

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

**CRIMINAL CASE NO.: HAC 161 OF 2015**

**STATE**

**v**

**HARUN SHAMIM ALI**

**Counsel:** Ms S. Navia with Ms. R. Uce for State  
Mr Iqbal Khan with Ms S. Khan for Accused

**Dates of Trial:** 29<sup>th</sup> January, 2019 to 31<sup>st</sup> January, 2019

**Date of Summing Up:** 4<sup>th</sup> February, 2019

**SUMMING UP**

Madam and Gentlemen Assessors:

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. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters 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.
4. In other words you are the judges of fact. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The counsel for Prosecution and the Defence made submissions to you about the facts of this case. That is their duty as the counsel. You are not bound to accept their arguments. However you may properly take into account their submissions when evaluating the evidence. It is a matter for you to decide which version of the facts to accept, or reject.
6. 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.
7. On the matter of proof, I must direct you as a matter of law that accused person is innocent until they are proved guilty. The burden of proving guilt of each accused person rests on the Prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find an 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.
9. Your opinions must be solely and exclusively 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. This summing-up is not evidence. Statements, arguments, questions and comments by the counsel are not evidence either. A thing suggested by a counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as being true.

10. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity.
11. 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 or 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.
12. 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 witnesses.
13. 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. Any person who has been raped, will have

undergone trauma whether the accused was known to her or not. 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.

14. 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.
15. In assessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole.
16. 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.
17. The agreed facts of this case are that:
  - I. The accused in the matter is Harun Shamim Ali.
  - II. The complainant in this matter is Reshmun Nisha.
  - III. The accused and complainant were in a relationship
18. Each accused is charged with one count of Rape. The Information reads as follows:

**FIRST COUNT**

*Statement of Offence*

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

*Particulars of Offence*

**HARUN SHAMIM ALI** on the 26<sup>th</sup> day of September 2014 at Nadi in the Western Division, penetrated the vagina of **RESHMUN NISHA** with his penis without her consent.

**SECOND COUNT**

*Statement of Offence*

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

*Particulars of Offence*

**HARUN SHAMIM ALI** on the 25<sup>th</sup> day of December 2014 at Nadi in the Western Division, penetrated the vagina of **RESHMUN NISHA** with his penis without her consent.

**THIRD COUNT**

*Statement of Offence*

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

*Particulars of Offence*

**HARUN SHAMIM ALI** on the 02<sup>nd</sup> day of May 2015 at Nadi in the Western Division, penetrated the vagina of **RESHMUN NISHA** with his penis without her consent.

19. I will now deal with the elements of the offence of Rape. A person rapes another person if:
- (a) The person has carnal knowledge with or of the other person without other person's consent; or
  - (b) The person penetrates the vulva, vagina or anus of other person to any extent with a thing or a part of the person's body that is not a penis without other person's consent; or
  - (c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

- (d) The person knew or believed that the complainant was not consenting, or he was reckless as to whether or not she was consenting.
- 20. Insertion of penis fully into vagina is not necessary. Slightest penetration is sufficient to satisfy this element.
- 21. 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. Consent obtained by force, threat or intimidation is not voluntary. Different people react differently to situations. You don't necessarily need violence, kicking, and shouting etc. to show that one is not consenting.
- 22. According to the Crimes Act, the offence of Rape requires proof that the complainant did not consent. The offence may or may not be accompanied by 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.
- 23. If you accept that the complainant was not consenting you must ask yourself did the accused know that she was not consenting, and if not, was that a reasonably held belief, or was the accused reckless in going on knowing that she might not be consenting. In the circumstances of this case you consider whether the accused knew or it was reasonable for him to believe that she was consenting.
- 24. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether the witness is consistent in his or her own evidence or with his or her previous statements or with other witnesses who have given evidence. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same tests and standards in applying them.

25. In the course of cross-examination, counsel for Prosecution referred to previous statements of witnesses recorded by police. A previous statement made by a witness is not evidence in itself unless it is adopted and accepted by the witness under oath as being true. You can of course use those statements to test the consistency and credibility of the witness if you are satisfied that such a statement was made.
26. Please bear in mind that, save in exceptional cases permitted in law, a previous consistent statement made by a witness to police is not admissible to prove the consistency of that witness. Therefore, the fact that an accused has told the same story to police in his caution interview is not admissible to prove the consistency of the accused.
27. 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 did they conduct themselves in court? In general, what was their demeanor in court? But, please bear in mind that many witnesses are not used to giving evidence and may find court environment distracting.
28. Proof can be established only through evidence. Evidence can be direct evidence that is the evidence of a person who saw it or by a victim 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. You are also free to draw reasonable inferences if such inferences are based on facts proved by evidence and reasonable in the circumstances of this case.
29. Documentary evidence is evidence presented in the form of a document. In this case, the medical report is an example if you believe that such a record was made. You can take into account the contents of the document if you believe that contemporaneous recordings were made at the relevant time upon examination of the Complainant.

30. In the course of cross-examination, some photo copied documents were shown to the complainant by the Defence Counsel which he said were generated from text messages, facebook posts / profile and viber messages. They are not best evidence that can be produced in a trial and therefore the court did not allow everything to be tendered but allowed only certain parts of those documents which were admitted by the complainant. The contents of a document which were read or put to a witness but not formally tendered as documentary evidence are not evidence. Therefore, you are to consider only the admitted parts of those documents which were marked and tendered in evidence.
  
31. I will now direct you as to how you should deal with evidence presented by the doctor as an expert witness. Usually, witnesses are not allowed to express opinions. They are allowed to give evidence on what they have seen, heard or felt by physical senses only. The only exception to this rule is the opinions of experts. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their opinions expressed on a particular fact to aid court to decide the issues/s before court on the basis of their learning, skill and experience.
  
32. In this case, the doctor gave evidence as an expert witness. Doctor's evidence is not accepted blindly. You will have to decide the issue of rape before you by yourself and you can make use of doctor's opinion if her reasons are convincing and acceptable to you; and, if her opinion had been reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence led in the case. You have to bear in mind that the expert evidence does not implicate the Accused or link him to the alleged offences even if you decide to rely on it. You can only use doctor's opinion to test the constancy of Complainant's story.
  
33. The other important thing you must bear in mind is that the history relayed to the doctor is not evidence as to what actually happened between the complainant and the accused because the doctor was not present during the alleged incident. The history relayed to a doctor by a complainant if admitted as being true or proved can only be used to test the consistency and credibility of the complainant. In this case the complainant was not sure if she relayed certain



parts of D10 in the medical report (PE1). Therefore, you decide what weight you should attach to D 10 of the medical report.

34. In testing the credibility of a witness, you can consider whether there is delay in making a 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 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 to such delay.
35. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. It is a matter for you to determine whether, in this case, complaint complainant made to police is genuine and what weight you attach to the complaint she eventually made.
36. In testing the consistency of a witness you should see whether he or she is telling a story on the same lines without variations and contradictions. You should also see whether a witness is shown to have given a different version elsewhere and whether what the witness has told court contradicts with his/her earlier version. 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. If it is shown to you that a witness has made a different statement or given a different version on some point, you must then consider whether such variation was due to loss of memory, faulty observation or due to some incapacitation of noticing such points given the mental status of the witness at a particular point of time or whether such variation has been created by the involvement of some another, for example by a police officer, in recording the statement where the witness is alleged to have given that version.
37. 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.

38. Evidence was led that the complainant appeared scared when she was produced before the doctor around 2 30 a.m. This is how you should approach the evidence of distress. You must be satisfied beyond a reasonable doubt that the complainant's distressed condition was genuine and that there was a causal connection between the distressed condition and the alleged sexual offence. The distress evidence is only relevant in assessing whether the alleged sexual incident occurred. The distress evidence must not be used to connect the accused to the alleged offence. Before you use the evidence of distress, you must be sure that the distressed condition was not artificial and was only referable to the alleged sexual offence and not any other cause. In deciding these matters, you must take into account all relevant circumstances. If you are so satisfied then you may give such weight to the evidence of distress as is appropriate. But if you are not so satisfied then you must disregard the evidence of distress.
39. You may also see whether there is a motive or obvious reason to fabricate a false allegation against the accused. If there is an obvious reason to make up a case, then you may think that these allegations have been fabricated.
40. 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.
41. I will now deal with the summary of evidence in this case. In doing this, I do not propose going through all the evidence. It should still be fresh in your minds. If I refer to only some aspects of a witness's evidence it does not mean that the rest is unimportant. You must weigh up and assess all the evidence in coming to your decision in this case.

### **Case for prosecution**

**PW 1 Dr. Lice Sororo Vaniqi**

42. Prosecution called doctor Vaniqi as its first witness. She is a MBBS qualified doctor having a professional experience of 10<sup>th</sup> years. She examined the Reshmun Nisha at 2.35 a.m. on the 2<sup>nd</sup> of May, 2015, when the latter was produced at the Nadi Hospital by police. Doctor tendered the medical examination form which she filled after the examination (PE1) of the patient. The patient appeared scared when she was produced.
43. Describing her specific medical findings listed under D12, doctor said that she noted the following on the patient: red mark on her left cheek, one linear red mark on her neck, one linear red mark on her right breast. Her hymen was not intact, vaginal fluid noted, one bruise noted on right side of her vaginal wall.
44. She said that most of the time vaginal bruising is caused by vaginal dryness due to inadequate lubrication, usually during forceful sex, especially if the woman is not aroused. The marks that she noted on the neck, the chest and the breast are contusions that could have been caused by a blunt force trauma, for example due to a punch or a fall causing the break in the vessels, or possibly by bites. The bruise on right outer wall of vagina is a blunt force injury that could have been caused by forceful penile penetration or having sex with her for example by using objects or by finger penetration without her consent.
45. Under cross-examination by Mr Khan, the doctor said that the patient had informed that she had three children already. She said that in a person who had delivered three children will not definitely have her hymen present. Doctor admitted that aggressive consensual sexual intercourse could also cause such bruises. She said that it is not possible to say how old those bites were. She admitted that 20 minutes is sufficient time for somebody to have consensual sex and make love bites but it is hardly possible to make love bites in 3 minutes.
46. Under re-examination, the doctor said that the conclusion in D14 that bruises were made by forceful sexual intercourse was arrived at by examining the bruises and also from the history provided by the complainant.

**PW 2 Reshmun Nisha (The Complainant)**

47. Nisha said that she is a divorcee having three daughters. Her elder daughter Fiza Nisha is 15 years old. She has been residing at Nadi Back road since 2009 with her three kids. She runs a hair Salon business at Namaka since 2008. The house she is renting in Nadi has 3 bedrooms. She occupies the master bedroom and her children occupy the adjoining room.
48. On 2<sup>nd</sup> of May, 2015, after mid night, she reported a matter regarding Haroon Shamim Ali to Nadi Police Station about an incident happened at the same night. On that day, she was at home sleeping and her children were sleeping too in the next room. Her phone rang after midnight. The call was from Shamim asking her to open the door for him. When she opened the door Shamim came in. She inquired: *why you here?* He didn't say anything. He just lifted her from her hip and walked towards her room. She saw her daughter was awake. She told in Hindi '*chordo*' meaning '*leave me*' as she was being taken to her room. He didn't put her down. As they went inside the room, she closed the door. Then he put her on the bed and directly came on top of her. She was wearing a black shorts and a bra. When he came on top of her, she told him "*no*" and at the same time she could feel that he was trying to push his pants down. He pushed his pants down and he pulled her shorts down. She told him, "*no, leave me*". He didn't listen to her.
49. Shamim was trying his best to have sex with her. He removed her panty and put it aside. He then forcefully inserted his penis into her vagina. She tried to push him down and push him away, but he was forcing himself with his body power, making it very hard for her to move. His head was on her face, and that's when he bit her cheek. She also bit her neck. She could feel that he kept on inserting his penis into her vagina few times.
50. She couldn't breathe and was trying to breathe. Her body was so loose and could not move. Then he turned her around and inserted his penis again into her vagina. She tried to move but it was hard for her to move. He did it few times as she kept telling him to stop; but he continued. Later she could feel that her vagina is wet.

51. After finishing, he just laid beside and said that he will continue doing this if he still gets married and if he comes from overseas, he will come back to her. He was there for a while and then he left.
52. That night, she felt that he will really continue this, because previously he had done the same to her. To stop further abuse, she thought she should report the matter to Police. She called Nadi Police Station. Police did not have a vehicle to attend to her report so she got dressed and went directly to Nadi Police Station and reported the matter. Police took her to Nadi Hospital where she was examined by a lady doctor. Nisha said that she did not scream because she did not want to let her kids know what she was suffering from.
53. Then she described the two previous incidents, one happened on 26<sup>th</sup> September, 2014, and another one on 25<sup>th</sup> December 2014.
54. On 26<sup>th</sup> of September, 2014, she reached home in the evening around 7 p.m.. Shamim came home to take the welding plant when she was in the dining room with her kids. Shamim held her hand and took her to her bedroom. They were fighting because he had just returned spending one week with another woman from New Zealand. His main objective was to come home and have sex with her.
55. He was trying to touch her body. He started touching her private parts. She told him to stop. He continued doing that. She couldn't shout or say anything as her two kids were still awake. He put his pants and underwear down and made her lie on the bed. He came on top of her. She was telling him "no", because he was spending weeks with another woman, and coming back to her.
56. He put her panty down, spread her legs forcefully, and inserted his penis into her vagina. He kept on pushing it in and out for about 5 or 6 times. She was telling him to stop but he never listened to her. After finishing, she could feel that her vagina is wet. The fight continued until he left. He said that the lady from New Zealand, Shenaz Khan was only his friend. From there, the relationship continued till December 2014.

57. Nisha said that she didn't shout at any of those incidents because of her kids. She said that she did not report the first two incidents because he was staying with her in her house in a relationship for nearly 2 years. Only when it happened the third time and he said that he will continue doing this, she reported the matter for her safety because she didn't want it to happen again.
58. Describing the second incident on the 25<sup>th</sup> of December, 2014, Nisha said that at about 10.00 a.m., Shamim came home when children were in Suva for holiday. Shamim went inside the house and changed into his mechanic clothes to fix his car. After finishing all the house work, she went for a shower in her master bedroom. When she opened the bathroom door, she saw him standing in her room, naked. He just pulled her and started kissing her. She pushed him away because he had come home again spending another week with another woman. Then he stood up and said that that lady is her cousin. He also said '*I can't live without you*' and put her on the bed. He then came on top of her and put his penis into her vagina more than 5 or 6 times. She told him '*no*', because that was the second time he was doing that.
59. That day, nobody was home and she kept on telling him to stop but he never listened. She tried to struggle but he didn't listen to her. Then he turned her around and inserted his penis into her vagina few times. Then all of a sudden he tried to insert his penis into her anal. She couldn't take the pain so she grabbed her clothes and ran out from there. She went to her neighbor's house while Shamim was still inside the bedroom.
60. On that day, her neighbors were preparing to celebrate Christmas with a *lovo*. She was waiting there for one hour for the food, because she had contributed for the food. Shamim had not left and was staying until she came back. She brought the food and offered him the food. He left in the evening.
61. Nisha said that she didn't shout because Shamim was not a stranger to her. Whatever abuse he was doing, she was just taking it on herself. She didn't report first two incidents to police because they were in a relationship. She said that she never agreed to have sexual intercourse with Shamim on any of these occasions. She said that she started dating Shamim since 2012 and was living together in a

relationship with him from January 2013. Shamim left her house in September 2014, but the relationship continued till April 2015.

62. Nisha further said that when she met Shamim at the Magistrates Court, he asked her to withdraw this case about 5 times. Recently he asked her to withdraw the case saying that he had lots of evidence to defame her. He offered \$20.00 to her daughter, and said that if he went to jail, no one is going to pay the maintenance to her. He also threatened to hang himself if she did not withdraw the case.
63. Under cross-examination, explaining the difference between her statement to police given on the 29<sup>th</sup> of January, 2019 and one given on 4<sup>th</sup> of May 2015, Nisha said that her previous statement was a brief statement about the incident and the police didn't ask her what happened after the incident. Explaining the reason why she had not given full details about the first two incidents, Nisha said that the police did not ask about those incidents in detail. She denied that those incidents were fabricated.
64. Nisha denied that the problem arose from the day she came to know that Shamim was leaving her and he was supposed to get married to a lady in Australia. She denied that she became very vindictive after coming to know about his marriage. Nisha said that when she sent out some messages to this lady, she said that she is his fiancée, and she is going to marry him. Shamim had told her that he's meeting his cousin. She said that it was normal to her because it was his normal routine. He kept on going for other women and coming back to her. Previously he had other relationships where ladies came and picked him from her house and dropped him. She had found him in other woman's house, so it was normal to her. Nisha said that she always had fights but she didn't become jealous because it was his habit and she knew that it's happening,
65. Nisha admitted speaking to a lady from New Zealand named Shenaz who had informed her that Shamim is her boyfriend and that she is going to marry him. Nisha admitted informing Shenaz that Shamim was living with her. Nisha said that, after Shenaz left, Shamim came to her and forcefully had sex with her but the relationship continued till December.

66. She also admitted sending some messages to Sophia, Shamim's present wife informing her that Shamim was staying with her but at that time she was not sure if Sophia was married to Shamim. Sophia was saying that they are getting married but whenever she asked Shamim he was always denying this fact. She said she came to know that Shamim is married to Sophia on or around 27<sup>th</sup> May 2015 when Sophia sent their wedding pictures on her facebook tagging her.
67. Before 22<sup>nd</sup> May, 2015, she admitted communicating with Shamim and also with Sophia via text and viber messages and also talking to Sophia for almost 30 minutes on the phone in answer to an incoming call. Nisha said that she could not remember if, at one instance, she had told Sophia not to marry Shamim. She denied that she brought this allegation of rape on the 2<sup>nd</sup> of May, 2015, 18 days prior to marriage, to prevent Shamim from getting married to Sophia on 22<sup>nd</sup> May.
68. Nisha said that, before 22<sup>nd</sup> May 2015, when rumors were going around, she asked Shamim if he was going to marry, but he kept on denying. Nisha said that she came to know about the marriage only when the wedding pictures were posted on Facebook.
69. She admitted that she was sending messages to Shamim on the 13<sup>th</sup> of April, 2014. She admitted that 8457963 is her company telephone number which was activated only to send and receive calls or to text messages. When she was shown a photocopied document containing some messages, which the Defence Counsel said were generated from her phone, she admitted only some parts and denied sending some messages. Admitted parts of the documents were allowed to be tendered in evidence as DE1-DE3. She said that the relationship lasted till 16<sup>th</sup> April, 2015, and admitted messaging him on 13<sup>th</sup> April, 2015 asking him to pick her when they were still in the relationship. She said that until 29<sup>th</sup> of April 2015, everything was okay with Shamim and that she even sent a message on 29<sup>th</sup> checking for her license.
70. She admitted that Shamim had a key of her house but he could not open it from outside because she had locked it from inside before going to sleep. She admitted that in the first Statement to the Police, she had never mentioned about her daughters because police did not ask about them. When she was asked to give



another statement on the 20<sup>th</sup> of June 2015, she told about the daughters. She said that she could not remember if she had told the doctor that the whole incident took twenty minutes. She said that she came to know that she was pregnant on 1<sup>st</sup> June 2015. The child was born on 24<sup>th</sup> January, 2016. She admitted filing a maintenance case and obtaining a stop departure order against Shamim to prevent him from leaving the country when she came to know on 1<sup>st</sup> June 2015 that she was pregnant.

71. Nisha denied going to Magistrates Court and Small Court Tribunal out of vindictiveness to punish Shamim because he didn't marry her. Nisha said that she could have married Shamim when he was staying with her for 2 years. She admitted that she didn't go to police to complain against Shamim regarding witness interference because she was seeking justice in court. She further said that a case is pending against him for breaching the domestic violence order.
72. She admitted that, after the 2<sup>nd</sup> incident, she didn't tell anyone when he ran to neighbour's house because at that time she was in a relationship with Shamim. She admitted giving a further statement to police on the 28<sup>th</sup> January, 2019, stating that, on two occasions in April 2015, she had consensual sexual intercourse with Shamim.
73. Under re-examination Nisha said that, in the documents tendered by defence, the replies sent to her viber messages have been deleted.

#### **PW 2 Fiza Nisha**

74. Fiza is the daughter of the complainant. Fiza stated that on 2<sup>nd</sup> May, 2014, when she was sleeping in her bedroom, she heard her mum's phone ringing. She woke up and came out. She saw her mum answering the phone and going towards the door. She went to the washroom and, when she came out of the washroom, she saw Shamim holding her mum in his arms and coming towards the room. Then they went in their room. She heard her mum saying in Hindi, *chordo*, which means 'leave me'. Then she heard somebody closing the door.

75. Under cross examination, witness admitted that Shamim was staying with them for two years at her house and treated her like a stepfather. She said that Shamim looked after her well when her mum was away on Sundays. He had a key for the house. Her mother was upset when he left her and married someone else.
76. She saw Shamim carrying her mum towards the room in his both arms. She gave a brief statement to police on 8<sup>th</sup> of May 2015 when her mother reported the matter to police. She forgot to mention anything about going to the washroom or to the kitchen in her both statements to police.

That is the case for the Prosecution.

77. 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.
78. As you are aware, accused elected to give evidence and call a witness on his behalf. That is his right. Now I must tell you that the fact that an accused gives evidence in his own defence does not relieve the Prosecution of the burden to prove their case to you beyond reasonable doubt. Burden of proof remains with the prosecution throughout. Accused's evidence 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 Harun Shamim Ali**

79. Shamim testified that he first met Nisha in December 2014 at a nightclub *and* became friends and, during this friendship, he used to drink with her often, after work. This relationship turned into a living one and he started living together with her in January, 2015 in a husband and wife kind of relationship, though they were not married.

80. He stopped seeing her from July 2014 when he found out that she was going to a hotel where she had clients and she was going to see them in the afternoon while her daughters remained with him.
81. The relationship eventually became sour. One day, when he went to his parent's place in Ba, Nisha had called her brother to check his whereabouts. When he came back, he found out that she was not home. So he started calling her on her mobile phone but she did not answer. She was waiting for the car to come in the settee. She came back at 2.00 a.m. without the two girls. He tried to see who there was in the car because, by the way she was dressed and that she was drunk, he got suspicious. When he went to check the car, he found out in the car a room key of Tanoa Hotel. Without saying anything to her, he took her car and went to Tanoa. The receptionist said that the room belongs to an aircraft pilot and the two girls were with him whilst she was at home. That day, he said *'enough, I know your character I am moving out'* and everything broke down thereafter.
82. He decided to move out and tried to make a life for himself and moved away overseas so he will not be rounded up in all these affairs. He asked one of the ladies from New Zealand, Shenaz whom he met on facebook. After few communications, they decided to meet and then move forward. Shenaz came to Fiji for a week for holiday and stayed with him, without having any relationships, only talking about future relationships. Nisha knew that he was meeting Shenaz and contacted her. Nisha was waiting at the airport and told the lady, *'he is mine why you want to come in between?'* But the lady ignored her and went back. Later on, she posted all their old messages and photos to Shenaz. Eventually Shenaz refused.
83. The lady that he is now married to is a distance family. He told the whole story to her as they moved on. She agreed that they settle down and create a family. Nisha come to know about this and started texting and posting her their old pictures, text messages, everything regarding their previous relationship and tried to say that *'you don't marry him because he is mine'*. Her intention was to break the marriage. Nisha spoke to his wife many occasions but they went further and decided to have the marriage done on the 22<sup>nd</sup> of May. The marriage took place as scheduled and the pictures were posted on the facebook, without

tagging anyone. He confirmed exhibits DE 2 and 3, the messages from the facebook and viber.

84. He denied the allegation that he went to Nisha's house on the 2<sup>nd</sup> day of May, 2015, and that he had forcefully had sex with her without her consent. However, he admitted going there and having sexual relationship with her on 1<sup>st</sup> of May, 2015 and giving her love bites. Shamim said that he never knocks, just opens the door, and enters the house as he had a key.
85. Shamim also denied the allegation that on the 26<sup>th</sup> of September, 2014, he had forcefully had sex with Nisha. He admitted having sexual intercourse with her consent on the 25<sup>th</sup> of December, 2014.
86. On the Christmas Day in 2014, Nisha informed that her kids went to Suva and that she had a plan for Christmas to have lovo with the neighbors, so he went there and had sex with her with her consent and had lunch together.
87. He said that he was getting married and that's why Nisha had done this and put an allegation against him to stop him from moving abroad. On the second day of the marriage, (23<sup>rd</sup> of May 2015), he received a summons and a Stop Departure Order claiming maintenance on the basis that she was 6 weeks pregnant. She went further and lodged a claim at Small Claims Tribunal against him for \$4,800.00 for parking of the vehicles at her place. He said that this claim was dismissed because the Tribunal found it to be a 'sour grapes case'.
88. He said that his wife lives in Australia with his child. Whilst on bail, he went to Australia thrice, taking leave from this Court, and came back to face the trial to clear his name.
89. Under cross-examination, Shamim admitted that he did not see the girls inside the pilot's room at Tanoa. When he went near the room, the security informed that the two girls were inside and the gentleman was also inside. He admitted that his lawyer never put the Tanoa hotel incident either to Nisha or Fiza when they took stand. He also admitted that his lawyer did not put his version that the

wedding photos were never tagged to Nisha by his wife when she took stand. He said that he first met Nisha at a nightclub in 2013 and not in 2014.

## **DW 2 Sophia Ali**

90. Sophia said that Shamim is related her aunty's brother's son and came to know him in 2012 through facebook. When she came to Fiji in 2014 to meet her husband, Nisha approached her through facebook sending her lots of messages and posting disturbing pictures and videos taken with her husband. Nisha was saying that Shamim wants to marry her only because she is in Australia and he's with her. Nisha gave her lots of numbers to contact her bur she didn't reply her at all. When she came to Fiji, Nisha was spying on her contacting her friends, families just to call her. Sophia said that Nisha told her to call her couple of times and then she did call Nisha but she never mentioned about a rape. She was telling that Shamim was with her, he's her husband and they have been together for more than 2 years and she will never let Shamim go out of this country, she will do everything just to stop him. After she got married, and the day she was leaving, she came to police and said that she was 6 weeks pregnant. She said, sometimes the conversation went on for an hour or half an hour. The day she came to Fiji to marry Shamim, Nisha rang her and said that she was following her from the airport. Sophia said that she even lodged a complaint against Nisha at Nadi Police Station.
  
91. Under cross-examination, Sophia said that she deleted all Facebook messages Nisha was sending. She admitted that even after receiving disturbing messages, she did not block Nisha's Facebook or Viber straight away. She said that she obtained screen shots of some of the messages and sent them to Shamim.

That is the case for Defence

## **Analysis**

92. Lady and Gentlemen assessors, the accused is charged with three counts of rape. To find the accused guilty of rape in this case on each count, the Prosecution must prove beyond reasonable doubt that the accused penetrated complainant's vagina with his penis, without her consent. You have to consider evidence

against each count separately for you to be satisfied that each charge has been proved beyond a reasonable doubt.

93. Accused denies sexual intercourse with the complainant on the 26<sup>th</sup> of September, 2014 and on 2<sup>nd</sup> of May, 2015. However he admits the sexual intercourse with the complainant on the 25<sup>th</sup> of December, 2014, but he denies having sexual intercourse with her, without her consent. Therefore, Prosecution has to prove all the elements of rape in respect of the 1<sup>st</sup> and the 3<sup>rd</sup> counts. In respect of the 2<sup>nd</sup> count; there is no dispute as to the first two elements of the offence of rape. The only dispute is in relation to the consent.
94. The resolution of the dispute in this case depends on whether you accept the complainant as a truthful witness. Prosecution called three witnesses and based its case substantially on the evidence of the complainant. 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. However, you may look at other pieces of evidence to see if complainant's version is credible and believable.
95. Prosecution says that the complainant told the truth in court when she said that the accused had forceful sexual intercourse without her consent on all three occasions. To support its version, Prosecution relies on evidence of complainant's subsequent conduct, the medical evidence of doctor Vaniqi and the evidence of her daughter Fiza to prove complainant's consistency.
96. Prosecution led evidence that after the third alleged incident on 2<sup>nd</sup> May, 2014, the complainant had promptly informed the police and rushed herself to the Nadi Police Station after midnight to lodge a complaint. She was medically examined by Dr. Vanqi on the same day in the morning around 2 30. am.
97. You heard what the doctor had to say about the first impression she had of the complainant and the marks and injuries on her cheek, neck breast and her vagina. Prosecution says that those marks/ injuries are consistent with a forceful sexual intercourse. Defence on the other hand says that the bite marks are 'love

bites' which are consistent with a consensual sexual intercourse and, the injury on the vaginal wall is a result of rigorous consensual sex.

98. The complainant had not complained about the first two alleged incidents to anybody. She had complained about those two incidents only when she went to police after the third alleged incident while recording her statement on the 4<sup>th</sup> May, 2015. She had not complained to her neighbours about the Christmas day attack when she ran to them. The argument of the Defence is that complainant had ample opportunity to complain about the first two incidents, but she had never complained to anyone because no such incidents happened.
99. You heard what the complainant said in her explanation. The complainant said that the accused was no stranger to her and she was living together with him for two years and during that period, she was in a relationship with him as husband and wife. She said that the relationship came to an end on 16<sup>th</sup> April, 2015, and after the 2<sup>nd</sup> May incident, she made a complaint to police for her own safety when the accused, after finishing his act, said that *"he will continue doing this if he still gets married and if he comes from overseas, he will come back to her"*. She said; only when it happened the third time and accused said that he will continue doing this, she reported the matter for her safety because she didn't want it to happen again.
100. The complainant admits that she did not shout or scream during any of those attacks. Her explanation was that she was in a relationship with the accused and whatever abuse he was doing, she was just taking it on herself. She also said in respect of the 1<sup>st</sup> and 3<sup>rd</sup> incidents, that her daughters were awake and she did not want to shout and let them know what was going on. She said she ran to the neighbour on the Christmas day to avoid an anal attack.
101. In light of directions I have given to you, you decide whether the explanations she had given are acceptable and if they appeal to your common sense in the circumstance of this case and from her perspective.
102. Version of the accused is that the complainant eventually complained to police in a vindictive motive to sabotage his marriage that was to take place on 22<sup>nd</sup> May,

2015. Accused said that the complainant was angry that he did not marry the complainant and her claims filed at maintenance court, Small Claim Tribunal, the stop departure order and the messages she sent or posted on social media/viber are all manifestations of her vicious motive. The Defence Counsel branded this case as a "sour grapes case". (*This phrase is used to refer to an attitude in which someone adopts a negative attitude to something because they cannot have it themselves*).

103. Complainant denies that she had such a motive. She had lodged the complaint on the 2<sup>nd</sup> of May, 2015, approximately 18 days prior to his marriage to Sophia. The complainant said that she came to know about the marriage only when the wedding pictures were posted on Facebook on 22<sup>nd</sup> May 2015. Shenaz, the lady from New Zealand, had informed her that the accused is her boyfriend and that she is going to marry him. Sophia had also informed the complainant that she is going to marry the accused. Before 22<sup>nd</sup> May 2015, when rumours were going around, the complainant had asked the accused if he was going to marry, but he had kept on denying and had told that he's meeting his cousin.
104. In her explanation, the complainant said that it was accused's normal routine that he kept on going for other women and coming back to her. She said that she always had fights but she didn't become jealous because it was his habit and she knew that it's happening. The complainant also said that she could have married the accused when he was staying with her for 2 years. She said that she went to court to claim maintenance and sought a stop departure order when she became aware on the 1<sup>st</sup> June 2015 that she was pregnant.
105. The State Counsel argues that the complainant was a well off woman and had nothing to lose by not marrying the accused. Having carefully considered all evidence and her demeanour, you decide if the complainant is a credible witness or whether she had made up these allegations with a vindictive motive to punish the accused.
106. The third Prosecution witness, Fiza Nisha, the 16 year old daughter of the complainant said that she saw accused on the 2<sup>nd</sup> of May 2015 in her house holding her mum in both of his arms and coming towards the room and when they went in the room, she heard her mum saying in Hindi, *chordo*, which means 'leave me'.



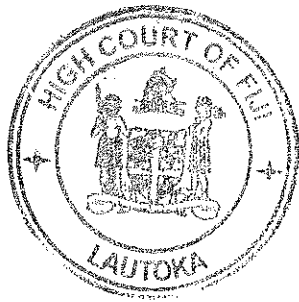
107. Defence says that Fiza is not a trustworthy witness. You decide if she is credible and what weight you should attach to her evidence.
108. The complainant testified that she clearly remembers the dates on which she was raped. She admitted even giving a further statement to police on the 28<sup>th</sup> January, 2019, stating that, on two occasions in April 2015, she had consensual sexual intercourse with Shamim. The Defence Counsel argues that it is not possible for a woman to specifically remember the dates which she had consented to sexual intercourse and the dates she had not. You see if the complainant has special reasons to remember the specific dates which she says she was raped.
109. The accused denies the allegations and gave evidence in his defence although he was not required to prove his innocence or prove anything at all. He also called his wife Sophia. You must consider evidence adduced for defence and evaluate the same using the same tests that you have used to test the credibility of Prosecution's witnesses.
110. Prosecution says that the accused and Sophia did not tell the truth in court and they are untrustworthy witnesses. That say that the accused has fabricated the Tanoa Hotel incident because his lawyer never put that version of events either to Nisha or Fiza when they took stand.
111. The accused said that he stopped seeing the complainant from July 2014 when he found out that she was going to a hotel where she had clients in the afternoon while her daughters remained with him. He also said that the relationship eventually became sour and everything broke down after the Tanoa Hotel incident upon which he had said '*enough, I know your character I am moving out*'. However, he admitted that he came to complainant's house on the 1<sup>st</sup> May, 2015 and had consensual sexual intercourse with her.
112. Sophia has come all the way from Australia to give evidence in her husband's case. She admitted that she rang up and had long telephone conversations with the complainant and also received some messages on her phone. She said she


deleted all the messages and posts she received. She further said that before deleting, some of the screen shots were given to the accused. Defence Counsel contended that none of the messages were tendered in evidence.

113. You decide if the Defence witnesses are credible and believable and what weight you should attach to their evidence.
114. If you believe the version of the Defence, you must find the accused not guilty. Even if you don't believe the version of the Defence, Prosecution must still prove the charges beyond reasonable doubt. Remember, the burden to prove the charges rests on the Prosecution. Accused is under no obligation to prove his innocence or prove anything at all.
115. If you are satisfied that the version of Prosecution is credible and believable, then you have to be satisfied that each element of the offence of rape as charged had been proved beyond reasonable doubt.
116. If you are sure that the accused had penetrated the complainant's vagina without her consent on each occasion, then you can find the accused guilty on rape as charged.
117. Ladies and gentleman assessor, it is for you to determine the case of each count separately on a consideration of all the evidence and applying the directions that I have given to you.
118. That concludes my summing up of the law and the evidence in this particular trial. We have now reached the stage where you must deliberate together and form your individual opinions on whether the charges have been proved against each accused. On your return, you will be asked to separately state in court your opinion in respect of each count whether he is guilty or not guilty.
119. Your possible opinions would be:

- 1<sup>st</sup> Count - accused guilty or not guilty?  
2<sup>nd</sup> Count - accused guilty or not guilty?  
3<sup>rd</sup> Count - accused guilty or not guilty?

120. Any re-directions?



  
Aruna Aluthge  
Judge

**AT LAUTOKA**  
**4<sup>th</sup> February, 2019**

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