

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**CRIMINAL JURISDICTION**

**SUVA CRIMINAL CASE NO. HAC 344 OF 2016S**

**STATE**

**vs**

**RAJINESH KAMAL NARAYAN**

**Counsels** : **Ms. L. Bogitini for State**  
**Mr. T. Ravuniwa for Accused**

**Hearings** : **3, 4 and 5 April, 2018**

**Summing Up** : **6 April, 2018**

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**SUMMING UP**

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**A. ROLE OF JUDGE AND ASSESSORS**

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.
2. State and Defence Counsels have made submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

**B. THE BURDEN AND STANDARD OF PROOF**

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.
5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that you must be satisfied, so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt so that you are not sure about his guilt, then you must express an opinion, that he is not guilty.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victim. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

**C. THE INFORMATION**

7. You have a copy of the information with you, and I will now read the same to you:

*"... [read from the information]..."*

**D. THE MAIN ISSUE**

8. In this case, as assessors and judges of fact, each of you will have to answer the following question:

- (i) Did the accused, on 13 September 2016, at Suva in the Central Division, rape the complainant (PW1)?

**E. THE OFFENCE AND IT'S ELEMENT**

9. For the accused to be found guilty of "rape", the prosecution must prove beyond reasonable doubt, the following elements:

- (i) the accused had sexual intercourse with the complainant, that is, his penis penetrated the complainant's vagina;
- (ii) without the complainant's consent; and
- (iii) he knew the complainant was not consenting to sex, at the time.

10. In law, the slightest penetration of the complainant's vagina by the accused's penis, is sufficient to constitute "sexual intercourse", and it's irrelevant whether or not the accused ejaculated.

11. Consent is to "agree freely and voluntarily and out of her own free will", and she must have the necessary mental capacity to give her consent. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority over her, that "consent" is deemed to be no consent. The consent must be freely and voluntarily given by the complainant. If the consent was induced by fear, it is no consent at all.

12. It must also be established by the prosecution beyond reasonable doubt that the accused knew the complainant was not consenting to sex, at the time. You will have to look at the parties' conduct, at the time, and the surrounding circumstances, to decide this issue.

**F. THE PROSECUTION'S CASE**

13. The prosecution's case were as follows. On 13 September 2016, the accused (DW1) was 33 years old. He was married to Yogita Narayan (DW2). They had been married for 7 years. They had 3 young daughters aged 5, 3 and 1 year old. They reside at 3 Miles, Nabua. The accused drives taxis for a living, and is the sole bread winner for his family.

14. The complainant (PW1) was 16 years old on 13 September 2016. She resided at Wailea Street, Vatuwaqa with her parents. She is the eldest in her family, and had two younger sisters. Her father (PW2) drives taxis also for a living, and works in the same taxi company as the accused. DW1 and PW2 knew each other well. DW1 was familiar with PW1 and PW2's family.

15. On 13 September 2016, a Tuesday, PW1 was assisting her parents operate the family BBQ stall at Extension Street, Suva. According to PW1, the accused was her friend. After 9 pm on

13 September 2016, PW1 went to the Flagstaff Bowser to meet the accused. The accused allegedly drove PW1 in his taxi to 8 Miles, then to Sakoca and then to Suva Point. According to the prosecution, the accused was supposed to drive the complainant to her home at Wallea. However, they ended up under the ivi tree at Suva Point, 10 to 15 footsteps from the Suva Point Police Post.

16. According to the prosecution, the accused allegedly locked the doors and windows of his taxi when he parked the same at Suva Point. He allegedly went to the backseat of his taxi, where the complainant (PW1) was sitting. He allegedly punched PW1 on the rib, made her lie on both of her hands with her back, facing upwards. He then allegedly took her pants and panty off, lifted her legs and inserted his penis into her vagina, without her consent. PW1 allegedly told the accused to stop. However, he allegedly ignored her and had sexual intercourse with her for about 10 to 15 minutes. PW1 alleged pushed the accused away, and he allegedly told her to go away.
17. The matter was reported to police. An investigation was carried out. PW1 was medically examined at Medical Services Pacific in Suva by Doctor Elvira Ongbit (PW3). He appeared in the Suva Magistrate Court on 19 September 2016 charged with raping the complainant on 13 September 2016. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

#### **G. THE ACCUSED'S CASE**

18. On 3 April 2018, the first day of the trial, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the rape allegation against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was called upon to make his defence, he choose to give sworn evidence and called his wife (DW2) as his witness. That was his right.
19. The accused's case was very simple. In his sworn evidence, he admitted he met the complainant (PW1) on 13 September 2016 at the Flagstaff Total Bowser. He admitted, she came in a taxi, and she later paid her taxi fare. He admitted, he was taking her home in his taxi, but said, she later wanted to go to Suva Point. He said, he later took PW1 to Suva Point, and at her request, left her there. He said, he did not rape the complainant at all, at Suva Point. He said, he later drove away from Suva Point.

20. Because of the above, the defence is asking you, as assessors and judges of fact, to find the accused not guilty as charged. That was the case for the defence.

H. **ANALYSIS OF THE EVIDENCE**

(a) **Introduction:**

21. In analysing the evidence, please bear in mind the directions I gave you in paragraphs 4, 5 and 6 hereof on the burden and standard of proof. In the acceptance and/or rejection of the evidence presented at the trial and your role as assessors and judges of fact, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analysing the evidence, we will first discuss the "Agreed Facts" and its significance; then the State's case against the accused. Then we will discuss the accused's case. Then we will consider the need to look at all the evidence.

(b) **The Agreed Facts:**

22. The parties submitted an "Agreed Facts", dated 27 October 2017. A copy of the same is with you. It had 5 paragraphs of "Agreed Facts". Because the parties are not disputing the 5 paragraphs of "Agreed Facts", you may treat the same as established facts and that the prosecution had proven the same beyond a reasonable doubt. The significance of the "Agreed Facts" was that the parties were not disputing the identities of the accused and the complainant, in this case, that is, paragraphs 1 and 2. The parties also do not dispute that the accused was well known to the complainant's father (PW2) and his family, that is, paragraph 3. Most important of all, was that the parties agreed that, the accused, on the evening of 13 September 2016, picked the complainant up in his taxi and took her to Suva point in the same, that is, paragraph 5. It will be noted that in paragraph 16 hereof, it was the State's allegation that the accused allegedly raped the complainant in his taxi (the crime scene), at Suva point, on the evening of 13 September 2016. So it would appear that, the parties are not in dispute, of the fact that the accused and the complainant, were present at the crime scene, that is, in the accused's taxi, at the material time.

(c) **The State's Case Against the Accused:**

23. A crime can be proven on the basis of a witness's verbal evidence, if you as assessors and judges of fact, accept the same. In this case, the State's case against the accused, was based fundamentally on the complainant's (PW1) verbal evidence given in court on 3 and 4 April 2018

(2 days). You have heard her evidence in court. You have watched her in court. You have observed her demeanour while giving evidence in court. I am sure her evidence is still fresh in your minds and I will not bore you with the details. However, I will summarize to you the salient points, as far as the elements of the offence of rape is concerned, to assist you in your deliberation.

(i) First Element of Rape: Accused's penis penetrated the complainant's vagina  
(Paragraphs 9 (i) and 10 hereof):

24. Before discussing the complainant's evidence on this issue, we need to establish and understand the alleged crime scene. The description of the alleged crime scene came from the evidence of the complainant (PW1). PW1 said, the alleged rape occurred on the back seat of the accused's taxi. Most of us have travelled in taxis in Fiji, and most of us have sat on the back seat of most taxis in Fiji. So, it would appear, because of that experience, most of us are familiar with what a back seat of a taxi in Fiji looks like, with minor variations here and there.
25. According to the complainant, when the accused took her to Suva point in his taxi on the evening of 13 September 2016, she was sitting on the back seat of his taxi. PW1 said, only her and the accused were in the taxi, at the time. No-one else was in the taxi, but them. PW1 said, the accused's taxi was a hybrid. PW1 said, the accused left the driver's seat and came to the back seat. PW1 said, the accused locked the car doors and windows with the remote control on his car key. PW1 said, the accused started kissing her. PW1 said, she told him to stop. PW1 said, she told him he had a family and she was a small girl. PW1 said, he ignored what she said and pushed her to the seat. PW1 said, he made her lie on her hands on her back, while facing up. PW1 said, the accused punched the left side of her rib. PW1 said, the accused then took off her pants and panty. PW1 said, the accused lifted her legs up and took off his trousers. PW1 said, she was angry and told him to stop. However, PW1 said, he ignored her and inserted his penis into her vagina, and had sex with her for about 10 to 15 minutes. PW1 said, her vagina was very painful when the accused did the above, and blood came out of her vagina. That was the complainant's evidence on the first element of rape, as described in paragraph 9 (i) and 10 hereof.
26. If you accept PW1's evidence on the above issue, then the prosecution would have proven the first element of rape beyond a reasonable doubt. This will entitle you to move on the second element of rape, as described in paragraphs 9 (ii) and 11 hereof. However, if you do not

accept the complainant's evidence on the above issue, then you will have to find the accused not guilty as charged. It is a matter entirely for you.

(ii) **Second Element of Rape: Complainant did not Consent to Sex (Paragraph 9 (ii) and 11):**

27. On this issue, you have to take on board the directions I gave in paragraph 9 (ii) and 11 hereof. In examining whether or not the complainant consented to the accused inserting his penis into her vagina, at the material time, you will have to examine the complainant and accused's conduct throughout their relationship, and more so the surrounding circumstances, before, during and after the accused penetrated PW1's vagina with his penis. You will note that this was a case of a mature married male going out with what appeared to be a naïve 16 year old female. The accused was 33 years old. There was a 17 years gap between the accused and the complainant. According to PW1, he bought her a mobile phone. Obviously, a mechanism to enable him to access her. According to PW1, they were "friends". However, it would appear that the accused saw her as his "girlfriend", even though he was married with three young daughters. PW1 said, she agreed to go out in the accused's taxi on 13 September 2016.
28. In paragraph 25 hereof, the complainant described what occurred prior to the accused inserting his penis into her vagina. PW1 said, she did not give her consent to the accused to penetrate her vagina with his penis on 13 September 2016. You have heard in paragraph 25 hereof that she pleaded with the accused to stop inserting his penis into her vagina, but he ignored her and continued with the same. PW1 said, when her hands were free, she tried to push the accused away to no avail.
29. If you accept the complainant's evidence that she did not consent to the accused inserting his penis into her vagina on 13 September 2016, then the prosecution would have proven the second element of rape beyond a reasonable doubt. This will entitle you to consider the third element of rape, which we will discuss later. However, if you reject the complainant's evidence on this issue, you must find the accused not guilty as charged. It is a matter entirely for you.

(iii) **Third Element of Rape: The Accused knew the complainant was not consenting to sex at the time (Paragraphs 9 (iii) and 12):**

30. If you find that the prosecution had satisfied you beyond reasonable doubt on the first and second element of rape, as discussed above, then the prosecution need to prove beyond

reasonable doubt, the third element of rape, that is, the accused knew the complainant was not consenting to him penetrating her vagina with his penis, at the time. The question becomes: Did the accused know that the complainant was not consenting to his penetrating her vagina with his penis, at the time? Take on board the directions I gave you in paragraphs 9 (iii) and 12 hereof. PW1 said, when the accused started kissing her, she told him to stop. PW1 said, she reminded him that he had a family and she was a small girl. PW1 said, he first asked her to lie on the back seat. PW1 said, he later pushed her to the seat. PW1 said, prior to doing the above, he locked the car doors and windows, which showed he didn't want her to escape from what he intended to do. PW1 said, he put both of her hands to her back and made her lie on the same, facing up. Obviously, this prevented PW1 from resisting the accused with her hands. PW1 said, she was angry when he took off her pants and panty and asked him to stop. PW1 said, he ignored her. PW1 said, he punched her left rib and pressed her down with one hand. PW1 said, he then inserted his penis into her vagina and had sex with her for 10 to 15 minutes

31. If you find that the accused knew the complainant was not consenting to him inserting his penis into her vagina at the time, then the prosecution would have proven beyond reasonable doubt the third element of rape. If you have found that the prosecution had also proven beyond reasonable doubt the first and second element of rape; then you must find the accused guilty as charged. However, if you find that the prosecution has not proven beyond reasonable doubt the third element of rape, then you must find the accused not guilty as charged. It is a matter entirely for you.
32. Doctor Elvira Ongbit (PW3) gave evidence for the prosecution. She medically examined the complainant on 15 September 2016 at Medical Services Pacific. She submitted her report into evidence as Prosecution Exhibit No. 1. In her report, she recorded the patient's medical history in D (10) and her medical finding in D (12) of the report. She found "hymnal lacerations" at 3 o'clock, 5 o'clock and 6 o'clock, and drew a sketch of the same in Appendix 1 of her report. She said, an erect penis going through the vaginal opening could cause those hymnal lacerations. The doctor examined the complainant two days after the alleged incident. If you accept the doctor's evidence, it would tend to confirm the complainant's evidence that when the accused allegedly offended against her, it was very painful to her vagina and that she bled, during the alleged offending. In any event, how you treat the doctor's evidence, is entirely a matter for you.



**(d) The Accused's Case:**

33. I have summarized the accused's case to you in paragraphs 18, 19 and 20 hereof. Basically, he denied the allegation against him. If you accept his sworn denials, you must find him not guilty as charged. If otherwise, you will have to consider the strength of the prosecution's case, and make a decision accordingly.

**(e) The Need to Consider All the Evidence:**

34. The prosecution called three witnesses:

- (i) The complainant (PW1);
- (ii) The complainant's father (PW2); and
- (iii) Doctor Elvira Onghit (PW3).

35. The defence called two witnesses:

- (i) The Accused (DW1); and
- (ii) The Accused's wife (DW2)

36. The following exhibits were tendered:

- (i) Prosecution Exhibit No. 1 – the complainant's medical report.
- (ii) Defence Exhibit No. 1 – Complainant's Love Note to Accused

37. Altogether, you have a total of five witness, on whose evidence, you will have to make a decision. You are to consider all the evidence together. Compare and analyse them together. If I have not mention a piece of evidence you consider important, please take it on board in your deliberation. If you find a witness credible, you are entitle to accept the whole or some of his or her evidence in your deliberation. If you find a witness not credible, you are entitle to reject the whole or some of his or her evidence in your deliberation. You are the judges of fact.

**I. SUMMARY**

38. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is

presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.

39. Your possible opinions are as follows:

(i) Rape : Accused : Guilty or Not Guilty

40. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.



**Salesi Temo**  
**JUDGE**

Solicitor for State : Office of the Director of Public Prosecution, Suva  
Solicitor for Accused : Mr. T. Ravuniwa, Barrister and Solicitor, Suva.