

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 202 OF 2016S

**STATE**

vs

**GOVIND SAMI RAJU**

**Counsels** : Ms. K. Semisi for State  
Ms. S. Vaniqi for Accused

**Hearings** : 29, 30, 31 May, 1 and 4 June, 2018

**Summing Up** : 5 June, 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 from your own opinions. You are the judges of facts.
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. I will now read the same to you:

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

**D. THE MAIN ISSUES**

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

- (i) On count no.1, did the accused, between 1 and 31 May 2016, at Nasinu in the Central Division, rape the complainant (PW1)?

- (ii) On count no. 2, did the accused, between 1 and 31 May 2016, at Nasinu in the Central Division, rape the complainant (PW1)?
- (iii) On count no. 3, did the accused, on 19 April 2016, at Nasinu in the Central Division, sexually assault the complainant (PW1)?

#### **E. THE OFFENCES AND THEIR ELEMENTS**

9. In counts no. 1 and 2, the accused was charged with "rape", contrary to sections 207(1), (2)(a) and (3) of the Crimes Act 2009. It was alleged that, he twice had sexual intercourse with an 11 year old female complainant between 1 and 31 May 2016, at Nasinu in the Central Division. For the accused to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements
- (i) **the accused's penis penetrated the complainant's vagina;**
  - (ii) **without her consent; and**
  - (iii) **he knew the complainant was not consenting to (i) above, at the time.**
10. The slightest penetration of the complainant's vagina with the accused's penis, is sufficient to satisfy element 9(i) above. Whether or not he ejaculated is irrelevant.
11. "Consent" is to "agree freely and voluntarily and out of her own freewill". If consent was obtained by force, threat, intimidation or by fear of bodily harm to herself 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. In this case however, we are dealing with a female complainant, who was under 13 years old at the time. In law, a person under 13 years old is incapable of giving her consent to her vagina been penetrated by a penis. So, for a child under 13 years old, the prosecution does not need to prove non-consent by the child complainant. It is already a presumption in law.
12. It must also be established by the prosecution beyond reasonable doubt that the accused knew the complainant was not consenting to 9(i) above, at the time. You will have to look at the parties' conduct at the time, and the surrounding circumstances, to decide this issue. However, for a child complainant who was under 13 years old at the time, an adult accused is presumed to know in law that she is incapable of giving her consent to her vagina being penetrated by his penis. This policy was put there to protect children.

13. In count no. 3, the accused was charged with sexually assaulting the complainant (PW1), by kissing her lips, on 19 April 2016, at Nasiru in the Central Division. "Sexual Assault" is an aggravated form of "indecent assault". For the accused to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements:

- (i) **the accused**
- (ii) **unlawfully and indecently**
- (iii) **assault**
- (iv) **the complainant**

14. To describe the offence, we will start with the verb "assault". To "assault" someone means to apply unlawful force to the person of another, for example, to punch someone in the face, without any justification, is to apply unlawful force to the person of another. Likewise, to kiss someone on the lips without that person's consent would be equivalent to applying unlawful force on that person. A child aged 11 years old, cannot in law consent to a person kissing her on the lips.

15. The "assault" must not only be "unlawful", it must also be "indecent". An "indecent assault" is one committed in circumstance of indecency. A circumstance of indecency is what right-minded people would consider indecent, for example, a grandfather kissing a 11 year old's lips for no adequate reasons. It is therefore essential for the prosecution to make you sure that the assault was not only unlawful, it was also indecent, that is, right-minded people would consider the assault to be indecent.

16. There are 3 counts in the information. You must consider them separately and come to a separate considered decision on each of them in the light of the total evidence presented at the trial.

17. Count no. 1 and 2 appear as "representative counts". This meant that the prosecutor was charging the accused for alleged sexual acts committed between two separate dates involving 31 days. This is not unusual, because in most child sex offence cases, the child complainant cannot recall the exact date of the alleged offences, but recall the incident occurring between two dates, thus the "representative counts". If you find and accept a single sex offence occurring between the two mentioned dates, that will be sufficient to prove the offence on that

particular count. The prosecution does not need to prove all the alleged sex offences occurring between the two mentioned dates.

**F. THE PROSECUTION'S CASE**

18. The prosecution's case were as follows. The accused (DW1) was born on 25 May 1931. In April and May 2016, he was 85 years old. The female complainant (PW1) was born on 16 February 2005. In April and May 2016, she was 11 years old. The accused was previously married, and his wife passed away in 2010. He and his wife had 6 children, 3 sons and 3 daughters. His children were all grown up and married. The complainant lived with her mother, and 3 brothers and 2 sisters. Her brothers are now aged 15 years, 11 years and 7 years, while her sisters are aged 5 years and 3 years old. She is now 13 years old. Their father passed away in 2013. So her mother is a solo parent.
  
19. According to the prosecution, in April and May 2016, the complainant (PW1) and her family were renting an upstairs flat from the Accused. The accused owned a two story flat, and the complainant's family occupied the top flat. The accused also occupied a top flat adjacent to the complainant's family's flat. The flat is located at 10 Miles Nasinu. According to the prosecution, the complainant's family had been renting the flat since December 2015. The Fiji Muslim League pays PW1's family's rental of \$250 per month. According to the prosecution, PW1's mother (PW4) works at a restaurant as a cook from 4 pm to 10 pm daily to support her family. When she is not at home, PW1 often looks after her other siblings.
  
20. On 19 April 2016, the complainant (PW1) was looking after her two young sisters at home. According to the prosecution, her mother was away at a mosque. According to the prosecution, the accused allegedly called PW1 to his bedroom to make up his bed. PW1 allegedly obliged and made up the accused's bed. According to the prosecution, the accused then allegedly held PW1's head, and brought her mouth towards his mouth, and allegedly kissed her on the lips for about 10 seconds. The accused then allegedly warned PW1 not to tell anyone about the incident (count no. 3). Sometime in May 2016, according to the prosecution, the accused allegedly called PW1 to his bedroom. PW1's mother was at work and she was looking after her sisters. PW1 allegedly went to the accused's bedroom. According to the prosecution, the accused allegedly took off PW1's clothes, pushed her onto his bed, parted her legs and allegedly inserted his penis into her vagina for about 10 seconds. After having

sex with PW1, the accused allegedly warned her not to tell anyone about the incident, otherwise he will throw them out of his house (count no. 1).

21. Following the above incident, the accused again allegedly repeated the above incident to PW1 in his bedroom in May 2016. He allegedly called her to his bedroom, removed her clothes, laid her on his bed and inserted his penis into her vagina for about 10 seconds. He later warned her not to tell anyone about the incident, or he will throw her family out of his house (count no. 2). However, PW1 later revealed the incident to an aunty and the matter was reported to police. An investigation was carried out. The accused appeared in the Nasinu Magistrate Court on 31 May 2016 charged with raping and sexually assaulting PW1. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged on all counts. That was the case for the prosecution.

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

22. On 29 May 2018, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to all the counts. In other words, he denied all the allegations 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 3 witnesses. That was his right.

23. The accused's case was very simple. On oath, he denied the complainant's (PW1) allegations against him. On oath, he said, he did not insert his penis into the complainant's vagina, at any time whatsoever. He denied the rape allegations against him in count no. 1 and 2. He also denied ever kissing the complainant (PW1), as alleged in count no. 3. Because of the above, the accused is asking you, as assessors and judges of fact, to find him not guilty as charged on all counts. That was the case for the defence.

#### **H. ANALYSIS OF THE EVIDENCE**

##### **(a) Introduction:**

24. 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, 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:**

25. The parties had submitted an "Agreed Facts", dated 29 May 2018. A copy of the same is with you. Please, read it carefully. There are 5 paragraphs of "Agreed Facts". Because the parties are not disputing the same, you may treat the same as established facts, and that the prosecution had proven those facts beyond a reasonable doubt. The significance of the "Agreed Facts" was that the parties do not dispute the identities of the complainant (PW1) and the accused (DW1) – please, refer to paragraphs 1 and 4. Also, the parties do not dispute that, at the material time, the complainant and her family, which included her mother and 6 siblings, were tenants at one of the accused's flats at Kings Road, 10 Miles. The parties also agreed that the accused resided at Kings Road, 10 Miles – please, refer to paragraphs 4 and 5. These "Agreed Facts" were significant because the alleged crime scene in this case was the Accused's bedroom at Kings Road, 10 Miles. The accused's bedroom, as depicted in photos 4, 8, 9, 10, 11, 12 and 13 of the booklet of photos tendered as Prosecution Exhibit No. 1, was adjacent to the complainant's family's flat. So, it would appear that at the material time, the complainant (PW1) was in close physical proximity to the accused (DW1), that gave rise to PW1's allegations in this case.
26. Furthermore, the "Agreed Fact" were significant in that the parties agreed that the complainant (PW1) was 11 years old at the time of the alleged offences – please, refer to paragraph 2. In paragraph 9 hereof, we discussed the elements of the offence of rape, as alleged in count no. 1 and 2. In paragraphs 11 and 12 hereof, we discussed the second and third element of the offence of rape as noted in paragraphs 9(ii) and 9(iii) hereof. Because the complainant (PW1) was 11 years old at the material time, and thereby a child, the prosecution does not need to prove non-consent to sex by the complainant. PW1 is presumed in law to be incapable of giving her consent to the accused's penis penetrating her vagina, at the material time. Likewise, the accused, as an 85 year old adult, is presumed in law to know that a 11 year old child is incapable of giving her consent to his penis penetrating her vagina, at the material time. The prosecution thus, in order to prove the offence of rape against the accused, need only prove the first element of rape, as discussed in paragraphs 9(i) and 10 hereof, that is, the accused's penis penetrated PW1's vagina, at the material time. So, the only issue for you to

consider, in terms of the allegations in count no. 1 and 2 was: Did the accused's penis penetrate PW1's vagina, at the material time?

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

27. The State's case against the accused was based fundamentally on the complainant's (PW1) verbal evidence, given in court before you on 29 and 30 May 2018. A crime can be proven on the basis of the verbal evidence of a witness, if the trier of fact, in this case you as assessors and judges of fact, find it credible and accept the same as statements of facts. In a rape case, there is no need for the complainant's verbal evidence to be corroborated by independent evidence. If you find the complainant's verbal evidence, on its own, been credible and you accept the same, and you find the elements of the offence satisfied beyond reasonable doubt, that verbal evidence is sufficient to ground a possible conviction.
28. You have watched and heard the complainant (PW1) give evidence in the courtroom on 29 and 30 May 2018. You observed her demeanour and saw how she answered questions from the prosecution and defence counsels. You saw how she re-acted to been cross-examined by defence counsel. I am sure her evidence is still fresh in your minds, and I do not wish to bore you with the details. In our discussion, I will only cover the salient points as far as the elements of the offence of rape and sexual assault are concerned.
29. On the rape allegations in count no. 1 and 2, the sole issue is whether or not the accused's penis penetrated the complainant's vagina, at the material time? PW1 said, sometime in May 2016, the accused called her into his bedroom. PW1 said, her mother was not at home. PW1 said, the accused closed the door of his bedroom. PW1 said, the accused removed her clothes, told her to lie on his bed. PW1 said, she did so. PW1 said, he took off his clothes. PW1 said, he then spread her legs apart. PW1 said, he then inserted his penis into her vagina for about 10 seconds. PW1 said, she bled from her vagina and it was painful. PW1 said, she saw some milky substance come out of the accused's penis. PW1 said, he later wiped his penis and vagina with a piece of cloth. PW1 said, he later told her to dress up. She did so. PW1 said, the accused warned her not to tell anyone about the incident, or he will throw her and her family out of his house. PW1 said, he did the above to her twice in May 2016 (count no. 1 and 2)



30. PW1 said, on 19 April 2016, the accused called her into his bedroom to make up his bed. PW1 said, she went to his bedroom and made up his bed. PW1 said, after doing the above, the accused held her head and kissed her lips for 10 seconds. PW1 said, the accused warned her not to tell anyone about the incident (count no. 3).
31. PW1 said, the day after her last sex act with the accused, she told Aunty Gita Reddy (PW3) about the incident. PW1 said, a day after that, they went to the Women's Crisis Centre and later to the police. PW1 said, she was later taken by police to the CWM Hospital for a medical examination. PW1 said, she saw a doctor who medically examined her. PW1 said, she was admitted at CWM Hospital for the following 2 weeks.
32. Although, there was no need to corroborate the complainant's allegations by independent evidence, the State called two doctors who medically examined PW1 on 27 and 31 May 2016. Doctor Annette Naigulevu (PW6) examined PW1 on 27 May 2016. Doctor Brain Fortuno (PW5) examined PW1 on 31 May 2016. PW6 prepared a medical report on PW1 for both medical examinations. The medical report was tendered in evidence as Prosecution Exhibit No. 2. A copy is with you. Please, read it carefully. In D(12)(b) of the report, Doctor Naigulevu recorded her findings. She saw "two small tear or superficial laceration" at PW1's hymeneal membrane and there was redness around the area. Please, note the sketch she drew in appendix 1 of the report.
33. According to Doctor Naigulevu, "the above findings are suggestive of penetration into the vagina with the tear and redness". Doctor Fortuno (PW5) examined PW1 4 days later under anaesthesia. PW5 found no laceration, no pus or discharge, nor bleeding. The hymen was seen all around. Doctor Naigulevu said her findings showed a possible penetration of PW1's vagina within 48 to 72 hours prior to her examination. Doctor Naigulevu said, it would be ideal to examine PW1 soon after the event. However, the doctor said if PW1 said she bled from the vagina at the time of the alleged incident and that it was painful, these signs indicated that something was penetrating her vagina, at the time. Doctor Naigulevu said, because the vagina had a rapid regenerative ability because of numerous blood vessels, any injury to the vagina could appear normal after 48 to 72 hours. She said, the vagina could look normal after a few days later. Doctor Fortuno saw PW1's vagina normal on 31 May 2016. What you make of the two doctor's findings, is matter entirely for you.

34. If you find the complainant's verbal evidence on her allegations in counts no. 1, 2 and 3 credible, and you accept the same, you must find the accused guilty as charged. If otherwise, you must find him not guilty as charged. It is a matter entirely for you.

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

35. From paragraphs 22 and 23 hereof, I summarized the accused's case to you. I repeat the same again here. On oath, he denied the complainant's three allegations against him. He said, he did not insert his penis into the complainant's vagina, at any time whatsoever. He said, he did not kiss the complainant as alleged in count no. 3. You have watched and heard him give evidence on 1 June 2018. You have noted his demeanour when he answered the questions levelled at him. He called three witnesses to give supporting evidence. If you find the accused's sworn evidence credible, and you accept the same, you must find the accused not guilty as charged on all counts. If otherwise, you will still have to assess the strength of the prosecution's case, and make a decision accordingly. It is a matter entirely for you.

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

36. The prosecution called 6 witnesses:
- (i) The complainant (PW1);
  - (ii) Mr. R. A. Chand (PW2);
  - (iii) Ms. G. Reddy (PW3);
  - (iv) Ms. L. W. Reddy (PW4);
  - (v) Doctor A. Naigulevu (PW5); and
  - (vi) Doctor B. Fortuno (PW6).
37. The prosecution tendered three exhibits:
- (i) Booklet of Photos - Prosecution Exhibit No. 1.
  - (ii) PW1's Medical Report - Prosecution Exhibit No 2.
  - (iii) Sketches of Hymen - Prosecution Exhibit No. 3.
38. The defence called 4 witnesses:
- (i) The Accused (DW1);
  - (ii) Mr. A. Kumar (DW2);
  - (iii) Ms. S. Singh (DW3); and
  - (iv) Doctor L. Lutuavatuvakarauvanua (DW4)

39. The defence tendered four exhibits:

- (i) Notice to Vacate Accused's Property - Defence Exhibit No. 1
- (ii) DW2's letter to Police - Defence Exhibit No. 2
- (iii) DW4's 1.6.16 letter to Accused - Defence Exhibit No. 3
- (iv) Sketch of male Reproductive Organ - Defence Exhibit No. 4

40. You have a total of ten witnesses, six from the prosecution and four from the defence, on whose evidence you will have to make a decision. You have a total of seven exhibits to consider, three from the prosecution and four from the defence. If I have not mentioned a piece of evidence you consider important, please take it on board in your deliberation. If you find a witnesses' evidence credible, you are entitled to accept the whole or some of it, in your deliberation. If you find a witness not credible, you are entitled to reject the whole or some of it, in your deliberation. You are the assessors and judges of fact.

I. **SUMMARY**

41. 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.

42. Your possible opinions are as follows:

- (i) Count No. 1: Rape : Guilty or Not Guilty
- (ii) Count No. 2: Rape : Guilty or Not Guilty
- (iii) Count No. 3: Sexual Assault : Guilty or Not Guilty

43. 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 your decisions.



**Salesi Temo**

**JUDGE**

Solicitor for State : Office of the Director of Public Prosecution, Suva.  
Solicitor for Accused : Ms. S. Vaniqi, Barrister and Solicitor, Suva