

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO.: HAC 19 OF 2017**

**STATE**

**v**

**SHANIL KUMAR**

**Counsel: Ms. R. Uce for State**

**Ms. K. Vulimainadave with Ms. Manueli for  
Accused**

**Dates of Trial: 13<sup>th</sup>, 14<sup>th</sup> & 15<sup>th</sup> June, 2018**

**Date of Summing Up: 18<sup>th</sup> June, 2018**

**SUMMING UP**

Madam Assessors 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. Matters of facts however, are a matter 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. In other words you are the judges of fact. All matters of fact are for you to decide.
4. The Counsel for Prosecution and Defence made submissions to you about the facts of this case. That is their duty as Counsel. You are not bound by their submissions. However, you may properly take their submissions into account when evaluating evidence. A proposition put to a witness is not evidence unless the witness accepts or adopts the proposition as being true.
5. 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 deliver my judgment.
6. On the matter of proof, I must direct you as a matter of law, that the accused person is innocent until he is proven guilty. The burden of proving his guilt rests on the Prosecution and never shifts.
7. 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. Remember if you have any doubt, it must be reasonable. You cannot speculate. These doubts must be based solely on the evidence or lack of evidence that you have seen and heard in this court room.
8. Your opinions must be solely and exclusively based 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 court room. 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.

9. Your duty is to find the facts based on the evidence and apply the law to those facts. You are free to draw reasonable inferences from facts proved by evidence. Approach the evidence with detachment and objectivity.
10. An incident of rape would certainly shock the conscience and feelings of our hearts. It is quite natural given the inherent compassion and sympathy with which human-beings are blessed. You may, perhaps, have your own personal, cultural, spiritual and moral thoughts about such an incident. You may perhaps have your personal experience of such a thing, which undoubtedly would be bitter. You must not, however, be swayed away by such emotions and emotive thinking. That is because you act as judges of facts in this case not to decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law to which every one of us is subject to.
11. It would be understandable if one or more of you came to this trial with certain assumptions as to what constitute rape, what kind of person may be the victim of rape, what kind of person may be a rapist, or what a person who is being, or has been, raped will do or say. It is important that you should leave behind any such assumptions about the nature of the offence because experience tells the courts that there is no stereotype for a rape, or a rapist, or a victim of rape. The offence can take place in almost any circumstances between all kinds of different people who react in a variety of ways. Please approach the case with open mind and dispassionately, putting aside any view as to what you might or might not have expected to hear, and form your opinion strictly on the evidence you have heard from the witness.
12. I must emphasize that the assessment is for you to make. However, it is of paramount importance that you do not bring to that assessment any preconceived views or stereotypes as to how a complainant in a rape case such as this should react to the experience. It is impossible to predict how that individual will react, either in the days following, or when speaking publically about it in court or at the police station. The experience of the courts is that those who have been victims of rape react differently to the task of speaking about it in evidence.
13. 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 the facts in a trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.

14. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth.
15. Agreed facts of this case are that:
  - I. That Shalini Pritika Charan (hereinafter referred to as the 'victim') at the material time resided at Saru, Tawatawa, Lautoka.
  - II. That Shanil Kumar (hereinafter referred to as the 'accused') at the material time resided at Votualevu Cemetery Road, Nadi and was 24 years of age.
  - III. That the victim resides with her brother, father and grandmother namely Manjeela Devi.
  - IV. That in early 2016, the victim was working as a waitress at Nani's Restaurant where she came to know the accused as a regular customer.
16. I have given you a copy of the Information which contains one count of Rape. The Information reads as follows:

*Statement of Offence*

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

*Particulars of Offence*

**SHANIL KUMAR** on the 28th day of January, 2016 at Lautoka in the Western Division, inserted his penis into the vagina of **SHALINI PRITIKA CHARAN**, without her consent.

17. In order to prove the charge, the Prosecution must prove beyond reasonable doubt that the Accused penetrated Complainant's vagina with his penis without

her consent. Insertion of penis fully into vagina is not necessary. A slightest penetration is sufficient to satisfy this element.

18. On the issue of consent, it must be proved that the Accused either knew that the Complainant did not consent or was reckless as to whether she consented. The Accused was reckless as to whether the Complainant consented to penetration if you are sure that he realized there was a risk that she was not consenting and carried on anyway when in the circumstances known to him it was unreasonable to do so.
19. Consent as defined in Section 206 of the Crimes Act, means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Simply put, if somebody does not resist physically it does not necessarily mean that she or he had given consent. Different people react differently to situations. You don't necessarily need violence, kicking, and shouting etc. to show that one is not consenting.
20. 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 Complainant was a witness who offered direct evidence as to what she saw, heard or felt.
21. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether witness is consistent in his or her own evidence and with his or her previous statements or with other witnesses who gave evidence. 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.
22. In testing the consistency of a witness you should see whether the witness is telling a story on the same lines without variations and contradictions. 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.

23. You must remember that merely because there is a difference, a variation or a contradiction or an omission in the evidence on a particular point or points that would not make witness a liar. You must consider overall evidence of the witness, the demeanor, the way he/she faced the questions etc. in deciding on a witness's credibility.
24. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in court. You have seen how the witnesses' demeanor in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers or were they evasive? But, please bear in mind that many witnesses are not used to giving evidence and may find court environment distracting.
25. You must bear in mind that the evidence comes from human beings. They cannot have photographic or video graphic memory. The witness can be subjected to the same inherent weaknesses that you and I suffer insofar as our memory is concerned.
26. In testing the credibility of a witness, you may 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.
27. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. There can be a reasonable explanation for the delay. It is a matter for you to determine whether, in this case, the lateness of the complaint and what weight you attach to it. It is also for you to decide, when complainant did eventually complain, whether it was genuine.
28. You may also consider whether there is a reason or motive on the part of the Complainant to make up an allegation against the Accused. If he or she had such a motive, then you may think that this allegation has been fabricated.

29. The offence of Rape requires proof that the complainant did not consent. The offence may or may not be accompanied by violence, force or the threat of force, but please note that it is no part of the prosecution's obligation to prove that the accused used force or the threat of force or that Complainant had received injuries.
30. Please remember, there is no rule in Fiji for you to look for corroboration of complainant'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.
31. I will now remind you evidence led in the trial. I will only summarize the salient features. If I do not mention a particular piece of evidence that does not mean it is unimportant.

*Case for Prosecution*

**PW 1 Shalini Preetika Chand**

32. In 2016, Shalini was living at Saru, Tawatawa with her parents, grandmother Manjeela Devi and brother. She was working at Nani's Restaurant near Lautoka bus stand just for about 3 or 4 weeks.
33. On 28<sup>th</sup> of January, 2016, during mid-day, she met Shanil Kumar at Natabua Junction and went to Nadi in a car driven by Shanil. She came to know Shanil whilst working at Nani's restaurant. She went to Nadi with Shanil because he had told her that he knew plenty people in Nadi so that she could easily get job. Instead of going to Nadi, Shanil drove the car to Saweni Beach. She asked him why he came there. He told her that just for a little while to rest and talk. No one else was there at Saweni Beach at that time.
34. When they got off the car, he started to touch and kiss her from her breast downwards. She was trying to stop him and asking him not to do that. He started to force her.
35. She was wearing jeans and a top. Shanil was wearing a t-shirt and jeans. Then he pushed her onto the ground and took off her clothes. She pushed him and tried to stop him. No one was there to call for help. Then he forced her to sleep with

him and started touching and kissing her private parts. He was lying down on top of her. She tried to get up and walk away from him. He pushed her down and removed her cloths and started having normal sex. His penis was touching her vagina. He put his penis inside her vagina for 10 to 12 minutes. She said she did not agree to have sexual intercourse with Shanil. She was pushing him and telling him not to do that. She was feeling pain. After that she wore her clothes. He told her not to tell anyone about this. After that they went back to the Natabua junction where she was picked up. She then went home by bus.

36. She said she was scared and didn't tell her parents or anybody about this incident. She started vomiting and not eating food well. When her grandmother came, she asked, but she didn't tell her. She went to a scanning on the 1<sup>st</sup> of April 2016 with her grandmother. Then the nurse told her that she is pregnant. When she came to know that she is pregnant, she told her grandmother what happened and lodged the complaint.
37. When she was waiting for 10 to 30 minutes for a bus in the main road, she saw Shanil driving his car. She went into hiding from the main road to avoid him. She denied having said that they both went back to where he picked her up from Natabua junction.
38. Under cross-examination the Complainant admitted that she was 16 years old in 2016. She came to know Shanil as a regular customer of Nani's Restaurant when she was working there for 3 to 4 weeks. She admitted that she first introduced herself to Shanil as Sonia and later she told him her real name. She denied being in a girlfriend, boyfriend relationship with Shanil. She admitted talking to each other as friends when he came to eat at the restaurant and over the phone. She admitted having given her grandmother's mobile number which she was using at that time to Shanil.
39. She made the complaint to police on 2<sup>nd</sup> day of April, 2016. She admitted meeting Shanil at the Chicken Express in Lautoka during the last week of January, after she had left Nani's Restaurant. She denied going to Nadi town in January 2016 with Shanil and staying in a motel and having had sexual intercourse with him. She denied going to Saweni Beach in a van driven by one Amit and coming back after 15 minutes because there was a big crowd.



40. Complainant admitted that she called Shanil and asked him to meet him in Lautoka Town and that he accompanied her to lodge her job application at McDonalds in Lautoka on the day they met at Chicken Express. She admitted that after the meeting at Chicken Express, she walked down to Lautoka bus stand with Shanil.
41. Complainant denied that she made up the rape allegation to cover up her unplanned pregnancy.

**PW2 Anjeela Devi**

42. Devi is Complainant's grandmother. She said that in early 2016 she was in Suva and when the mother died she came back to the house in Tawatawa, Saru sometimes in March 2016. She did not notice any difference in her granddaughter. Only when the doctor told her she came to know that her granddaughter was pregnant. She was shocked when she found out when her granddaughter was pregnant. She called the father and the family and informed about it and went to the police station.
43. Under cross examination, Devi denied that she had any knowledge about a relationship her granddaughter had with Shanil. All the propositions put to her by the Defence Counsel with regard to her knowledge about the relationship were denied by the witness.
44. Witness denied that she was aware that Shanil and Complainant were in a boyfriend –girlfriend relationship. She denied inviting Shanil to her house and having a discussion with him about the relationship.
45. She said that her granddaughter had not informed her as to how she got pregnant, before reporting the matter to police. She inquired from the Complainant regarding the father of the baby, but she got scared and she said everything in the police station when they went to report the matter.
46. 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.

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.

47. Accused exercised his right to remain silent. He called a witness on his behalf. That is his right. You must not hold against the Accused for not giving evidence in his defence. You must not draw an inference that the Accused remained silent because he was guilty. Burden of proof remains with the Prosecution throughout. Evidence presented by the Defence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.

### *Case for Defence*

#### **DW 1 Arvin Amit Kumar**

48. Defence called Amit as their only witness. Amit said that in 2016, he was driving a 7 seater van. One day he met Shanil Kumar and his girlfriend around 10.00 am at Saweni Supermarket and Shanil requested him to drop him at Saweni Beach. He had known Shanil because he used to drink grog with him a few times. He took them down to Saweni Beach and dropped them there. He was told to come back at 2.00 pm. There were more than 25 people at Saweni Beach at that time. He went to pick them up at 2.00 pm. but he could not find them. Shanil's phone was also switched off. He did not receive any payment from Shanil.
49. Under cross-examination Amit said that he did not know Shanil's girlfriend. It was Shanil who told him that this girl is his girlfriend. She was not very fair, a little bit dark and not very tall. After this, he met Shanil only once in a bus. He did ask about the fare Shanil failed to pay. Shanil rang him up and asked to come to Court to give evidence.

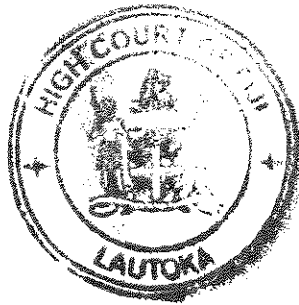
### *Analysis*


50. Ladies and gentleman Assessor, the Accused is charged with one count of Rape. To find the Accused guilty, you must be satisfied beyond a reasonable doubt that she penetrated Complainant's vagina with his penis without her consent.

52. Prosecution called two witnesses and based their case substantially on the evidence of the Complainant. The resolution of the dispute depends on whether you accept the Complainant as a truthful witness. If you are satisfied that the evidence she gave in Court is truthful and believable, then you can safely act upon her evidence in coming to your conclusion. No corroboration is required.
53. Prosecution says that the Complainant is consistent and reliable. They say that the Complainant did not complain about the rape until her grandmother took her to the police station because she was ashamed and scared.
54. Defence on the other hand says that the Complainant did not raise any alarm at the time of the alleged incident and she refrained from making a complaint to anybody because she was not raped. They further say that the Complainant was in a relationship with the Accused and when her pregnancy was exposed to her grandmother, she, after nearly two months, ultimately made a complaint to police because she wanted to cover up her unplanned pregnancy by implicating the Accused.
55. You observed Complainant's demeanor in court. Considering the directions I have given, you decide whether the Complainant is a trustworthy witness and what weight to be attached to her evidence.
56. Defence called Amit to support the version of the Defence that Accused and Complainant were in a romantic relationship. You decide if Amit is a reliable witness and what weight should be given to his evidence.
57. 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.
58. If you believe the Complainant is telling you the truth that the Accused penetrated her vagina with his penis on the 28<sup>th</sup> January, 2016, and the penetration was without her consent, you may express an opinion that the Accused is guilty of Rape. But if you do not believe the Complainant's evidence regarding the alleged rape, or if you have a reasonable doubt about the guilt of the Accused, then you must find the Accused not guilty.
59. Your possible opinion is either guilty or not guilty.

regarding the alleged rape, or if you have a reasonable doubt about the guilt of the Accused, then you must find the Accused not guilty.

59. Your possible opinion is either guilty or not guilty.
60. 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.
61. Any re-directions?



  
Aruna Aluthge  
Judge

**AT LAUTOKA**

**18<sup>th</sup> June, 2018**

**Solicitors:                   Office of the Director of Public Prosecution for State  
  Legal Aid Commission for Defence**