

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**

**Crim. Case No: HAC 246 of 2015**

**STATE**

**v.**

**ADHI NARAYAN NAIDU**

**Counsel:** Ms. E. Samisoni for State  
Ms. N. Mishra for Accused

**Hearing:** 30<sup>th</sup> to 31<sup>st</sup> October 2017  
**Summing Up:** 2<sup>nd</sup> November 2017

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**SUMMING UP**

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1. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. You will then retire to consider your respective opinions.
2. Our functions are different. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
3. You are to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.
4. I may comment on the facts 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 facts. Hence, it is entirely upon you to accept or disregard

any comments I make on facts, unless it coincides with your own independent opinion. I say so because you are the judges of the facts.

5. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box and the documents tendered as exhibits. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The purposes 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 defence 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 testimony put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. 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 I will give the greatest possible weight on your opinions when I form and deliver my judgment.
7. 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**

8. 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.
9. The burden of proof of the charge against the accused is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused to prove his innocence, as his innocence is presumed by law.
10. 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**

11. The accused is charged with one count of Rape, contrary to Section 207 (1) and (2) (b) of Crimes Act. The particulars of the offence are before you. Therefore, I do not wish to reproduce them in my summing up.
12. The main elements of the offence of Rape are that:
  - i) The accused,
  - ii) Penetrated the vagina of the complainant with his finger,
  - iii) The complainant did not consent the accused to penetrate her vagina with his finger,
  - iv) The Accused knew or believed or was reckless as to whether or not she was consenting for him to insert his penis in that manner.

**Agreed Facts**

13. I now request you to draw your attention to the agreed facts, which are before you. They are the facts that the prosecution and the defence have agreed without dispute. Hence, you are allowed to consider them as proven fact by the prosecution beyond reasonable doubt.
14. According to the agreed facts and the evidence given by the accused, the identity of the accused is not disputed by the parties.

**Penetration**

15. Evidence of slightest penetration of the finger of the accused into the vagina of the complainant is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

**Consent**

16. 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 complainant did not give her consent to the accused to insert his finger into her vagina.
17. 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 complainant 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 complainant to an act of another person shall not alone constitute consent.
18. The complainant must have the freedom to make the choice. It means that she must not be pressured or forced to make that choice. Moreover, the complainant must have a mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. 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.



19. If you are satisfied, that the accused had penetrated the vagina of the complainant and she had not given her consent, you are then required to consider the last element of the offence, that is, whether the accused honestly believed or knew that the complainant 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 complainant was consenting. You must consider whether the accused knew either that the complainant was not in a condition or a position to make a choice freely and voluntarily, or the complainant had made no choice to agree to sexual intercourse. If you conclude that the accused believed or knew that the complainant was consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that was prevailed at the time of the alleged incident took place.

#### **Evidence of Corroboration**

20. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. The offence of Rape falls within this category. It means that if you are satisfied with the evidence given by the complainant and accept it as reliable and credible beyond reasonable doubt, you are then not required to look for any other evidence to support the account given by the complainant.
21. 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.
22. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety of ways. As I said above, it is your duty to determine the legal culpability of the alleged act committed by the accused according to law and not the moral or emotional culpability. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgment strictly on the evidence that you have heard from the witnesses during the course of the hearing.

**Evidence of the Prosecution**

23. Let me now remind you the evidence presented by the prosecution and the defence during the course of the hearing.
24. The complainant in her evidence said that she had stayed with her husband at the house of the accused for a week. They then moved into to the next house, as it was empty and the accused sometimes had friends at his place. The house that they have moved in is just ten meters away from the house of the accused. They had no problem with the accused.
25. The complainant recalls that on the 25th of June 2015, she was having a stomach pain, which is called as "nara ukh raha" in Hindi. It was a severe pain. While she was standing at the door, the accused had asked her about the pain in her stomach. He then asked her whether he can see what was it. For that, she had agreed because she knew that the accused had massaged and cured the stomach of her sister-in-law when she was suffering from the same kind of pain. The accused then came to her house. The door was open. It is an open house. The complainant had then given him oil as he requested. She then lied down on the mattress on the floor. She covered her legs with the blanket and lifted her upper garment for the accused to see the stomach. The accused then started to massage her stomach. He did it for about five minutes. During that time, they had no conversation between them. While he was massaging her stomach, the accused started to hold the breast of the complainant. He did with force. One of his hand was on her stomach while other hand holding her breast. She tried to push his hand away. She told him not to do it. He then tried to suck her breast. The complainant tried to push his head away, but failed. The accused then put his hand and try to touch her private part. She tried to push his hands away and told him to stop what he was doing, but he did not stop. He then penetrated the vagina of the complainant with his finger. She felt his fingers were going inside her vagina.
26. Meanwhile, her husband came in his taxi and parked it in front of the house. The accused then took his hand out and got up and left the house. He usually talks to her husband, but on that day, he did not say anything and left the house. According to the complainant, the accused did not say anything to her when he left. He just left. The place that the car was parked by her husband is about six feet ways from the place where she was lying down.



27. During the cross examination, the complainant said that she tried to remove the hand of the accused with a force when he put his finger into her vagina. She was scared when he was doing it. The complainant said that she never expected that the accused would do such a thing as she considered him as a brother. The complainant explained that she never attempted to shout for help because there is no one around and also she was so weak. The only strength she had was consumed to push the accused away and no strength left for her to do anything.
28. After the accused left, her husband came and helped her to get up. He asked her what had happened. The complainant had not gone to police station to report this incident on the same day. It took six days for her to go and report this matter to the police, that was 1st of July 2015. The complainant in her evidence said that she had no strength to go and report this matter to the police on the 25th of June 2015. Before she went and reported the matter on the 1st of July 2015, her cousin had a fight with the accused in their compound. The cousin came to her house in order to take her to his place on that day, as she was afraid to live in the house. The complainant later in her evidence said that her cousin came to her place on the 1st of July 2015, to help her to go to the police station. The complainant said that she went to the police station, before the accused came to the police station. The complainant admitted in her evidence that she refused to go to a medical examination as she was having her monthly mensuration.

#### **Evidence of the Defence**

29. At the conclusion of the prosecution's case, the accused was explained about his rights in defence. The accused opted to give evidence, but did not call any other witness for the defence.
30. The accused in his evidence denies this allegation. According to his evidence, the complainant had requested him to massage her stomach as she was having a pain. He had learned this method of massaging from his mother and has been doing it for last fifteen years. He had massaged and cured the sister-in-law of the complainant previously. When the complainant called him, he was having his food at his house. Once he finished his food, he went to her place to massage her. He was given oil by the complainant, when he asked for it. She then lied down on the mattress and lifted her upper garment up. He then massaged her stomach for about five minutes. Once he finished, he had told her to go to the hospital and see a doctor. He told this because if

there is something other than “nara” that has caused this pain, the doctors could heal it. Her husband came when he was finishing the massage. He had also told her husband to take her to the hospital. He then went home.

31. On the 1st of July 2015, he found on his way to the washroom that the husband of the complainant had parked his car, blocking his driveway. He then asked the husband of the complainant to take his car and park it in front of their house. When he was coming back from the washroom, the brother-in-law of the complainant assaulted him on his face. He got injured and the daughter of his sister-in-law had shouted them to stop assaulting him. She had called the police. The accused then went to the Valelevu Police Station to report the matter. But the police had directed him to the medical center instead of recording his complaint. He first went to Valelevu Medical Center, where he found that the x-ray machine was not working. Valelevu Medical Center had asked him to go to CWM hospital. Accordingly, he went to CWM hospital and got the medical report done. On his way back, he once again went to Valelevu Medical Center. Finally, when he came to the Police Station, he found that the complainant had already lodged this complaint against him. The police then arrested him and remanded in the cell.
32. I have summarized the evidence presented during the course of this hearing. However, I might have missed some. It is not because they are not important. You have heard every item 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**

33. You have heard the evidence given by the complainant and the accused. The complainant claims that the accused penetrated her vagina with his finger without her consent, while he was massaging her stomach on the 25th of June 2015. In contrast, the accused claims that he only massaged the complainant’s stomach as she requested. This alleged incident has taken place in private between the accused and the complainant.



**Evaluation of Evidence**

34. In order to determine whether the prosecution has proven beyond reasonable doubt that the accused had penetrated the vagina of the complainant with his finger without 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 the 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 the witness is telling the truth and is correctly recalling the facts about which she or he has testified. You can accept part of the witness's evidence and reject other parts. The witness may tell the truth about one matter and lie about another; he/she may be accurate in saying one thing and not accurate in another thing.
35. In assessing evidence of the witness, 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/her own evidence but also with other evidence presented in the case.
36. It is your duty as judges of facts to consider the demeanours of the witness, how she or he reacted to being cross examined and re-examined, was she/he evasive, in order to decide the credibility of the witness and the evidence.

**Delay in Reporting,**

37. You may recall that the learned counsel for the defence suggested in her closing address that the six days of delay in reporting this matter makes it less likely that the complaint she eventually made was true. It is a matter for you to consider and resolve. However, it would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible. The experience of the courts is that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response. A late complaint does not necessarily signify a false complaint; likewise an immediate complaint does not necessarily demonstrate a true complaint.

38. Moreover, defence adduced evidence that the complainant actually went to police to report this matter after the cousin/brother-in-law of the complainant assaulted the accused on the 1st of July 2015. You have heard the evidence of the accused, stating that he went to police to report this incident of assault, but the police advised him to go for a medical examination. Once he returned from the medical examination, he found that the complainant had already lodged this complaint. The complainant in her evidence said that she went to the police station before the accused came.
39. In order to determine the issue of delay and the reason for the delay, you have to consider the explanation or evidence given by the prosecution and the defence. The complainant in her evidence said that she had no strength to go and report this matter to the police on the 25th of June 2015. The complainant said that her cousin came to help her to go to police on the 1st of July 2015. She had enough strength to go to police on that day. However, you may recall that the complainant in her evidence once said that the cousin came to take her to his house as she was afraid to stay at her place on the 1st of July 2015.

**Evidence of the Accused.**

40. I now take your attention to the evidence adduced by the defence. The accused elected to give evidence on oath. The accused is not obliged to give evidence. He does not have to prove his innocence. However, the accused decided to give evidence. Therefore, you have to take into consideration the evidence adduced by him when determining the issues of fact of this case.
41. Accordingly, it is for you to decide whether you believe the evidence given by the accused. If you consider that the account given by the accused is or may be true, then you must find the accused is not guilty for this offence.
42. If you neither believe nor disbelieve the version of the accused, yet, it creates a reasonable doubt in your mind about the prosecution case. You must then find the accused is not guilty for this charge.
43. Even if you reject the version of the accused 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 this offence as charged in the information.


**Directions**

44. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged, you can find the accused guilty for the said offence of Rape.
  
45. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged, you must find the accused is not guilty for the said count of Rape.

**Conclusion**

46. Madam and Gentlemen assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.
  
47. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



  
R.D.R.T. Rajasinghe  
**Judge**

**At Suva**  
2<sup>nd</sup> November 2017

**Solicitors**  
Office of the Director of Public Prosecutions for the State  
Office of the Legal Aid Commission for the Accused