

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 99 of 2016

STATE

v

ENESHWAR RAJ

Counsel : Ms. Shirley Tivao for the State
Ms. Talei Kean with Mr. V. Tuicolo for the Accused

Dates of Trial : 26 September, 28-29 September & 2 October 2017

Date Summing Up : 3 October 2017

SUMMING UP

Madam Assessors and Gentleman Assessor,

- [1] It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the Accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.
- [2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.

- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinion. You must take all evidence into consideration, before you proceed to form your opinion. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charges against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charges against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witnesses said from the witness box, and any admissions made by the parties.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.
- [10] A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel

are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening and closing submissions made by both Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.

- [11] As I already indicated to you, another matter which will be of concern to you is the determination of the credibility of witnesses, basically the truthfulness and 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 correctly recalls the facts about which he or she has testified.
- [12] Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13] You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may find Court environment stressful and distracting. Consider also the likelihood or probability of the witness's account.
- [14] The experience of the Courts is that those who have been victims of a sexual offences react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others will not. The reason for this is that every victim has her own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in Court alone is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
- [15] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her evidence. This includes omissions as well. 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.

- [16] However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. 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 or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider him or her to be reliable as a witness.
- [17] You may also have to consider whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.
- [18] Ladies and Gentleman Assessors, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [19] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [20] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not to the four charges he is charged. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.
- [21] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offences charged.

- [22] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [23] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [24] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [25] I must emphasize, it does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.
- [26] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [27] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offences charged. The fact that the accused has given evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence.
- [28] I have said that it is the prosecution who must prove the allegations. Then what is the standard of proof or degree of proof, as expected by law?
- [29] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond any

reasonable doubt every element that goes to make up the offences charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason.

- [30] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offences, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.
- [31] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for victim or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [32] Let us now look at the charges contained in the amended information.
- [33] There are four charges preferred by DPP, against the accused:

COUNT 1

REPRESENTATIVE COUNT

Statement of Offence

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

Particulars of Offence

ENESHWAR RAJ between the 30th day of November 2015 and the 4th day of January 2016 at Nasinu in the Central Division had carnal knowledge of **RENUKA DEVI NARAYAN**, without her consent.

COUNT 2

Statement of Offence

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

Particulars of Offence

ENESHWAR RAJ between the 1st and 31st day of December 2015 at Nasinu in the Central Division penetrated the vagina of **RENUKA DEVI NARAYAN**, with an eggplant without her consent.

COUNT 3

Statement of Offence

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

Particulars of Offence

ENESHWAR RAJ on the 5th day of January 2016 at Nasinu in the Central Division had carnal knowledge of **RENUKA DEVI NARAYAN**, without her consent.

COUNT 4

Statement of Offence

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

Particulars of Offence

ENESHWAR RAJ on the 5th day of January 2016 at Nasinu in the Central Division penetrated the vagina of **RENUKA DEVI NARAYAN**, with his finger without her consent.

[34] As you would have noted there are four counts of Rape; two counts in terms of Section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009 (Crimes Act) and two counts in terms of Section 207 (1) and (2) (b) of the Crimes Act.

[35] Section 207(1) of the Crimes Act reads as follows:

207 — (1) Any person who rapes another person commits an indictable offence.

[36] Section 207(2)(a) and (b) of the Crimes Act are reproduced below.

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent; or

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent.

[37] Therefore, when Section 207(1) is read with Section 207(2)(a) it would read as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent.

[38] Likewise, when Section 207(1) is read with Section 207(2)(b) it would read as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

(2) A person rapes another person if —

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent.

[39] In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207(2)(a), means having penile sexual intercourse with that other person or having sexual intercourse with the use of the penis. On the other hand, Section 207(2)(b) refers to a person penetrating the vulva, vagina or anus of the other person, to any extent, with a thing or a part of the person's body that is not a penis.

[40] Therefore, in order for the prosecution to prove the first count of Rape, they must establish beyond any reasonable doubt that;

- (i) the accused;
- (ii) during the specified period (in this case the 30 November 2015-4 January 2016);
- (iii) at Nasinu, in the Central Division;
- (iv) penetrated the complainant's vagina, with his penis;
- (v) without the consent of the complainant; and

- (vi) the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[41] In order for the prosecution to prove the second count of Rape, they must establish beyond any reasonable doubt that;

- (i) the accused;
- (ii) during the specified period (in this case the 1 December 2015-31 December 2015);
- (iii) at Nasinu, in the Central Division;
- (iv) penetrated the complainant's vagina, with an eggplant;
- (v) without the consent of the complainant; and
- (vi) the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[42] In order for the prosecution to prove the third count of Rape, they must establish beyond any reasonable doubt that;

- (i) the accused;
- (ii) on the specified day (in this case the 5 January 2016);
- (iii) at Nasinu, in the Central Division;
- (iv) penetrated the complainant's vagina, with his penis;
- (v) without the consent of the complainant; and
- (vi) the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[43] Similarly, in order for the prosecution to prove the fourth count of Rape, they must establish beyond any reasonable doubt that;

- (i) the accused;
- (ii) on the specified day (in this case the 5 January 2016);
- (iii) at Nasinu, in the Central Division;
- (iv) penetrated the complainant's vagina, with his finger;
- (v) without the consent of the complainant; and
- (vi) the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

- [44] The first element is concerned with the identity of the person who committed the offence. The second element relates to the specific period or day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.
- [45] The fourth element involves the penetration of the complainant's vagina; in respect of counts one and three, with the accused's penis, and in respect of count two, with an eggplant, and in respect of count four with his finger. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration.
- [46] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina, with his penis, an eggplant and his finger, respectively, without her consent.
- [47] You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance shall not alone 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; or
 - (e) by false and fraudulent representations about the nature or purpose of the act; or
 - (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.
- [48] Apart from proving that the complainant did not consent for the accused to insert his penis, an eggplant and his finger into her vagina, respectively, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon

who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

- [49] A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 32 years of age at the time of the incident, and therefore, she had the mental capacity to consent.
- [50] In our law, no corroboration is needed to prove an allegation of Sexual Offence; Rape is obviously considered as a Sexual Offence.
- [51] It is also my duty to mention another relevant legal requirement concerning the first count against the accused. It is titled as a representative count. This representative count of Rape against the accused is based on act or series of acts done during a specified time period (In this instance between 30 November 2015-4 January 2016). Such a charge is described generally as a representative count in legal terminology. The prosecution is expected to prove just one incident of Rape which falls within this period in respect of such a count. They need not prove a continuous or a series of incidents of Rape in support of a representative count.
- [52] If you are satisfied beyond any reasonable doubt that the accused, between 30 November 2015-4 January 2016, penetrated the complainant's vagina with his penis, without her consent, then you must find him guilty of the first count of Rape.
- [53] If you are satisfied beyond any reasonable doubt that the accused, between 1 December 2015-31 December 2015, penetrated the complainant's vagina with an eggplant, without her consent, then you must find him guilty of the second count of Rape.
- [54] If you are satisfied beyond any reasonable doubt that the accused, on 5 January 2016, penetrated the complainant's vagina with his penis, without her consent, then you must find him guilty of the third count of Rape.
- [55] If you are satisfied beyond any reasonable doubt that the accused, on 5 January 2016, penetrated the complainant's vagina with his finger, without her consent, then you must find him guilty of the fourth count of Rape.
- [56] If you find that the prosecution has failed to establish any of these elements in relation to any of the four counts, then you must find the accused not guilty to all four charges.
- [57] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.
- [58] The State and the Defence have consented to treat the following facts as "Admitted Facts" without placing necessary evidence to prove them:

BACKGROUND

1. The complainant is Renuka Devi Narayan, 32 years, a Garment Factory worker, of Sakoca Settlement.
2. The accused person is Eneshwar Raj, 31 years, self-employed, also of Sakoca Settlement.
3. The complainant in paragraph 1 and the accused in paragraph 2 have been husband and wife for the past 10 years and have a 9 year old daughter of their marriage.

MEDICAL EXAMINATION OF RENUKA DEVI NARAYAN

4. On 8 January 2016, Renuka Narayan was medically examined at the CWM Hospital by Dr. Unaisi Tabua.
5. Subsequent to paragraph 4 above, a police medical report form was filled provided by the doctor.

CAUTION INTERVIEW AND CHARGE

6. Eneshwar Raj was interviewed under caution at the Valelevu Police Station on 18 February 2016, by Detective Sergeant 2561 Vinod Chand.
7. The interview under caution was witnessed by Detective Constable 1853 Luke Lewabeci.
8. Eneshwar Raj was afforded his constitutional rights as an accused person and given sufficient breaks, meals and rest.
9. On 18 February 2016, Eneshwar Raj was charged by Detective Constable Niklesh for the offence of rape.

[59] You must therefore, treat those facts as proved.

[60] The prosecution, in support of their case, called the complainant.

Case for the Prosecution

[61] Evidence of the complainant Renuka Devi Narayan

- (i) *It is an admitted fact that the complainant is 32 years of age and Garment Factory worker. It is also an admitted fact that the accused person, Eneshwar Raj, is 31 years old and is self-employed. The complainant and the accused have been husband and wife for 10 years and have a 9 year old daughter from their marriage.*
- (ii) *Renuka testified that she had got married to the accused on 5 April 2006. She had been formally divorced from the accused on 25 June 2016. At the beginning of the examination in chief, she had stated*

that the divorce had been formalised on 25 June 2015. However, later she corrected the record and stated that her divorce had been formalised on 25 June 2016.

- (iii) She said that at the beginning of the marriage, the first two years, the marriage was running smoothly. After that there were some small conflicts. In 2013, her marriage started to break up. This was because her husband was not working and they used to have arguments about that.
- (iv) She testified that her husband assaulted her. He had punched her and she had got swollen eyes. She had reported this matter to the Police.
- (v) While married, they had been living at Narere, 8 Miles (in the Nasinu area). The house they were living in had been rented by them.
- (vi) Between 30 November 2015 to 4 January 2016, she testified that the relationship between herself and her husband was not too good. This was due to small conflicts and arguments. During this period, they always had arguments and her husband forced her to have sex with him every night. She stated "if I deny him he always used to force me to have sex with him every night. If I deny he always pulls my clothes off and he always makes love bites on my neck. And he won't listen to me. He used to always have sex with me."
- (vii) Renuka explained that by sex she meant the accused inserting his penis inside her vagina. Although the accused was legally married to her, she did not want to have sex with him, and didn't consent to have sex with him. She had told the accused that she didn't want to have sex with him. However, the accused would not listen to her and would forcefully have sex with her. She said she felt unhappy about this.
- (viii) Between 30 November 2015 to 4 January 2016, nearly every night the accused would forcefully have sex with her.
- (ix) On one occasion during this period, the accused had inserted an eggplant into her vagina. Renuka explained further. After returning home from work, it was night time and they were sleeping. She and her husband had arguments again. She didn't want to have sex but the accused had forced her. He had sexual intercourse with her 2 times and after that in an aggressive manner he had inserted an eggplant into her vagina. She states that she felt something different in her vagina. Different to a penis. When she got up to go to the washroom to wash herself, she had put on the lights. She had then seen the eggplant. Only at that time did she realise that her husband had inserted an eggplant in her vagina.

- (x) Renuka testified that although she had felt very bad about this, she didn't want to argue with the accused as she was afraid of him. She was afraid that he would punch her. So she kept it to herself.
- (xi) The complainant testified further as to the events which took place on 5 January 2016. She said it was a Tuesday. She had returned from work around 5.00-5.30 in the evening. They had their dinner and had arguments. The accused had forcefully had sexual intercourse with her and thereafter, had forcefully inserted his fingers into her vagina and kept her awake until morning. He had not let her sleep.
- (xii) She testified that on this day she refused to have sexual intercourse with the accused. However, he had forcefully pulled her clothes off and started having sex with her. Renuka again explained that by sex she meant the accused inserting his penis inside her vagina. Thereafter, the accused had forcefully inserted two of his fingers into her vagina.
- (xiii) Renuka testified that after these incidents of 5 January 2016, she had been fed up with his behaviour. Therefore, she had made a complaint to the Police.
- (xiv) It was put to Renuka in cross-examination that she had not told the Police that the accused had acted in an aggressive manner at the time he had inserted an eggplant into her vagina. She replied that she had actually told the Police but maybe they did not write it down.
- (xv) It was also put to her in cross-examination that, in relation to the incidents which took place on 5 January 2016, she had told the police that the accused had forcefully had sexual intercourse with her two times and then inserted his finger inside her vagina. Whereas, in the evidence-in-chief she had stated that the accused had forcefully had sexual intercourse with her and thereafter had forcefully inserted two of his fingers into her vagina.
- (xvi) In cross-examination, it was put to the complainant that she was having affairs with other men and that she was cheating on the accused. The names of Sanjay, Rajiv and Ashnil were mentioned. The complainant denied all these allegations.
- (xvii) It was also suggested to Renuka in cross-examination that all the acts of sexual intercourse between her and the accused took place with her consent. Renuka denied these allegations.
- (xviii) The witness further testified that she had obtained a DVRO against the accused, with the Standard Orders. The accused had been charged for breaching the said DVRO on two occasions and had been imprisoned on both occasion.

[62] That was the case for the prosecution. You then heard me explain several options to the accused. I explained to him that he could give sworn evidence and call witnesses on his behalf. He could also address Court. He could have even remained silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times. However, the accused opted to offer evidence under oath.

[63] **Evidence of the Accused – Eneshwar Raj**

- (i) *The accused testified that in April 2013, he had got to know from his daughter that a man had come inside the house at night, when he was not at home.*
- (ii) *He stated that his wife had obtained a DVRO against him in 2013.*
- (iii) *He had been imprisoned on two occasions for the breach of the DVRO. The first occasion was in April 2015. He had been sentenced to 6 weeks imprisonment and had been released in May 2015. The second occasion was at the end of July 2015. He had been imprisoned for 3 months and 20 days. He had been released on 30 November 2015. On both occasions he had been imprisoned at the Korovou Prison.*
- (iv) *While he was serving in prison his wife and daughter had come and visited him.*
- (v) *He alleges that his wife was cheating on him. In his evidence, he referred specifically to the names of Sanjay, Rajiv and Ashnil. Ashnil is his neighbor and also his cousin.*
- (vi) *The witness testified that he had warned the complainant that he will go and inform her sister and friends as to what she was doing and that for her freedom she is trying to send him to prison. He explained further, that whenever the complainant had affairs she used to send him to prison so that she can enjoy her life.*
- (vii) *He stated thus "whenever she has affairs and I get to know about it, before I can tell anyone, she goes and reports to the Police and puts false allegations against me.....the first time I went to prison she was having an affair with Rajiv, and second time I went to prison she was having an affair with Ashnil."*
- (viii) *The witness categorically denied that he raped his wife Renuka. He testified that all the acts of sexual intercourse was consensual. He also denies that he inserted an eggplant into Renuka's vagina or that he inserted his fingers into her vagina.*
- (ix) *The witness also testified that he had visited his home several times after leaving on 7 January 2016. He also testified that on some occasions he and Renuka had consensual sexual intercourse during this period.*

- (x) *it must be borne in mind that at the time the complainant Renuka gave evidence in this Court, no questions were put to her that the accused had consensual sexual intercourse with her after he left home on 7 January 2016.*
- (xi) *In cross-examination it was put to him that the reason he did not leave Renuka was because she was not having any affairs as alleged by him.*
- (xii) *It was also put to him in cross-examination that he forcefully entered his house after he left on 7 January 2016.*
- (xiii) *It was also put to him in cross-examination that he was lying in Court and that his testimony cannot be believed.*

Analysis

- [64] The above is a brief summary of the evidence led at this trial. The prosecution relied on the evidence of the complainant to prove its case. The defence relied on the evidence of the accused himself.
- [65] This is case of marital Rape. During the period of 30 November 2015 to 5 January 2016, the complainant and the accused were legally married to each other.
- [66] As I have informed you earlier, the burden of proving each ingredient of the charges rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- [67] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [68] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by the complainant, Renuka Devi Narayan, is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of all four counts, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved the elements of the offences of Rape, beyond any reasonable doubt.
- [69] It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on the prosecution evidence, also when you are assessing the evidence of the accused. You must consider his evidence also for its consistency and also the probability of his version. If you find the evidence of the accused is truthful and reliable, then you must find the accused not guilty of all four charges, since the prosecution has failed to prove its case.
- [70] If you neither believe the evidence adduced by the accused nor disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the

prosecution case. The benefit of such doubt should then accrue in favour of the accused and he should be found not guilty of the charges.

[71] However, I must caution you that even if you reject the evidence of the accused as not truthful and also unreliable that does not mean the prosecution case is automatically proved. The prosecution have to prove their case independently of the accused and that too on the evidence they presented before you.

[72] As you already know there is four counts of Rape against the accused in the information. You must consider each count separately and you must not assume that because the accused is guilty on one count, that he must also be guilty of the others.

[73] In summary and before I conclude my summing up let me repeat some important points in following form:

- i. *If you believe the evidence of the accused, then you must find the accused not guilty of all four charges;*
- ii. *If you neither believe nor disbelieve the evidence of the accused, then again you must find the accused not guilty of the charges;*
- iii. *If you reject the version of the accused, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution;*
- iv. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of all four charges;*
- v. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charges of rape has been established beyond reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*

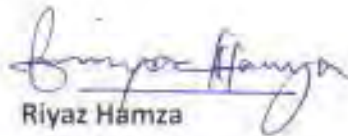
[74] Any re directions the parties may request?

[75] Madam Assessors and Gentleman Assessor, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions on the four counts separately against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[76] Your possible opinions should be as follows:

- First Count-Rape- Guilty or Not Guilty
- Second Count-Rape- Guilty or Not Guilty
- Third Count-Rape- Guilty or Not Guilty
- Fourth Count-Rape- Guilty or Not Guilty

[77] I thank you for your patient hearing.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



AT SUVA

Dated this 03rd Day of October 2017

Solicitor for the State : Office of the Director of Public Prosecutions, Suva.
Solicitor for the Accused : Office of the Legal Aid Commission, Suva.