

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 234 of 2016

[CRIMINAL JURISDICTION]

STATE

V

JAI PRASAD

**Counsel** : Ms. J. Fatiaki with Ms. M. Konrote for State  
Mr. J. Reddy with Mr. J. Vulakauvaki for Accused

**Hearing on** : 12<sup>th</sup> - 15<sup>th</sup> June 2017

**Summing up on** : 16<sup>th</sup> June 2017

**SUMMING UP**

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now 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 judges of facts.
2. Evidence is what the witnesses said from the witness box inside this court room, the exhibits tendered and the admitted facts. Your opinion should be based only on the evidence presented inside this court room. If you have heard, read or

otherwise come to know anything about this case outside this court room, you must disregard that information.

3. Please remember that I will not be reproducing the entire evidence in this summing up. I would only refer to the evidence which I consider important to explain the case and the applicable legal principles. If I do not refer to certain evidence which you consider as important, you should still consider that evidence and give it such weight you may think fit.
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 lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
5. A statement made by a witness to the police can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of his/her the evidence.
6. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. No such emotion should influence your decision.

7. 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 experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.
  
8. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes regarding what we remember.
  
9. 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. 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 is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.
  
10. 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 him/her is for you to decide.

11. 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 his/her evidence is inaccurate; or you may accept the reason he/she provided for the inconsistency and consider him/her to be reliable as a witness.
12. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what he/she said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
13. 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 is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.
14. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
15. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of the accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.

16. In order to prove that the accused is guilty, the prosecution should prove all the elements of the offence beyond reasonable doubt. If you have a reasonable doubt in respect of any element of the offence the accused is charged with, as to whether the prosecution has proved that element, then you must find the accused not guilty. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in a short while.
17. You are not required to decide every point raised by lawyers in this case. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not that charge has been proved.
18. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
19. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offence;

#### **FIRST COUNT**

##### *Statement of Offence*

**RAPE:** contrary to section 207(1) and (2)(a) of the Crimes Decree No. 44 of 2009.

##### *Particulars of Offence*

**JAI PRASAD** on the 31<sup>st</sup> day of July 2014 at Suva in the Central Division had carnal knowledge of Elizabeth Swamy without her consent.

20. In order to prove the above offence, the prosecution should prove the following elements beyond reasonable doubt;
  - a) the accused;
  - b) penetrated the anus of the complainant with his penis;
  - c) without the consent of the complainant; and
  - d) the accused knew or believed that the complaint was not consenting; or the accused was reckless as to whether or not she was consenting.

21. The first element is concerned with the identity of the person who committed the offence. There is no dispute over the identity in this case.
22. Second element involves the penetration of the complainant's anus. The law states that this element is complete on penetration to any extent. Therefore, it is not necessary to have evidence of full penetration or ejaculation. A slightest penetration is sufficient to satisfy this element.
23. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated the complainant's anus without her consent.
24. 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;
  - a) by force; or
  - b) by threat or intimidation; or
  - c) by fear of bodily harm; or
  - d) by exercise of authority.
25. 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.
26. What is meant by 'reckless as to whether or not she was consenting'? If the accused was aware of the risk that the complainant may not be consenting for him to penetrate her anus and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant's anus, 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.

27. Please remember that knowledge and intention of the accused can only be inferred based on the proved facts because you will not find direct evidence regarding same.
28. You heard the evidence of the fourth prosecution witness, the doctor who gave evidence on the Medical Report tendered as PE01. He did not examine the complainant. He was called because the doctor who examined the complainant is unavailable. The fourth witness gave his opinion based on the observations that were made when the complainant was examined. You are not bound to accept the evidence of the fourth prosecution witness. It is a matter for you to give whatever weight you consider appropriate with regard to the observations made and the opinion given by the doctor.
29. The prosecution says that they are relying on recent complaint evidence. You heard in this case that the complainant had made a complaint to her sister, the second prosecution witness after the incident. In this regard you should consider whether that was a prompt complaint regarding the incident and whether the complainant sufficiently complained of the offence the accused is charged with.
30. Such complaint need not specifically disclose all the ingredients of the offence and describe every detail of the incident, but should contain sufficient information with regard to the alleged conduct of the accused. However, please remember that this evidence of recent complaint is not evidence as to what actually happened between the complainant and the accused. The second prosecution witness cannot confirm whether the content of that complaint is true because she was not there. It may only assist you to decide whether the complainant is consistent and whether or not the complainant has told you the truth. In the end you are deciding whether the complainant has given a truthful account of her encounter with the accused.
31. On the other hand, the accused says that this complaint is not a recent complaint. The defence points out that the complainant had the opportunity to complain to her sister or father earlier.

32. Experience has shown that victims of sexual offences may react in different ways to what they went through. Some, in distress or anger may complain to the first person they see. Some, due to shame, fear, shock or confusion may not complain for some time or may not complain at all. However, if there is a delay, that may give room to make-up a story, which in turn could affect the reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation to such delay. Your task is to decide whether you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offence the accused is charged with.
33. Now let us look at the evidence led in this case.

#### ***Prosecution Case***

34. The complainant said that;

- a) *She is 22 years old. On 30/07/14 she went with her son to the accused's house to join her father and the accused who were having drinks. Accused was her neighbour. It was usual for her to go and have drinks at the accused's house. They had a bottle of beer and after that they switched to whiskey. When her father said he had enough and wanted to go back, the accused asked him whether she can come back and help him finish the drinks. So she took her son home and came back to the accused's house.*
- b) *The accused asked her whether she wanted to go to the seawall, and she said 'no'. Then the accused asked her whether she wants to watch a rated movie and she again said 'no'. But the accused put the rated movie on anyway. He was watching it while she was on her phone. It was her first time to drink alone with the accused. After the accused started playing the movie, he asked her to move closer as it would be easier to pass the drinks. So she moved to the middle. Then the accused started kissing her. She pushed him off and told him to stop. Thereafter the accused asked her to stand up and she stood up. He asked her to go to the room and she told him that he was drunk and she said 'no'. Then the accused pulled her hand and took her to the room. She asked him to stop.*



- c) *She said when the accused was taking her to the room she just followed because she didn't know what is going to happen. She also said "I don't know what I was thinking, following him". While he was pulling her to the bedroom nothing really happened, he just took her and she just followed. Inside the room the accused tried to kiss her again and she told him to stop. Then the accused pushed her onto the bed and kept moving closer. She moved back on the bed and hit her head on the concrete wall and passed out.*
- d) *Then she felt a bite on her back. She also felt pain and could feel the accused's penis inside her anus. After that, she was turned over on her back and again the accused penetrated her anus with his penis. She asked him to stop while this was happening but he did not stop. She tried to scream but she does not think that anyone heard her. She said when she tried to scream the accused tried to stop her and told her to be quiet and also tried to cover her mouth. She asked him again to stop and then he just stopped. Before she hit her head on the wall she had her clothes on but when she regained consciousness she was naked.*
- e) *Then she asked for her clothes, put them on and went to the door. But the door was locked. The accused opened the door for her and also told her not to tell anyone or her father.*
- f) *She went back and sat outside her house for a while. It was around 3am. She didn't want to go inside the house while she was crying because her father may wake up. She was crying because she felt disgusted with herself and because she didn't expect that to happen. The next day she texted her boyfriend informing him that she wants to end the relationship. She said that is because she felt damaged. When the boyfriend kept asking why, she told him what happened. The boyfriend told her to tell her father or the sister.*
- g) *The next morning she approached her sister, Edwina and told her that she thinks that she had been raped. She said, "I meant, I know that it was something I didn't want to happen I didn't know what else to tell her". The sister told her to inform the father. She did not want to tell her father because she didn't want him to feel disappointed.*
- h) *Her sister called their mother and informed her. Then the mother kept calling her to tell her to report the matter to the police. She kept cutting the mother off. She didn't want to report the matter to the police because she was scared and didn't want to talk about it. She didn't want to tarnish her father's image. That night her father asked her what happened and whether she wanted to go to the police station. First she said 'no'*

but because her mother and the sister kept pleading she went with her father to the police station.

- i) During cross examination she said the accused's house was about 4 metres away from her house. She went to the accused's house that day around 10.30pm. When she was asked why she did not go away when the accused played the rated movie even after she said 'no', she said she doesn't know what she was thinking and what made her stay.
- j) She said the accused kissed her close to her neck and the edge of her lips. She said it was quick and probably lasted just a second. When she was asked again, she said the accused tried to kiss her and she is sure that is what she said earlier. She said she did not feel entirely threatened when the accused asked her to go to the bedroom because the accused was giggling and she thought the accused was joking. When the accused grabbed her hand, she asked him politely to let go. She said she tried to pull her hand out. When she was asked what action did she take to free herself she said 'none'. She said "I felt like I was in shock. I don't know what was happening in my mind at that time. I just let it happen".
- k) She agreed that in her statement to the police she had stated that the accused tried to kiss her but she pushed him away. She said the police officer had missed out few things she said in her statement and when she told that to the police she was told that it was 'ok' because it doesn't matter. When it was pointed out that it was stated in her police statement that she saw the accused on top of her and she tried to push him away she said she can't remember whether she said that to the police.
- l) When she was asked whether she received any injuries in her anus she said she did bleed. When she was asked what the position of her body was when she saw the accused behind her, she said she can't remember. She said she did scream when the accused was on top of her. She said it was the first time that her anus was penetrated by a penis. When she was asked whether she had vaginal sex that night she said she can't remember.
- m) She said that after she hit her head on the wall there was a bump on her head and she informed the doctor about that. She denied the suggestion that one Nimesh Deo who was accused's flat mate at that time walked in when she was with the accused, kissing each other.
- n) During re-examination she said the bedroom was about 2 or 2½ steps from the couch.

35. The 2<sup>nd</sup> witness was Edwina Swamy sister of the complainant. She said;
- a) *On 01/08/14 at about 7.30am when she was getting ready to go to work, the complainant came to her and told her that she wanted to tell her something. Then the complainant lifted up her shirt and showed the back. She saw bruises and marks. When she asked what happened, the complainant told her that the accused raped her. The complainant told her that the accused grabbed her by the hand, pulled her to his room where she was walking backwards, then she fell on the bed and she hit her head on the wall and blacked out. When the complainant regained consciousness she saw the accused on top of her and her clothes were removed. The complainant also told her not to tell their father. The bruises on the complainant's upper back looked like love bites and where her hip was it looked like there were hand marks. She called her mother and informed what had happened.*
  - b) *During cross examination she agreed that there were plenty bite marks that looked like love bites.*
36. Next witness was Rajas Swamy. He said that;
- a) *He is the complainant's father. He's working at the Fiji Revenue & Customs Authority and prior to that he was with the Fiji Police for 23 years. On 30/07/14 the accused invited him for a drink. Later the complainant and her son joined them. After they finished four beer bottles they switched to liquor. After a while, he left with his grandson and the complainant remained with the accused. On 31/07/14 he went to see the accused. While he was at the accused's house he got a call from his ex-wife and she told him over the phone that the accused had raped the complainant.*
  - b) *He went home to get confirmation from the complainant. After she confirmed, he confronted the accused. He informed the accused that he will report the matter to the police. The accused begged him not to do so, saying that it will tarnish his image. Thereafter he went to the police station to report the matter.*
  - c) *During cross examination he said he can't recall whether the complainant came home with him and the grandson after he finished drinking and then she went back to the accused's house. He said when he first confronted the accused the accused's response was that 'it was a mistake'. When he was asked whether the accused said that 'it was by consent' he again said the accused told him that 'it was a mistake'.*

*When the statement he gave to the police was shown to him he agreed that the accused told him that it was through consent.*

37. Fourth witness was Dr. James Fong who is the head of the Department of Obstetrics and Gynecology at the CWM hospital. He said that;

a) *The doctor who prepared the medical report tendered as PE 1 is currently working in Vanuatu. He said the said examination had been conducted at 11.30pm on 01/08/2014. He said bruises had been noted on the back. On the pelvic examination an abrasion had been noted at the very back beyond the opening of the vagina towards the anus. He said the anus had been intact and there had been no bruises or lacerations. He said the fact that there were no bruises or lacerations does not rule out the possibility of anal penetration. He said the abrasion noted during the pelvic examination on the entrance of the vagina closest to the anus is an injury frequently occurs during sex. He said it is consistent with the history of vaginal penetration. When he was asked again, he said that the injury number 2 only indicates that the vagina was penetrated.*

38. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving his guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to give sworn evidence.

39. The accused said in his evidence that;

a) *On 30/07/14 he was drinking beer with the complainant's father after he returned from work. Later the complainant's father called the complainant to join them. Complainant came with her son and started serving drinks. After the 4<sup>th</sup> bottle of beer finished he took out a bottle of whiskey as the complainant's father said he wants to drink some more. After two rounds the complainant's father said he had enough. The complainant's father also said that the complainant can finish the balance with him.*

b) *Then the complainant, her father and the complainant's son left. Later the complainant came back alone and again started serving him the drinks. First*

*the complainant was sitting on a different couch. Then the complainant wanted to use his mobile phone and she came and sat beside him on the same couch.*

- c) After sometime the complainant started touching his thighs and his penis area. He could see her coming towards him. Then they started hugging and kissing each other. He said all this happened automatically from both of them. Then they removed their clothes and continued kissing each other. While this was happening his flat mate opened the door and he saw them. By this time the complainant was sitting on his lap. She quickly picked her clothes and covered her private parts.*
- d) After that the complainant asked him if they can go to his bedroom. They were holding their hands in a romantic manner when they went inside the bedroom. Inside the bedroom the complainant asked the accused to make love with her. Then they had sex where he inserted his penis inside her vagina. He said the complainant was enjoying it.*
- e) After they finished having sex, they came back to the living room where the complainant again gave him whiskey. After a while the complainant wanted to go home so he opened the main door and took her to the main gate. The complainant gave him a goodbye kiss and left.*
- f) He said they did not watch a rated movie. He said he didn't penetrate the complainant's anus with his penis. He said he had vaginal intercourse with the complainant with her consent.*
- g) During cross examination he agreed that he bit the complainant on the back. When it was put to him that he had to be behind the complainant in order to bite her back, he said they changed positions while making love. He said the complainant did not become unconsciousness. He denied begging the complainant's father not to report the incident to the police.*

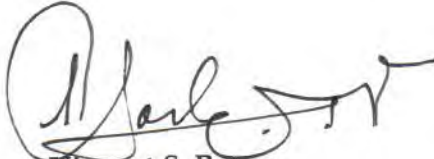
40. That is a summary of the evidence adduced by the prosecution and the defence. Please note that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I have not referred to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.

41. The prosecution case is that the accused penetrated the complainant's anus with his penis when she was unconscious and then he continued to penetrate the anus without her consent after she regained consciousness. Prosecution says that the accused is lying and his evidence is simply self-serving.
  
42. Prosecution says that when the complainant gave evidence it was not suggested to her that she served drinks after the alleged incident and the fact that she kissed the accused goodbye. The prosecution says it was unfair as the complainant was not given an opportunity to respond in that regard. Before you draw any inference on this failure to cross examine the complainant you should remember that there may be other explanations for the failure of the counsel to put matters to a witness such as the counsel misunderstanding the accused's instructions or the matter simply being overlooked. You should also consider how relevant are these matters that are not put to the complainant to the main issues you are required to decide in this case.
  
43. A similar approach should be taken when you consider the fact that the accused did not call the flat mate he referred to in his evidence. The prosecution says that the said person was not called because he was not there as testified by the accused. There may be other explanations. You should also keep in mind that an accused person does not have to prove anything.
  
44. The accused denies that he penetrated complainant's anus. But he says that he had sexual intercourse with the complainant with her consent where he inserted his penis inside her vagina. Defence points out that there are inconsistencies in the evidence given by the complainant and her evidence is not credible and her version is not probable. Defence also points out that according to the medical examination there is evidence of vaginal penetration which supports the accused's version and no injuries were noted in the complainant's anus.

45. You must remember to assess the evidence for the prosecution and defence using the same yardstick but bearing in mind that always the prosecution should prove the case against the accused beyond reasonable doubt.
46. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
47. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise;
- (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
  - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
  - (iii) The third possibility is that you reject his evidence. But if you disbelieve him, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether prosecution has proved all the elements beyond reasonable doubt. If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.
48. Any re-directions?
49. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the accused. You may peruse the exhibit if you wish to do so. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.

50. Your opinion should be whether the accused is guilty or not guilty.



  
Vincent S. Perera  
JUDGE

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.  
Solicitor for the Accused : Jiten Reddy Lawyers, Suva.