands and pushed her to the bed, suffocating her. Avnil tried to stop him. He finally stopped it. Salmendra then told her that she can go but has to leave what belonged to him. While saying that, he got a knife and held her hands from the back. He pointed the knife on her tattoo and said he will remove it from the knife. Taziana screamed and begged him to let her go. Eventually he let her go. At that point, the Receptionist came and knocked on the door and said somebody had called Taziana. The receptionist asked Taziana to accompany her to the reception.

58. Avnil could not help Taziana as he didn't know the hotel or the area and the resources to take her out of the hotel. He further said that the outside of room was fenced. Moreover, he could not escape from the back door, leaving his bag inside the room because his passport was in the bag.
59. Taziana hurriedly left with Receptionist. She did not return. Salmendra got angry and left the room looking for Taziana. Avnil found an opportunity and then left the room with his bag.
60. Avnil said that he did not know the room number when he came to the resort. He did not ask the receptionist the room number. It was Salmendra who told him the room number. Taziana told him that she was not dating with Salmendra while they were at the backside of the room. He did not want to risk himself of getting injuries and it was the reasons he did not want to escape from the room. Salmendra was not violence until he found Taziana used the phone of Avnil to call someone while she was at the outside of the room. Avnil said that he could have used his phone to call police, but he did not call. He further said that he told the police that Salmendra held the knife at her back, but it was not written down in the statement he made to the police.

Evidence of the Defence

61. At the conclusion of the prosecution's case, the accused was explained about his rights in defence. The accused opted to give evidence on oaths. However, he advised the court that he does not wish to call any other witnesses for his defence.

62. The accused in his evidence denies this allegation. The accused stated that he planned to celebrate the birthday of Taziana with her. They have exchanged email and face book messages discussing the arrangement of the birthday celebration. They were in a relationship as boyfriend and girlfriend. As they planned, he came to Nadi and went to Denarau to meet her on the 8th of December 2012. He called her on her mobile phone when he came to the bus station at the main security office of the Denarau Island. Taziana was at work at that time. She then got an early leave from her work and came to meet him. He told her that they will celebrate her birthday and stay the night at Wailoaloa Beach Resort. They took a bus and first went to Nadi town, from there to Martintar to buy some groceries. They split the bill of the groceries. They then went to the Resort. On their way Taziana told him that one of her friends "Poomba" will join with them at the Resort. He agreed with it. She then called Poomba on his mobile phone and informed him about the hotel and room number. The real name of Poomba is Avnil Deo.

63. After they came into the room, she went to the sink and started to defrost the chicken. She started to model in front of him while she was defrosting the chicken. He went behind her and started to kiss and hug her. He took her to the bed, where they started to kiss each other. She never said anything or did anything to indicate him that she was not consenting for this. She then told him

that they were just wasting time doing this and started to undress herself. He too got undressed. They then started to have sexual intercourse. She willingly participated in sexual intercourse. She did not say anything to him or refused to have sexual intercourse. Taziana wanted him to be rough and asked him to put love bites on her neck. While he was doing it, she pressed his head towards her chest making difficult for him to breath. That caused those deep bite marks founded on her chest and also his shaved beard made some reddish marks on the skin around her chest.

64. While they were having sexual intercourse, her phone started to ring. The caller ID appeared as 'Stranger'. He told her that someone by the name "Stranger" was calling and she told him just to ignore it. However, this caller kept on calling on her mobile phone. He then answered the call. A male voice asked Taziana and introduced himself as her boyfriend. Salmendra replied him saying that he is the boyfriend of Taziana and she is now with him in the hotel room. With this phone call, they stopped the sexual intercourse. He asked her who this person was and why was he claiming that he was her boyfriend. Salmendra said that he felt jealous and that he was betrayed and used by Taziana. While he was inquiring her about this, Avnil came and knocked on the door. Taziana and Salmendra opened the door and greeted him. After a while Taziana and Avnil went outside of the room and talked for a while. Salmendra started to cut the chicken. When she came back to the room, she told him that she wanted to go. He was holding a knife at that time as he was cutting the chicken. He then told her that she can go but he wanted back the tattoo that he made on her shoulder. She then came to him and asked what did he meant by it. He hugged her and pointed out the tattoo from his finger. She pushed him away. At that time, the Receptionist came

and told Taziana that she got a phone call at the Reception. Taziana then went with the Receptionist. She did not come back.

65. During his evidence, the accused denied that he forcefully had sexual intercourse with the victim. He did not threaten her with a knife saying that he will remove the tattoo that he made on her shoulder. He had been in a relationship with the victim since 2010 and he was never charged or alleged with any violence conduct by the victim until this allegation made against him. Salmendra went to a wedding in Nadi in the morning before he came to meet Taziana as Denarau.
66. I have summarised the evidence presented during the cause of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence and reminded yourselves of all of them. What I did only to draw your attention to the main items of evidence and help you in reminding yourselves of the evidence.

Analysis

67. The prosecution and the defence presented conflicting versions of events, which took place in private between the victim and the accused. The victim claims that the accused forcefully had sexual intercourse with her without her consent. The accused claims that it was a consensual intercourse. Both the prosecution and the defence did not dispute having sexual intercourse in the room 411 on the 8th of December 2012. The Prosecution further alleged that the accused threatened to injure the victim with a knife.
68. The issue of the existence of consent for an alleged sexual intercourse that took place in private between two persons is always involving with believing of the

version of a person against another's. Hence, in order to determine whether the victim gave the consent, it is important to consider how the victim and the accused behave before and after the alleged sexual intercourse.

69. As I mentioned above, there is no stereotype of circumstances for a rape, a rapist, or a victim of rape. A mere fact that a girl went with a boy to a room in the hotel or she had/ have a relationship with the same boy, does not automatically constitute that she has given her consent to have sexual intercourse with the boy. You are required to consider all the circumstances of this incident. Having considered all the circumstances as a whole, if it leads to an indisputable and inescapable conclusion that she had not given her consent freely and voluntarily to have sexual intercourse with the accused, you can then conclude that the victim has not given her consent to the accused to insert his penis into her vagina.
70. In order to determine whether the prosecution has proven beyond reasonable doubt that the victim did not give her consent, you have to consider the credibility of the witnesses, and the reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. 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.
71. 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 testifying in the

evidence. You then should consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that, you are required to consider the consistency of the witness not only with his or her own evidence but also with other evidence presented in the case.

72. It is your duty as judges of facts to consider the demeanor of the witnesses, how they react to being cross examined and re-examined, where they evasive, in order to decide the credibility of the witness and the evidence. Moreover, you have to consider the knowledge of the witness on the facts that he or she is testifying, his or her disinterestedness, his or her integrity, and his or her veracity in order to determine the credibility of the witness and his evidence.
73. The learned counsel for the defence proposed you to consider the inconsistent nature of the evidence given by the victim with her own evidence and also with other evidence presented by the prosecution. Hence, being judges of facts, you are allowed to consider whether the evidence given by the victim is inconsistent with her own evidence and also with the evidence given by other witnesses.
74. You may recall that the learned counsel for the accused person questioned the victim during the cross examination about the inconsistent nature of her evidence given in court and the two statements she made to the police on 8th of December 2012 and on 10th of December 2012 respectively. She has referred Salmendra as her boyfriend in the statement. She has not mentioned in the statement that she was going home and Salmendra joined with her because he was also going to Lautoka. She has further stated Avnil checked into the hotel room in fifteen minutes after they checked in. Moreover, she has told the police that she ran out of the room when Salmendra tried to remove her tattoo with the

knife. Taziana in her evidence in court stated that she forgot to mention it in evidence in chief that she actually ran out of the room. According to the evidence given by Taziana, she was still shocked and scared of what had happened when she gave her statement to the police on the 8th of December 2012. Likewise you can consider the inconsistent nature of the evidence given by the victim with her own evidence as well as the other evidence presented by the prosecution.

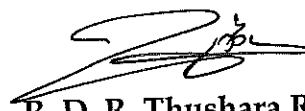
75. I will now explain you the purpose of considering the inconstant nature of the evidence given by a witness with his or her own evidence or the evidence of other witnesses. You can also apply this direction in considering the inconsistent nature of the evidence given in court and the previously made statement of a witness. You are allowed to take into consideration about such inconsistencies and the omissions when you consider credibility and reliability of the evidence given by the witness. However, the previously made statements are not evidence of the truth of its contents. The evidence is what a witness testified in the court.
76. 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, specially in revealing those incidents to another person. Sometimes they are unable to recall every minute detail soon after the incident due to the traumatic impact or the experience they undergo *et cetera*. Sometimes, with the passage of time they would be able to resurrect their memory and recall some details of those traumatic experiences.
77. 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.

78. You heard the evidence of Avnil, where he stated that Taziana informed him that she was raped by the accused. She said it hurriedly while they were at the outside of the room. She feared that the accused might hear what she was telling to Avnil. This form of evidence is known as evidence of recent complaint. It is not an evidence as to what actually happened between Taziana and Salmendra. Avnil was not present and witnessed what happened between them.
79. You are entitled to consider the evidence of recent complaint in order to decide whether or not Taziana has told the truth. It is for you to decide whether the evidence of recent complain helps you to reach a decision, but it is important that you must understand that the evidence of recent complaint is not independent evidence of what happened between Taziana and Salmendra. It therefore cannot of itself prove that the complaint is true.
80. Ladies and Gentleman, it is your duty now to consider whether the evidence presented by the prosecution is reliable and truthful. If you accept them as reliable and truthful, then you can consider whether you accept them as proven facts. Likewise, you must consider whether the evidence presented by the accused could be accepted as reliable and truthful. I must again remind you that the accused has no responsibility to prove his innocence.

81. You heard the evidence presented by the accused, where he denied this allegation. According to his evidence, Taziana engaged in a consensual sexual intercourse with him. She willingly participated in it. The accused further denies that he threatened the victim with a knife. If you accept the version of the accused as reliable and truthful, or consider it as reasonably true, although you are not convinced that it is true, then the case of the prosecution fails. You must then acquit the accused from these two counts as charged in the information.
82. If you neither believe nor disbelieve the version of the accused, yet, it creates a reasonable doubt in your mind about the prosecution case in respect of the count of rape. You must then acquit the accused from the count of rape.
83. Likewise, if you neither believe nor disbelieve the version of the accused, yet, it creates a reasonable doubt in your mind about the prosecution case in respect of the count of criminal intimidation. You must then acquit the accused from the count of criminal intimidation.
84. Even if you reject the version of the accused person that does not mean that the prosecution has established that the accused is guilty for 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 counts as charged in the information.
85. Upon consideration of all evidence, if you believe that the count of rape is proved beyond reasonable doubt, you can find the accused is guilty of the charge. If you believe that that charge is not proved beyond reasonable doubt, then you must find the accused not guilty.

86. Likewise, if you believe that the count of criminal intimidation is proved beyond reasonable doubt, you can find the accused is guilty of the charge. If you believe that that charge is not proved beyond reasonable doubt, then you must find the accused not guilty.
87. 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 on the charge against the accused person. You will be asked individually for your opinion and are not required to give reasons for your opinion. Once you have reached your opinion, you may please inform the clerks, so that the court could be reconvened.
88. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?

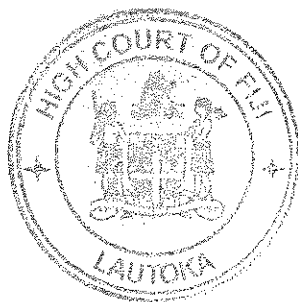


R. D. R. Thushara Rajasinghe

Judge

At Lautoka

16th of August 2016



**Solicitors : Office of the Director of Public Prosecutions
Office of Legal Aid Commission**