

IN THE HIGH COURT OF FIJI  
AT LAUTOKA  
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 02 of 2017

**BETWEEN** : **STATE**

**AND** : **ADI MULLAM NAICKER**

**Counsel** : Mr. T. Tuenuku for the State  
Ms. J. Singh for the Accused

**Hearing on** : 21<sup>st</sup> of May 2019 – 23<sup>rd</sup> of May 2019

**Summing up on** : 23<sup>rd</sup> of May 2019

**SUMMING UP**

Lady and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the Judges of facts.
2. The names of the complainant juvenile is suppressed and he will be referred to as either by his initial N or the witness number, PW1.
3. As the representatives of the society, your role is to assist this legal system to serve justice. In doing so, you are guided by two equally important principals of prudence. To wit;
  - i) If a person has committed an offence, he should be meted out with an adequate punishment.

In other words, if you are sure that the accused has committed the alleged offence, then it is your duty to find him guilty. If an offender goes scot-free, he'll be ridiculing this legal system. It is your duty to not to let that happen.

- ii) An innocent person should never be punished.

There is a saying that it is better to let 100 offenders go free than to punish one innocent person. That is, unless you are very sure that the accused has committed the alleged offence, you should not find him guilty.

If any of the said principles are violated, it would amount to a failure of the system, thus you have failed in your duty to the society. Having reminded you of your duty, let us proceed.

4. Evidence in this case is what the witnesses said from the witness box inside this court room and the admissions made. As I have stated you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.
5. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution or for the defence are not evidence. A suggestion made by a lawyer during the examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those questions, suggestions, arguments and comments when you evaluate the evidence only to the extent you would consider them appropriate.
6. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.
7. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and

decide how much of it you believe. You may believe all, a part or none of any witness' evidence.

8. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes a witness may have other concerns when giving evidence. A witness may be worried that the evidence would incriminate him or reveal a safely guarded secret. Or else he/she might honestly forget things or make mistakes regarding what he/she remembers.
9. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies between the evidence given by different witnesses. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you should not expect a witness to have a photographic memory or every detail to be the same from one account to the next.
10. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question of reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by the witness is a matter for you to decide.
11. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.

12. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you, how you assess the evidence and what weight you give to a witness' testimony.
13. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that, that inference is the only reasonable inference to draw from the proved facts. If there are two or more reasonable inferences to draw, one or more against the accused, as well as one or more in his favour, based on the same set of proved facts, then you should not draw the adverse inference.
14. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. That is, you must be sure of the accused person's guilt.
15. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of the offence against the accused, then you must give the benefit of that doubt to the accused and find the accused not guilty. If you have any reasonable doubt, the accused should have the benefit of it and your verdict should be not guilty. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in detail in a short while.
16. You are not required to decide every point the lawyers in this case have raised.

You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge is proved against the accused.

17. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not mandatory.
18. Let us look at the Information. The Director of Public Prosecutions by his amended information filed on 21<sup>st</sup> of May 2019 has charged the accused for the following offence;

#### **Statement of Offence**

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

#### **Particulars of Offence**

Adi Mullam Naicker, on the 05<sup>th</sup> day of November 2016 Tuvu, Ba, in the Western Division, penetrated the mouth of N, a child under the age of 13 years, with his penis.

19. Now I will deal with the essential elements of the offence.

Section 207(1) of the Crimes Act reads as;

*207. — (1) Any person who rapes another person commits an indictable offence.*

Section 207(2) (c) of the Crimes Act reads as;

(2) A person rapes another person if —

*[c] the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.*

Section 207 (3) reads as;

*(3) For this section, a child under the age of 13 years is incapable of giving consent.*

Accordingly, in this case, to prove the offence of Rape the prosecution must prove the following elements beyond a reasonable doubt.

- (i) The accused;
- (ii) On the specified period (in this case, on the 05<sup>th</sup> of November 2016);
- (iii) At the specified place (in this case at Tuva, Ba in the Western Division);
- (iv) Penetrated the mouth of N with his penis.

The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence. In this case there is no issue of mistaken identity. The accused is well known to the PW1.

The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. These elements are also goes unchallenged and admitted.

The fourth element involves the penetration of the N's mouth; with the accused's penis. This is the vital issue which you should consider in this case. That is; whether the accused penetrated the mouth of the N with his penis or not. The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the mouth of N with his penis to any extent.

#### **Summary of the evidence**

20. The 1<sup>st</sup> witness for the prosecution or the PW1 is N, the alleged Juvenile victim. His evidence is that;
  - i) He was born on 04<sup>th</sup> of May 2008.
  - ii) Presently he is staying with his parents and the siblings at Tuvu. He is studying at class 6 at Tuvu primary school.
  - iii) His mother's name is Sarita Devi Naicker and his father's name is Virendra Naidu.
  - iv) He knows Adi Mullam Naicker as he is the maternal grandfather of the witness. The witness calls him Nana (grandfather).
  - v) The witness identified the accused as Adi Mullam Naicker, his grandfather.
  - vi) He could remember the 05<sup>th</sup> of November 2016. On that day, he was at his grandfather's place as it was the day of his grandmother's funeral rituals. The witness has gone there with his mother and the siblings.
  - vii) The witness had been playing with his siblings and cousins, when his grandfather, the accused called him to go to the shop. When the witness has

refused, the accused has forced him to go with the accused. The accused has taken the witness through the shortcut which goes through jungle.

- viii) While going through the jungle, the accused has stopped near the drain and opening his pants, has asked the witness to suck his penis. When the witness refused to suck the accused's penis, the accused has held him from the back of his head and forced him to suck the accused's penis. The witness has sucked the accused's penis for about one minute. Then something white has come out of the accused's penis and the accused putting on the pants, has gone to the shop. At the shop the accused bought the witness a lolly and has told the witness to not to tell anyone, of the incident. On their way back they have come home through the main road.
- ix) Having come home the witness has told the incident to his cousin Junior who is elder to him. Later on the same day, the witness has told the incident to his mother.
- x) The witness identifies the accused as the person who made him suck that person's penis.

21. Answering the cross examination, PW1 says that;

- i) The incident happened at around 11.00am before the lunch. There, the defence elicits a contradiction with his statement to the police. Though his statement states the alleged incident happened after lunch, the witness affirms that he told police that it happened before lunch.
- ii) The witness denies knowing anyone by the name of Ronish. When the learned counsels suggests on instructions that the witness did not inform the incident to his mother, the witness denies it.
- iii) The witness, denying the learned counsel's suggestion that accused did not put his penis into the mouth of the witness, re-affirms that the accused did so.

22. The PW2 was the 14 year old Nikil Naidu the elder brother of the PW1. His evidence was that;

- i) He has 3 brothers and a sister. His brothers are, N (PW1), Nohil, and Elvis and his sister is Aniya Nehar.
- ii) On the 05<sup>th</sup> of November 2016, he has gone with his mother and the siblings

to his grandfather's place as it was his grandmother's death remembrance day.

- iii) At his grandfather's place he was playing with his brothers and the cousins. While playing, he has seen his grandfather going with his brother, N to the river side.
- iv) Then the time would have been around 11am or 12 noon. Later he has seen his brother N saying something to his mother.
- v) The name of the shop close to his grandfather's house is Velappan, but it is also known as Chandu's. There is a shortcut to go to that shop from the grandfather's house. The witness has gone through it and that path goes through a jungle, towards the river.
- vi) In answering the cross-examination, the witness said that while he was playing he saw his grandfather and brother N going towards the shortcut and though there are other houses close by people use the said shortcut occasionally.
- vii) The witness has not heard what N told his mother as he was far away, but he has seen it from the playground.

23. The next witness, PW3 was the mother of the alleged juvenile victim. Her Name is Sarita Devi Naicker, and is aged 37 years. She states that;

- i) She is married to Virendra Naidu and resides in Tuvu for 16 years.
- ii) The accused is her father and PW1 is her second son.
- iii) On 05<sup>th</sup> of November 2016, she has gone to her father's place as it was the day of 3 months rituals of her late mother. She has gone there with all her children.
- iv) At her father's place she had been cooking while her children played. She has seen her second son, N came and informed her nephew Junior, that the grandfather (her father, the accused) has done something bad to him. The nephew has told that to her and she has called N and asked. N (PW1), has told her that grandfather did something to him. The witness states that she did not ask N what his grandfather did to him.
- v) This witness was not subjected to any cross examination by the defence.



24. PW4 was Virendra Naidu, the father of the PW1. He states that;
- i) He is married to Sarita Devi Naicker and lives in Tuvu. He is a fisherman and once go out in the morning, comes back on the following morning.
  - ii) The accused is his father-in-law (his wife's father).
  - iii) On the 7<sup>th</sup> of December, while at home he received a message from a person named Sunil that something has happened to his kids. Then he has asked his wife and the kids and they have not told him anything. At that point he has scolded N and asked him.
  - iv) Then N has told him that Nana (grandfather) has done a bad thing to him. Straightaway, he has called the police and had informed the incident.
  - v) In cross-examination the defence elicits a contradiction between his evidence in court and his statement to the police in regards to the time he came home on the 07<sup>th</sup> of December 2016.
25. With the leading of the above evidence prosecution closed their case and the Court being satisfied that the prosecution has adduced sufficient evidence covering the elements of the offence, decided to call for a defence from the accused, acting under the virtue of section 231(2), of the Criminal Procedure Act, explaining and offering him the due rights of the accused.
26. The accused having understood his rights properly, elected to remain silent exercising his constitutional right. However, he decided to call a witness on his behalf. The said witness is master Ronish Kunal Samy, aged 16 years, a grandchild of the accused. His evidence is that;
- i) His mother is Arti Ashwini Naicker and the accused is his maternal grandfather.
  - ii) On 05<sup>th</sup> of November he has gone to the grandfather's house for his grandmothers' 3 month funeral rituals.
  - iii) At the grandfathers' house he was helping with the work.
  - iv) N, who is a cousin brother of him, was also there on that day, playing in the shed prepared for funeral rituals, making the shed dirty.
  - v) He has had a conversation with N on that day. When queried as to what the conversation was about, the witness stated "N was making the shed dirty

and my grandfather scolded him". This question had to be repeated and explained several times for the witness to ultimately come out with the answer that N told him that grandfather scolded him.

- vi) When N informed that the witness has gone and told that to the N's mother, Sarita.
- vii) In cross-examination, the witness states that the shed was in the compound and N was playing in the shed and making it dirty. The witness has seen his grandfather scolding N and N's elder brother for being naughty.
- viii) The witness denies that his grandfather went with N to the shop and states that N was playing. He further denies that he was lying to protect his grandfather.
- ix) The witness denies that he told Sarita that N told him that grandfather did something bad to him.
- x) When queried whether he saw the grandfather scolding N, the witness answers that he did not see, but N told that N and N's elder brother were scolded by the grandfather. Further he reaffirms that he did not see his grandfather scolding any of them. However, later states that he saw grandfather scolding N and N's brother, and admits what he said before was wrong.
- xi) After about 3 minutes from having seen that, N has come and complained him. When queried that having seen that, why did he wait without complaining to Sarita until N came and complained, the witness says that he was on the way to complain to Sarita when N came and complained.
- xii) The witness admits giving a statement to the police, however, denies his signature when shown.
- xiii) When asked whether he has been discussing this case with Sarita, the witness answers in the negative. However, later admits to have discussed this case with Sarita. The witness says he has discussed of this case as everyone else was discussing since the day of the incident. You the assessors should consider, as for the witness if N has complained of a scolding on that day, was there anything much for everyone to talk about or was there anything for Sarita to try to go home immediately.

27. That is a summary of the evidence given by the witnesses. Please remember

that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I did not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit. As I have already explained, which evidence you would accept and which evidence you would not accept is a matter for you and you alone to decide.

28. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proven and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offence have been proven beyond reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.

29. The Accused has indicated his stance through his evidence and cross-examination done from the PW1 and the other prosecution witnesses; It is that he did not do the alleged act.

With the submission of the accused's stance, one of the three situations given below would arise;

(i) You may accept his stance and, if so your opinion must be that the accused is 'not guilty'.

(ii) Without necessarily accepting his stance you may think, 'well what he suggests might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.

(iii) The third possibility is that you reject his stance. But, that itself does not make the accused guilty. The situation would then be that you should still consider whether the prosecution has proved all the elements beyond a reasonable doubt.

30. Any re-directions? (on corroboration – redirected)

31. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. When you have reached your separate opinion, you will come back to court and you will be asked to state your opinion.

32. Your opinion should be whether the accused is guilty or not guilty.



**Chamath S. Morais**  
**JUDGE**

**At Lautoka**

**23<sup>rd</sup> of May, 2019**

**Solicitors for the State** : Office of the Director of Public Prosecutions,  
Lautoka

**Solicitors for the Accused** : Legal Aid Commission, Lautoka