

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO: HAC 87 OF 2016**

**STATE**

**v**

**SAIYAD KHAN**

**Counsel : Ms D.S. Alagendra with Ms S. Navia for State**  
**: Mr. J. Sing for Accused**

**Dates of Trial : 29, 30, 31<sup>st</sup> October 2018**

**Date of Summing Up : 1 November 2018**

**(Name of the victim is suppressed. She is referred to as NN)**

**SUMMING UP**

Ladies and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me, as the Judge who presided over this trial to sum up the case to you. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my

summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.

2. I will direct you on matters of law which you must accept and act upon.
3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So, if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. In other words you are the judges of facts. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The counsel for the Prosecution and the Accused made submissions to you about the facts of this case. That is their duty as the Counsel. But it is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the accused person is innocent until he is proved guilty. The burden of proving his guilt rests on the Prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the Accused guilty, you must be satisfied so that you are sure

of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.

9. Your opinions must be solely and exclusively upon the evidence which you have heard in this Court and upon nothing else. You must disregard anything you might have heard or read about this case outside of this courtroom. Your duty is to apply the law as I explain it to you to the evidence you have heard in the course of this trial.
10. Your duty is to find the facts based on the evidence and apply the law to those facts. You are free to draw inferences from proved facts if you find those inferences reasonable in the circumstances.
11. As Assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of facts in a trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
12. In assessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole. In deciding on the credibility of any witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gives evidence. Was he or she evasive? How did he or she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable. But, please bear in mind that many witnesses are not used to giving evidence and may find Court environment distracting.
13. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether the witness is consistent in his or her own evidence and with his or her previous statements or with other witnesses who have given evidence in court. It does not matter whether that evidence was

called for the Prosecution or for the Defence. You must apply the same test to evaluate evidence.

14. In testing the consistency of a witness you should see whether he or she is telling a story on the same lines without variations and contradictions. You should also see whether a witness is shown to have given a different version elsewhere and whether what the witness has told Court contradicts with his/her earlier version. You must however, be satisfied whether such contradiction is material and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter.
15. You can consider whether there is delay in making a prompt complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect 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 for such delay.
16. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. Victims of rape 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. Victim's reluctance to report the incident could also be due to shame, coupled with the cultural taboos existing in her society in relation to an open and frank discussion of matters relating to sex with elders. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response by victims of rape. It is a matter for you to determine whether, in this case, complaint victim had made to police was genuine and what weight you attach to the complaint she eventually made.
17. Evidence was led that the victim looked distressed when she arrived home shortly after the alleged incident and also at school on the following day. This is how you should approach the evidence of distress if you believe distress evidence. You must be satisfied beyond a reasonable doubt that victim's

distressed condition was genuine and that there was a causal connection between the distressed condition and the alleged rape. The distress evidence is only relevant in assessing whether the alleged sexual incident occurred. The distress evidence must not be used to connect the accused to the alleged offence. Before you use the evidence of distress, you must be sure that the distressed condition was not artificial and was only referable to the alleged rape and not any other cause. In deciding these matters, you must take into account all relevant circumstances. If you are so satisfied then you may give such weight to the evidence of distress as is appropriate. But if you are not so satisfied then you must disregard the evidence of distress.

18. You may consider whether there is a reason or motive on the part of prosecution's witnesses to make up an allegation against the accused. If the witnesses had such a motive, then you may think that this allegation has been fabricated.
19. I have given you a copy of the information which contains the charges against the accused. Please refer to it. The information reads as follows:

#### *Statement of Offence*

**RAPE:** Contrary to Section 207 (1) and (2) (a) and (3) of the Crimes Act 2009.

#### *Particulars of Offence*

**SAIYAD KHAN** on an unidentifiable date between the 1<sup>st</sup> day of December 2014 and the 31<sup>st</sup> day of March 2015 at Sigatoka in the Western Division inserted his penis into the vagina of **NN**, a child under 13 years.

20. I will now deal with the elements of the offence of Rape. A person rapes another person if:

- (a) The person has carnal knowledge with or of the other person without other person's consent; or
  - (b) The person penetrates the vulva, vagina or anus of other person to any extent with a thing or a part of the person's body that is not a penis without other person's consent; or
  - (c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.
21. Consent as defined by Section 206 of the Crimes Act means the consent freely and voluntarily given by a person with a necessary mental capacity to give such consent. A person under age of 13 years is considered by law as a person without necessary mental capacity to give consent. The victim in this case was 12 years of age at the time of the alleged offence and therefore, she did not have the capacity under the law to consent. So, the Prosecution does not have to prove the absence of consent on the part of the victim because law says that she, in any event, cannot consent.
22. The elements of Rape in this case are that:
- a. the accused, Saiyad Khan;
  - b. penetrated the vagina of the victim NN, with his penis.

Other parts of the offence are irrelevant to the facts of this case.

23. Apart from the elements of the offence, the identity of the person who is alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the accused-person that connects him to the offence that he is alleged to have committed.
24. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a complainant who saw, heard and felt the offence being committed. In this case, for example, the

victim was a witness who offered direct evidence, if you believe her as to what she saw, heard and felt.

25. You saw victim give evidence hiding behind a screen so she could not see the accused. The screen was put up because the victim in this case is an underage vulnerable witness. By looking at this special arrangement, you must not draw any negative inference against the accused.
26. Please remember, there is no rule in Fiji for you to look for corroboration of victim's story to bring home an opinion of guilt in a case of sexual nature. The case can stand or fall on the testimony of complainant, depending on how you are going to look at her evidence.
27. I will now remind you of the Prosecution and Defence cases. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the salient features. If I do not mention a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your decision in this case.

### **Case for the Prosecution**

#### **PW 1 NN (Complainant)**

28. Complainant NN is the first witness for Prosecution. She is 16 years old. She said she was born on 11<sup>th</sup> September, 2002.
29. NN said that she had to leave school early because she could not concentrate in school after the rape case.

30. In March 2015, after 7.00 pm she went to her cousin Saiyad Khan's place to charge the phone her mum had given to her. She requested Saiyad if he could charge the phone. Saiyad took the phone and while the phone was being charged Saiyad played a movie for them to watch. She was watching the movie with her cousin Imtiaz and his two kids and Saiyad's mother, Aisha. When the movie finished Imtiaz and his kids went home. Aisha also went to sleep. NN heard her mum calling her to bring the phone. She took the phone from Saiyad and went outside the house.
31. As soon as she went outside, Saiyad grabbed her from the back, putting the right hand on her stomach and the left hand on her mouth. He took her to his room, forcefully pushed her on his bed. She was crying out for help but no one could hear her because Saiyad was covering her mouth. He took off her sarwal trousers and took off his pants. He forcefully put his penis into her vagina and had sex with her for ½ an hour. It was painful because it was her first time having sex with a man. She said she was bleeding from her vagina. She was crying out for help. Saiyad told her not to tell the incident anyone in her family; if she did he would slap her. After that she put on her clothes and went straight home. She did not tell anyone what had happened because Saiyad followed her home.
32. After a while, she saw her dad and Saiyad having grog. She went to her room. The next day she went to school. Her class teacher observed her having attitude problem. She did not concentrate on her studies and could not go to school. Her teacher came home and asked her mum what's wrong with her.
33. After one month, she went to aunty Jasmine's place because did not want to see Saiyad's face. One morning, when she was at Jasmine's place, Jasmine saw her stomach swollen. Jasmine called her mum and informed about her vomiting and stomach pain. When her mother came, Jasmine told her mum that she is pregnant. She did not know that she was pregnant. She told her aunty and mother that she was raped by her cousin brother Saiyad. Mother was shocked and angry on Saiyad. Mother called her father and told him everything what had happened. Father came and took her to a private doctor. Doctor gave an injection for an abortion. She was angry on herself because she lost her virginity.
34. Her father called his big brother, uncle Ahmed Khan who was in Australia. Uncle Khan said that he'll come to Fiji and have a conversation with her family



and Saiyad's family. Uncle Khan told her not to take this matter to police. Her father never supported her. Her father listened to his elder brother Ahmed Khan and prevented her from going to police because her family wanted to keep their name up. She said she was angry with mother, because she never took her to police station although she really wanted to report to police. Her school teacher Mrs Nabewa took her to the Social Welfare office in Sigatoka.

35. NN said that she had maintained a good relationship with her mother but she ran out of house and did not listen to her mother after the incident. She further said that after the case was started her uncle, Ahmed Khan, told her not to come to the case and wanted her to settle this case. On October 8<sup>th</sup> Saiyad's mum also came to her crying and told her to settle the case.
36. Under Cross examination, NN said that her house is just several footsteps away from Saiyad's house and conjoined to each other. She said that when Saiyad covered her mouth and her voice never came out. Before she left for home Saiyad told her not to tell this to anyone of her family. He will slap her if she did. If anything happens, he asked her not to blame him.
37. NN said that she did not tell anyone what had happened because she was scared. Uncle Ahmad Khan prevented her from going to police. She gave a statement to police on 1/4/16. She admitted having told police that she was waiting for Saiyad to go out to inform her mum and dad about the incident. She admitted that she did not inform her parents when Saiyad left, although she had the opportunity to do so. She said that she was scared. She also admitted that she did not tell her teacher or aunty Jasmine until her pregnancy was discovered. She denied the proposition that a rape never happened. NN denied that she made up this allegation on Saiyad because she was panicked when she discovered pregnancy.

**PW2 Rehana Sherin Begum**

38. Rehana said that her daughter NN stopped schooling after her cousin Saiyad raped her. She said she came to know about the rape in March 2015 when her aunty discovered changes in NN's body. When asked, NN said that she was

raped by her cousin. She was shocked and got scared to inform her husband. She called her husband on the same day and did an abortion in Sigatoka to avoid humiliation.

39. NN did not want to stay home, because she did not want to face Saiyad. She did not report the matter to police because NN's uncle Ahmad Khan wanted them to settle the matter without reporting it to police. Ahmad Khan is the head of the family and a good decision maker but he didn't do anything in this regard. She was angry for what Saiyad had done to her daughter. She told the teacher and the teacher informed the Social Welfare. Then the Social Welfare informed the police. She said that NN's teacher came home after school complaining that NN was disturbed at school and that her ways were changing and not studying properly. She observed a lot of changes in NN's behaviour ever since she got raped. NN was not listening to her and she always ran away from the house; that is why she was behaving like that.
40. Under Cross-examination, Rehana said that she trusted NN's words when NN said that she was raped by Saiyad. She admitted that the rape incident was reported to the Police from Welfare in April, 2016. She denied that Saiyad had directly talked to her and had denied any relationship with NN. She also denied that Saiyad had offered to do a DNA test if she had any doubts. She denied that the relationship with her daughter after this alleged incident was abusive but admitted that NN was not listening to her and ran away with boys and started drinking.
41. She said that when NN returned from Saiyad's house, she was behaving in a strange way, and was a bit scared. He admitted that NN's teacher came to her place after the alleged rape incident because NN was having some attitude problems at school.

### **PW 3 Salanieta Nabewa**

42. Nabewa said that NN was a student at Korotogo Andhra Primary School. She said that on the previous day, when she was seated outside the court room, the Defence Counsel- Mr. Singh approached her and sat beside her and told her that

nowhere in her statement she had mentioned that NN had disclosed that she was raped. The Counsel said that he read through her statement. He told her that it was NN's mum and her aunt and not NN who had told that NN was raped. The witness said that she was feeling really uncomfortable. The Counsel mentioned that NN had been going around with so many men and at present she is staying with someone. He told her that it's the mum who is playing this blame game, blaming someone who is innocent and he just want to clear his name.

43. Nabewa said that when the Defence Counsel was talking to her, the accused Saiyad Khan was hovering around them, just standing next to them.
44. The Counsel for Defence denied the allegation from the bar table that he influenced the witness for Prosecution.
45. That is the case for the Prosecution. At the close of the Prosecution case, you heard me explain to the accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or he could give evidence in which case he would be cross-examined.
46. You know that the accused elected to exercise his right to remain silent. That is his right. You should not assume that he remained silent because he is guilty. Accused has nothing to prove in this case and he is under no obligation to prove his innocence. Accused called a witness and his Counsel put her case to the prosecution witnesses in her cross examination. You must take into consideration the version of the defence when evaluating evidence.

## **Case for Defence**

### **DW.1 Sherena**

Shereena is the sister-in-law of the accused. She said that the Saiyad Khan talked to her about the rape allegation against him. He denied the allegation. She then suggested that a DNA test can elicit the truth and suggested to Saiyad that he go to a doctor for a DNA test. He was ready to do the test. She said that she approached NN's mother in the presence of NN and made the same suggestion but she refused her daughter to be subjected to a DNA test.

47. That is the case for Defence

### Analysis

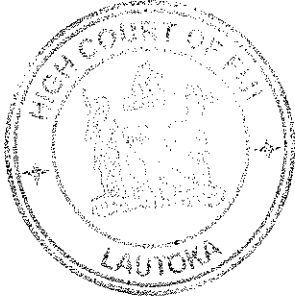
48. Ladies and gentleman assessor, the accused is charged with one of Rape. To find the accused guilty of Rape in this case, you must be satisfied that the Prosecution had proved beyond a reasonable doubt that the accused penetrated victim's vagina with his penis.
49. Prosecution called three witnesses, the victim-NN, her mother Rehana and victim's teacher- Nabewa. Prosecution's case is substantially based on the evidence of the victim. The prosecution says that victim's evidence is credible and believable.
50. If you are satisfied that the evidence victim gave in court is truthful and believable, then you can safely act upon her evidence in coming to your conclusion. No corroboration of her evidence is required.
51. The Defence Counsel in his closing remarks said that the Defence is disputing the identity of the accused although he did not dispute the identity of the accused in the course of his cross-examination. However it is the responsibility of the Prosecution to prove the identity of the accused beyond reasonable doubt. Therefore, you must be satisfied beyond reasonable doubt that it was the accused who had committed the alleged rape.

52. The victim said that she was raped by her first cousin Saiyad Khan who was watching a movie at his house with her a short while ago. She said her cousin Saiyad Khan was living in the adjoining flat. Prosecution ran the case on the basis that the accused was known to the victim from their childhood as her neighbour and cousin. For the purpose of doc identification, Prosecution did not remove the screen that was placed to protect the child victim. It is for you to be satisfied that the Saiyad Khan victim described in her evidence is the accused person sitting in the doc.
53. Prosecution says that the victim is consistent in her conduct with the allegation of rape because she was in a distressed and disturbed condition at school and home soon after the alleged incident. You heard what the victim and her mother had to say about victim's behaviour at school and home soon after the alleged incident. You decide what weight you attach to distressed evidence.
54. It is not disputed that the victim became pregnant, an abortion was done on her and the allegation came to light upon the discovery of her pregnancy. There is a delay of approximately 12 months in reporting the alleged incident to police. The report was lodged in April 2016 by the Social Welfare Office when the matter was reported by victim's teacher.
55. Explaining the reason for delay, NN said that she was scared to report the matter to anybody. She said that her mouth was blocked before the rape and the accused told her not to tell the incident to anyone in her family; if she did he would slap her. Her mother Rehana explained why she did not report the matter to police. She said that her husband's brother Ahmad Khan who is the decision maker of the family prevented her and her daughter from going to police. In light of the directions I have given in my Summing Up, you decide if there was a reasonable explanation for the delay in reporting and what weight you should attach to the evidence of the victim and her mother, and whether the complaint finally made to police is true.

56. Prosecution also says that the accused and his family members took every effort to prevent the matter being reported to police and tried to influence the witnesses because this allegation is true.
57. The Defence case is one of total denial. They say that this allegation has been fabricated by the victim to cover up her pregnancy. They say that NN had ample time and opportunity to complain to her mother, aunty Jasmine or her teacher but she never complained to anyone or authority until her pregnancy was discovered by aunty Jasmine. They say that the reason why NN did not complain was because this allegation was never true.
58. The Defence called Sherene to support the Defence's case. Defence says that the victim and her mother did not respond positively to Sherene's suggestion to do a DNA test because this allegation was fabricated. The Prosecution on the other hand says that Sherene lied to this court to save her cousin Saiyad. They also say that the fact that Sherene had approached victim's mother with a DNA test suggestion was a made up story because it was never put to the victim or her mother when they took stand.
59. You had the opportunity to observe the demeanour of the victim and her mother. You decide if you could accept their evidence.
60. It is up to you to decide which version is to believe and whether you could accept the version of the Defence. If you accept the version of the Defence you must find the accused not guilty. Even if you reject the version of the Defence, still the Prosecution should prove their case beyond reasonable doubt.
61. If you believe that the victim is telling you the truth when she said that the accused Saiyad inserted his penis into her vagina, you should find the accused guilty of Rape. But if you do not believe victim's evidence regarding the alleged offence, or if you have a reasonable doubt about the guilt of the accused, then you must find the accused not guilty. Your possible opinion is either guilty or not guilty.

62. You may now retire to deliberate on your opinions. Once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.

63. Any re-directions?



Arund Aluthge

Judge

**AT LAUTOKA**

**1<sup>st</sup> November, 2018**

**Solicitors: Office of the Director of Public Prosecution for State**

**Samusamuvodre Sharma Law for Defence**