

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 152 of 2016**

**STATE**

**V**

**SEMI MALAI**

**Counsel** : Ms. S. Navia for the State.  
: Ms. V. Diroiroy with Ms. E. Radrole for the Accused.

**Dates of Hearing** : 21 and 22 May, 2019  
**Closing Speeches** : 23 May, 2019  
**Date of Summing Up** : 23 May, 2019

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**SUMMING UP**

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*(The name of the complainant is suppressed she will be referred to as "VH").*

Ladies and Gentleman Assessors

1. It is now my duty to sum up this case to you.

**ROLE OF JUDGE AND ASSESSORS**

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an 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 facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused is guilty or not.
5. State and Defence Counsel 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 Counsel in this case.
6. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
7. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

### **BURDEN OF PROOF AND STANDARD OF PROOF**

8. As a matter of law, the burden of proof rests 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 or she is proven guilty.
9. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means 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 about his guilt, then you must express an opinion that he is not guilty.

10. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
11. You must decide the facts without prejudice or sympathy to either the accused or the complainant. Your duty is to find the facts based on the evidence without fear, favour or ill will.
12. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

### **INFORMATION**

13. The accused is charged with one count of rape and two counts of indecent assault. (A copy of the information is with you).

#### **COUNT ONE**

##### *Statement of Offence*

**RAPE**: Contrary to section 207 (1) and (2) (c) and (3) of the Crimes Act No. 44 of 2009.

##### *Particulars of Offence*

**SEMI MALAI**, on the 23<sup>rd</sup> day of July, 2016, at Sigatoka, in the Western Division, inserted his penis into the mouth of **“VH”**.

#### **COUNT TWO**

##### *Statement of Offence*

**INDECENT ASSAULT**: Contrary to section 212 (1) of the Crimes Act No. 44 of 2009.

*Particulars of Offence*

**SEMI MALAI**, on the 23<sup>rd</sup> day of July, 2016, at Sigatoka, in the Western Division, unlawfully and indecently assaulted “**VH**” by touching her vagina.

**COUNT THREE**

*Statement of Offence*

**INDECENT ASSAULT**: Contrary to section 212 (1) of the Crimes Act No. 44 of 2009.

*Particulars of Offence*

**SEMI MALAI**, on the 23<sup>rd</sup> day of July, 2016, at Sigatoka, in the Western Division, unlawfully and indecently assaulted “**VH**” by touching her breasts.

14. To prove count one the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
  - (a) The accused;
  - (b) Inserted his penis into the mouth of the complainant “**VH**”;
  - (c) “**VH**” was below the age of 13 years.
15. The slightest of insertion of the complainant’s mouth by the accused’s penis is sufficient to satisfy the act of penetration. As a matter of law a person under the age of 13 years does not have the capacity to consent. In this case it is an agreed fact that the complainant was 7 years at the time of the alleged offending. I therefore direct you that the consent of the complainant is not an issue in this trial.
16. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
17. The second element is the act of inserting the penis into the complainant’s mouth.

18. The final element of the offence is the age of the complainant. It is an agreed fact that the complainant was 7 years at the time of the alleged offending which establishes that she was below the age of 13 years at the time of the alleged incident.
19. In respect of the count of rape the accused has denied all the elements of the offence. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had inserted his penis into the mouth of the complainant "VH".
20. If you are satisfied that the accused had inserted his penis into the mouth of the complainant then you must find the accused guilty of rape. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of rape then you must find the accused not guilty of the offence of rape.
21. To prove counts two and three the prosecution must prove the following elements of the offence of indecent assault beyond reasonable doubt:
  - (a) The accused;
  - (b) Unlawfully and indecently;
  - (c) Assaulted the complainant "VH".
22. The first element of the offence of indecent assault is concerned with the identity of the person who allegedly committed counts two and three.
23. The words "unlawfully" and "indecently" in respect of the second element of the offence simply means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such act indecent.
24. Assault is the unlawful use of force on the complainant "VH" by the act of touching her vagina and touching her breasts.

25. In respect of the counts of indecent assault the accused has denied all the elements of the offences. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had unlawfully and indecently assaulted the complainant "VH" by touching her vagina and by touching her breasts.
26. If you are satisfied that the prosecution has proved all the elements of the offences of indecent assault beyond reasonable doubt, then you must find the accused guilty of the offences of indecent assault. However, if you have a reasonable doubt in respect of any elements of the offences of indecent assault then you must find the accused not guilty.
27. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.

#### **ADMITTED FACTS**

28. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as admitted facts.
29. From the admitted facts you will have no problems in accepting those facts as proven beyond reasonable doubt and you can rely on it. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
30. In this case, the accused is charged with one count of rape and two counts of indecent assault, you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.
31. I will now remind you of the prosecution and defence cases. In doing so it would not be practical of me to go through all the evidence of every witness

in detail. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is not important. You should consider and evaluate all the evidence in coming to your opinion in this case.

### **PROSECUTION CASE**

32. The prosecution called two witnesses to prove the charges against the accused.
33. The complainant who was 7 years of age in 2016 informed the court that she was on her way to the beach near her house looking for her mother when “Vava” Semi meaning uncle Semi the accused held her hair and took her into the bushes.
34. In the bush the accused told the complainant to suck his penis when she refused the accused forced her to suck his penis by pulling her head towards him. The accused and the complainant were standing at this time. The accused also touched her body by putting his hand inside her clothes from her breast down to her private part by putting his hand inside her panty.
35. On this day the complainant was wearing a t-shirt and a skirt. The complainant wanted to run away but the accused grabbed her hand and then gave her a \$2 coin. Both went to the beachside, the complainant wanted to call out to her grandmother but the accused blocked her mouth with his hand. At this time the accused told the complainant to go after a while her mother came and asked her what had happened. Whilst crying the complainant told her mother that she had told the complainant if someone touches her private part then she should inform her mother.

36. Upon hearing this, the complainant's mother started to cry. The matter was reported to the police by her mother.
37. In cross examination the complainant stated on 23<sup>rd</sup> July, 2016 she had met the accused at the house of her uncle Sevina, before leaving she told the accused that she was going to the beach to see her mother.
38. When it was suggested that nothing had happened that day the complainant stated that something did happen. When the accused had taken her to the bush she did not scream because the accused had closed her mouth. The complainant stated that the accused forced her to suck his penis and touched her private part.
39. When suggested that whatever the complainant had told the court was told to her by her mother the complainant stated that what she had told the court had happened.
40. The final prosecution witness was the mother of the complainant Miriama Naioba, on 23<sup>rd</sup> July, 2016 between 2pm to 3pm the witness returned from the beach. When she could not find the complainant at home she started asking around the village whether someone had seen the complainant. After a while the witness came to know that the complainant was standing beside the by-pound crying. When the witness went to where the complainant was the complainant said *"Mum both you and dad always told me that if anyone touches my private part I should tell you"*. The witness then asked the complainant what had happened. The complainant told the witness the accused had forced her to suck his penis also the complainant showed the \$2 coin the accused had given her.
41. The witness cried and took the complainant to the village and then from there the matter was reported to the police.



42. In cross examination the witness agreed some villagers had told her that they saw the complainant with a boy which made them suspicious but they did not say who the boy was. The witness agreed from what she was told she had made up her mind that something had happened to the complainant. The witness denied when she could not locate the complainant and because of her suspicion she had told the complainant to implicate the accused.
43. The witness stated she was told by the complainant that the accused had touched her private part and that the allegation was not made up by her upon her suspicion.

#### Ladies and Gentleman Assessors

44. Victims of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.
45. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to the fact that the complainant who was 7 years of age told her mother that the accused had forced her to suck his penis and had touched her private part.
46. This is commonly known as recent complaint evidence. The evidence given by Miriama is not evidence of what actually happened between the complainant and the accused since Miriama did not see what had happened between the complainant and the accused.

47. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant told her mother the accused had forced her to suck his penis and touched her private part immediately after the complainant met her mother after the alleged incident and therefore she is more likely to be truthful. On the other hand, defence says Miriama was only suspicious of what may have happened to the complainant after she was told by some villagers that they had seen the complainant with an unidentified boy near the bushes. Defence further says due to Miriama's suspicion she had told the complainant to implicate the accused and therefore the complainant should not be believed.
48. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the complainant was consistent and credible in her conduct and in her explanation of it.
49. This was the prosecution case.

### **DEFENCE CASE**

#### Ladies and Gentleman Assessors

50. At the end of the prosecution case you heard me explain options to the accused. He has those options because he does not have to prove anything. The burden of proving the accused guilty beyond reasonable doubt remains on the prosecution at all times. The accused chose to remain silent and did not call any witness that is his right and you should not draw any adverse inference from the fact that the accused decided to remain silent and not call any witness.

51. From the line of cross examination the accused takes up the position that the accused did not commit the offences as alleged by the complainant. The allegation by the complainant was made up by the complainant's mother after she was told by some villagers that they had seen the complainant with an unidentified boy near the bush. It was due to Miriama's suspicion that she had told the complainant to make up a story to implicate the accused.

52. This was the defence case.

### **ANALYSIS**

53. The prosecution alleges on 23<sup>rd</sup> July, 2016 the complainant was on her way to the beach near her house looking for her mother when the accused held her hair and took her into the bushes.

54. In the bush the accused told the complainant to suck his penis when she refused the accused forced her to suck his penis by pulling her head towards him. The accused also touched the complainant's body by putting his hand inside her clothes from her breast down to her private part by putting his hand inside her panty.

55. On this day the complainant was wearing a t-shirt and a skirt. The complainant wanted to run away but the accused grabbed her hand and gave her \$2 coin. Both went to the beachside, the complainant wanted to call out to her grandmother but the accused blocked her mouth with his hand. After a while Miriama the complainant's mother came and asked the complainant what had happened. Whilst crying the complainant told her mother that she had told her if someone touches her private part she should inform her mother.

56. The mother of the complainant Miriama Naioba, on 23<sup>rd</sup> July, 2016 between 2pm to 3pm returned from the beach. When she could not find the complainant at home she started asking around the village whether

someone had seen the complainant. After a while the witness came to know that the complainant was standing beside the by-pound crying. When the witness asked the complainant what had happened the complainant told the witness the accused had forced her to suck his penis and had touched her private part.

57. On the other hand the accused denies committing the offences as alleged. The accused takes up the position that the allegation by the complainant was made up by the complainant's mother Miriama after she was told by some villagers that they had seen the complainant with an unidentified boy near the bush where the alleged offences were committed. It was due to Miriama's suspicion that she had told the complainant to make up a story to implicate the accused.

#### Ladies and Gentleman Assessors

58. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
59. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.
60. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and

reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.

61. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.
62. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
63. 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 must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
64. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
65. In this case, the accused is charged with one count of rape and two counts of indecent assault, as mentioned earlier you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.

66. Your possible opinions are:-

Count One: **RAPE**: GUILTY OR NOT GUILTY.

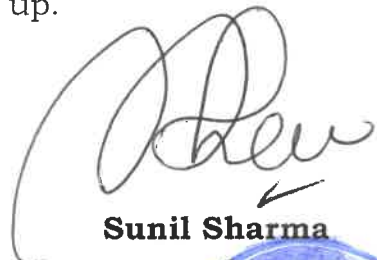

Count Two: **INDECENT ASSAULT**: GUILTY OR NOT GUILTY

Count Three: **INDECENT ASSAULT**: GUILTY OR NOT GUILTY

Ladies and Gentleman Assessors

67. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of my staff so that the court can be reconvened.

68. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.

  
Sunil Sharma  
Judge  


**At Lautoka**

23 May, 2019

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid Commission for the Accused.**