

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 281 of 2018

STATE

vs.

MOHAMMED YUNUSH

Counsel: Mr. M. Vosawale with Ms. S. Sharma for the State
Mr. D. Sharma with Mr. S. Deo for the Accused

Date of Hearing: 12th, 13th, 14th, 15th, 16th, 19th, 20th, 22nd August 2019

Date of Closing Submissions: 23rd August 2019

Date of Summing Up: 29th August 2019

SUMMING UP

1. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. As I explained you before the commencement of the hearing, we have different functions. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
2. Your function is to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

3. I may comment on the facts if I think it will assist you when considering the facts. However, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard any comment I make about the facts of this case, unless it coincides with your own independent opinion.
4. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box and the exhibits tendered as evidence. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The purposes of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. Therefore, the opening address of the prosecution is not evidence. The closing addresses of the counsel of the prosecution and the defence are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
5. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony put before you in this courtroom. Ensure that no external influence plays a part in your deliberation. You are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I make my judgment.
6. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused, the complainant or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

Burden and Standard of Proof

7. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused is guilty to the offence.
8. The burden of proof of the charge against the accused is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused to prove his innocence, as his innocence is presumed by law.
9. The standard of proof in criminal trial is “proof beyond reasonable doubt”. It means that you must be satisfied in your mind that you are sure of the accused’s guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you find any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused.

Information and elements of the offences

10. The accused has been charged with two counts of rape, contrary to Section 207 (1) and (2) (c) of the Crimes Act, three counts of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act, and two counts of Sexual Assault, contrary to Section 210 (1) (b) (i) of the Crimes Act. These offences have been charged in the information under the counts 3, 4, 5, 6, 7, 9, and 10. The particulars of the offences are in the information, which is before you, hence, I do not wish to reproduce them in my summing up.
11. For the purpose of clarity I will now explain you the factual basis of counts 6, 7, and 9 of the information, as the particulars of the offences given in the information have not properly distinguished the factual basis of these offences. As submitted by the learned counsel for

the prosecution, the factual basis of the offences of rape as charged under counts 6, 7, and 9 are that:

Count 6:

The incident that the accused asked the complainant to sit on his penis, thus inserting his penis into the vagina of the complainant when she sat on his penis,

Count 7:

The incident that the accused poured baby oil into the vagina of the complainant and then penetrated into the vagina of the complainant with his penis,

Count 9:

The incident that the accused penetrated into the vagina of the complainant with his penis from her back.

Offences of Rape

12. Let me now take your attention to the main elements of the offences as charged under counts 3 and 10 of the information. Both offences are founded on the allegation that the accused had penetrated into the mouth of the complainant with his penis without her consent.

- (i) The Accused,
- (ii) Penetrated into the mouth of the complainant with his penis,
- (iii) The complainant did not consent to the accused to penetrate into her mouth with his penis,
- (iv) The Accused knew or believed or reckless that the complainant was not consenting for him to insert his penis in that manner.

13. The main elements of the offences charged under counts 6, 7, and 9 of the information are that:

- (i) The Accused,
- (ii) Penetrated into the vagina of the complainant with his penis,

- (iii) The complainant did not consent to the accused to penetrate into her vagina with his penis,
- (iv) The Accused knew or believed or reckless that the complainant was not consenting for him to insert his penis in that manner.

Admitted Facts

- 14. I now request you to draw your attention to the agreed facts, which are before you. They are the facts that the prosecution and defence have agreed without dispute. Hence, you are allowed to consider them as proven fact by the prosecution beyond reasonable doubt.

Separate Consideration

- 15. The accused is charged with seven separate counts. You have to consider them separately. If you find the accused guilty of one count, that does not automatically make the accused guilty of the other remaining counts. Likewise, if you find the accused not guilty of one count, that does not make him not guilty of other counts. You have to give separate consideration to each of these counts.

Accused

- 16. It is the onus of the prosecution to prove beyond reasonable doubt that it was the accused who committed these offences to the complainant. According to the admitted facts, the accused had admitted his presence at the home of the complainant during the time material to these charges. Hence, the identity of the accused is not a disputed issue between the prosecution and the defence.

Penetration

- 17. Evidence of slightest penetration of the penis of the accused into the vagina and/or to the mouth of the Complainant is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

Consent

18. Let me now draw your attention to the issue of consent. It is your duty to decide whether the prosecution has proven beyond reasonable doubt that the complainant did not give her consent to the accused to insert his penis into her vagina and to the mouth as charged in the information.
19. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of rape, the complainant consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. A consent obtained through fear, by threat, by exercise of authority, by use of force or by intimidation could not be considered as a consent given freely and voluntarily. A submission without physical resistance by the complainant to an act of another person shall not alone constitute consent.
20. The complainant must have the freedom to make the choice. It means that she must not be being pressured or forced to make that choice. Moreover, the complainant must have a mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. It should not be an optional choice. The consent of a person should not be assumed.
21. If you are satisfied, that the accused had inserted his penis into the vagina/or the mouth of the complainant and she had not given her consent, you are then required to consider the last element of the offence, that is whether the accused honestly believed or knew or reckless that the complainant was freely consenting for these alleged sexual acts. I must advise you that belief in consent is not the same thing as a hope or expectation that the complainant was consenting. You must consider whether the accused knew either that the complainant was not in a condition or a position to make a choice freely and voluntarily, or the complainant had made no choice to agree to sexual act. If you conclude that the accused believed or knew that the complainant was consenting, you must then consider whether such belief of the

accused was reasonable under the circumstances that was prevailed at the time of the alleged incident.

Sexual Assaults

22. The main elements of the offence of Sexual Assault as charged under counts four and five in the information are that:

- i) The accused,
- ii) Unlawfully and Indecently,
- iii) Assault the Complainant.

23. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act as indecent. It is your duty as assessors to consider and decide whether the accused had indecently made the complainant to lick his thighs, genitals and anus without any lawful excuse, in this case without properly obtaining the consent of the Complainant.

Evidence of Corroboration

24. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. It means that if you are satisfied with the evidence given by the complainant and accept it as reliable, credible and truthful; you are not required to look for any other evidence to support the account given by the complainant.

25. One or more of you may have assumptions as to what constitutes rape, what kind of person may be the victim of rape, what kind of person may be the rapist or what a person who is being or has been raped will do or say. Though such assumptions are natural in ordinary life, it is important that you must leave behind such assumptions as there is no stereotype of circumstances for a rape, a rapist or a victim of rape.

26. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety of ways. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgment strictly on the evidence that you have heard from the witnesses and the exhibits during the course of the hearing.
27. It is your duty as judges of facts to assess the evidence in order to determine whether the accused has actually committed these crimes to the complainant. In doing that, you must be mindful that not to bring in to the assessment of the evidence any preconceived views as to how a victim of rape in a trial such as this should react to the experience that the victim had gone through. Every person has his or her own way of coping with such incident. Some may display obvious signs of distress and others may not. Demeanours of the Complainant in the court while giving evidence is not necessarily a clue to the truth of the Complainant's account.

Evidence of the Prosecution

28. Let me now remind you the evidence presented by the prosecution and the defence during the course of the hearing. The prosecution called three witnesses including the complainant to give evidence during the course of the hearing. I will now summarize the evidence of the prosecution.
29. According to the evidence, the complainant had gone to Nadi with her son to attend some matters relating to her property in Nadi sometimes before June 2018. While she was in Nadi, her son had developed a toothache, for which she had contacted the accused, who is a dentist and also the cousin of her later husband. When the complainant and her son went to the dental surgery of the accused, she came to know that the accused was coming to Suva for a wedding. However, the accused had not attended to her son's toothache as he was busy.
30. On the 28th of June 2018, the accused had come to Suva. He has given her a missed call on her mobile phone at around 11 a.m. for which she had called him back. The accused had

informed her that he was coming to Suva to attend a wedding. Once again the accused had called her around 5 p.m. to get the direction to her home. According to the complainant, the accused had frequently visited her place when she was in Nadi and also after she moved to Omkar road in Suva. During all of those previous visits the accused had come alone. However, it was his first visit to her new place at Vesida Kinoya.

31. After reaching to her place, the accused had mistakenly gone to her landlord's flats which is just next to her flat. He had spoken to the landlady and then came down to her flat. According to the complainant, the compound comprises with three flats including her's. One of the flats was occupied by the landlady, and other was occupied by another tenant which she did not know.
32. The complainant was shocked to see the accused alone, as the accused initially told her that he was coming with his family. The complainant then offered him some food and coffee and went back to her room. She arranged her son's room for the accused to get change in order to go to the wedding. Accused remained in the house from 6.00 p. m. to 7.30 p. m. During that time, the accused and the complainant had a normal conversation about their respective families. The accused then left to the wedding.
33. At around 10.00 a.m. the accused gave her call, saying that he was not feeling well, so he could not drive back to Nadi. He wanted to stay at her place and go back to Nadi on the following morning. The accused then came back and the complainant arranged him the room of her son. She then went into her room to sleep. In a while, she heard a sound of knocking. She got up and went to the door, thinking that the accused might need something. The accused then tried to grab her, but she managed to pull herself back. The accused then forced and pulled her clothes and slapped her on her face. The complainant was wearing a pajama and a dress. He held her clothes and slapped and then took her to his room. He held her clothes tightly and tore it. The complainant was scared and asked him to leave her. He then pushed her on to the bed and pulled out her dress.

34. Having pulled out her dress, the accused had snatched her body but she did not specifically mentioned which part of her body was snatched. Then he scratched her hands and stomach. She was yelling and crying telling him to leave her. He then place his hands tightly on her neck and told her that if she scream, he will kill her. He then told her to lick him starting from his ear till down and suck his breast and penis. She was scared and licked his ear, neck and sucked his breast and performed oral sex on him. The accused then asked her to lick his thighs and his genitals, which she licked.
35. The complainant had told the accused that she was tired and cannot do that. He then pushed her on to the bed and slapped on both side of her face. The accused was not wearing anything at that time. He then spat on her and asked her to lick his back including the anus, which she did. She said that he hit her on both of her cheeks and tangled her neck, that was the reason she licked his back, genitals and anus.
36. According to the complainant, she then got an asthma attack and she could not properly breathe. The accused then got a ventolin machine and gave her to breath. She did not know, from where the accused got that ventolin machine. After that, the accused had asked her to lie down on the bed. He then inserted his penis into her vagina and had sexual intercourse with her. While having the sexual intercourse with her, the accused rubbed his beard on her chest and stomach. He did it for 15 minutes and the complainant had asked him to stop it. The accused then pinched her stomach and chest.
37. The accused then got a pillow and put it under her buttock. The accused then said that she is dry and poured baby oil into her vagina. She did not know from where he got the baby oil. The complainant was not doing anything but crying. The accused then inserted his penis into her vagina and had sexual intercourse. Having done it for sometimes, the accused then laid down on the bed. He asked the complainant to sit on him and put her vagina on his penis. She then sat on his penis, making it to insert into her vagina. She did it for sometimes and then he pushed her away and told her to bend down and lift up her back. The accused then inserted into her vagina from her back. He then had sexual intercourse with her in that position with force. It was a forceful penetration and she felt pain. The accused asked her to

say “ha ha ha”. The complainant said that she did it as the accused told her because that would get him the feelings. Moreover, the accused had asked her to say “love you” to him, which also she did. The complainant said that she love him because he was slapping on her back, while penetrating from her behind. With the forcefulness of his penetration, the bed broke down. None of them did anything to the broken bed. He then pulled her hair and dragged her to the settee at the living room.

38. The complainant said in her evidence that the penis of the accused was erected a bit during these four incidents of penetration into her vagina with his penis. She said that his penis was not that hard, but was erected.
39. Moreover, you may recall that the complainant said that when she performed the oral sex on the accused before he made any penetration into her vagina, the penis of the accused started to get erected.
40. The accused then asked her to make a cup of coffee, which she made. According to the complainant, she was naked at that time. Once the accused drank the coffee, he asked her again to perform oral sex on him, which she did as he asked.
41. The complainant said that she did not agree to do any of these sexual activities, but she had to perform them as she was scared. The accused then went to the bathroom. The complainant then closed the kitchen door by locking the tower bolt of the door, which closed the passage that goes to the bathroom. The accused was locked inside the bathroom.
42. The complainant then put her clothes and get her mobile phone and ran out of the house for her life. The complainant said that she was scared as he might do it again when he comes back from the shower. She went near to her car, which was six to seven meters away from the house. She has not shouted loudly, but called “help, help, help” but no one came to her help. She then called 917, but no one answered to her call. Then she called 919. One lady officer answered to her call. She informed that lady that she was raped. The lady had asked her to provide the direction to her location. Out of her nervousness, she has failed to tell the

correct name of the street. When the lady told her that the location given by the complainant was not correct, the complainant had disconnected the call. The complainant said that she was scared that the accused might break the door and come outside.

43. The complainant then called the Valelevu Police Station. The number of the Valelevu Police Station was saved in her mobile phone. Her daughter had saved it in the phone. When she went through the numbers, she found the number of the Valelevu Police Station. The complainant had told the police that she was raped, but again forgot the name of the road. However, the police had informed her that they will come soon. After that called she had called the Fiji Woman Crisis Centre. However, no one had responded to her call. She then called Virisila, a friend from her church group. Virisila had asked her to stay on the call until she come to her. Virisila had then gone to the Raiwaqa Police Station and came to the complainant's place with the police officers from Raiwaqa Police Station.
44. When the Police came, the complainant had told them that the person who raped her was inside the house. The police went inside and came back saying that they cannot locate him. She then told them to be careful as he was dangerous and he might kill them. Then she told them that the accused was locked up inside the bathroom. Few police officers then went inside the house and brought the accused. She was then taken to the Valelevu Police Station and then to the CWM hospital for the medical examination.
45. The complainant said that the accused used to visit her frequently and communicated with her very often. He used to talk about her children and also he wanted to buy the land that she owns in Sigatoka. The accused used to talk *via* his own mobile phone or from the phone of Father John. Specially, the accused used the phone of father John most of the time to call her.
46. Madam and Gentleman Assessors, I now take your attention to the summary of the evidence given by the complainant during the cross examination by the learned counsel for the defence.

47. According to the complainant, the accused was very closed to her late husband and used to visit her home frequently, when they were in Nadi. Her husband inherited the house and the property at No 63, Kennedy Avenue Nadi. The property is presently belonged to the complainant and her late husband. The complainant had been collecting the rent of the property at Kennedy Avenue until the judgment of Lautoka High Court dated 12th of February 2018. According to the Judgment, the property was divided between the brother of her late husband and the complainant. The complainant was further ordered by the High Court in that judgment to pay \$147, 000 to her brother-in-law whose name is Abu Baker as the arrears of rent together with 4% of interest. The accused had given evidence in favour of her brother-in-law in that civil matter. After the judgment, the rent income of the property is now being equally shared between the complainant and her brother-in-law.
48. The complainant said that the judgment did not affect her. She has not made the payment of \$147,000 to the brother-in-law so far. The complainant further said that she had no hard feeling towards the accused though he gave evidence in that case against her. She denies the suggestion that she devised this plan to make an allegation against the accused in order to get revenge from him.
49. The complainant said that she never discussed the property issue with Father John. She had never requested Father John to approach the accused in order to discuss a settlement to the property issue. However, you may recall that the complainant then said that Father John had asked her to talk to the accused about the property matter.
50. You have seen the defence tendered a copy of the title certificate of the property of Kennedy Avenue and the copy of the judgment of the High Court of Lautoka as defence exhibits one and two.
51. The complainant had met the accused at the McDonalds restaurant in Suva on the 12th of May 2018. The complainant denies that she discussed about the property and requested the accused to make a deal with her brother-in-law regarding the property. The complainant said the conversation was for the purchase of certain farm equipment by the accused from her.

The accused wanted to purchase certain farm equipment from the complainant. The accused came to her daughter's house at Fletcher Road on the 12th of May 2018 to pick her and then went to McDonalds.

52. According to the complainant, the accused was a good person and he never misbehaved with her prior to this incident. The accused was not aware that she had moved to a new place until he gave her call at around 11.00 a. m. on the morning of 28th of June 2018.
53. The complainant said that the accused intended to go back to Nadi after attending to the wedding. The accused did not leave any of his shirt in the room when he left to the wedding. According to the complainant, the accused did not come to her place in order to talk to her children regarding the settlement for the property at Kennedy Avenue. He did not call her around 10.00 p. m. to check whether the gate was still open. He called and told her that he was not feeling well and wanted to stay at her place. He said that he would go back to Nadi on the following morning. The call made by the accused at 10.02 p. m. was lasted only for 13 seconds.
54. You have seen that the complainant then changed her version about the contents of that conversation and said that he did not ask whether the gate was opened, but only said that he was not feeling good and is coming. The accused reached to her place within 5 to 7 minutes after the said call. She denies the proposition that the accused came about 40 to 45 minutes after the call. When the accused came, she was sleeping in the room. She then showed him the room of her son and went back to her room.
55. The complainant denied that she went into the room when the accused was changing his shirt and then tried to seduce him. She further denied that she made an offer to the accused, saying that if the accused does a favour for her property matter, she would do him a favour in return.
56. The accused never told her that he was suffering from an erectile dysfunction. He had asked her to masturbate him. He then forced her to perform oral sex on him. When the learned counsel for the defence referred to the complainant the statement that she made to the police

on the 1st of July 2018, stating that “he forced his penis in my mouth and I sucked it like he said. He let me suck it for long and his penis was still weak”, the complainant said that the penis of the accused was not that weak and it was bit erected. The penis was slowly getting erected.

57. The complainant said that she did not tell the accused that one scream of her could bring the neighbours to her house and the accused will be ashamed. She further said that she did not tell the accused that if she scream, his political career would go down to pieces. The complainant further denies that she made a proposition to the accused asking him to tell Abu Baker that she would pay for his share in the property but the accused has to wave the \$147,000.
58. You have heard that the learned counsel for the defence then cross examined the complainant about the telephone calls that she made after she ran out of the house. The complainant said that she could understand the number 191 in the record of outgoing call history of June of her mobile phone. 191 is for the change of ringing tone of the mobile phone.
59. According to the said report, the first number that she had dialled after this alleged incident was 191. The complainant said that she was nervous and could have mistakenly dialled the 191. She said that the call that she made to 917 is not recorded in the report of outgoing call history of her mobile phone for the month of June. Moreover, she said the call that she made to 919 is also not recorded in the record of the history of her outgoing calls for the month of June. There are two other calls to 191 after she made the call to Valelevu Police Station. Moreover, the complainant said that the call that she made to the Fiji Women Crisis Centre is also not recorded in the record of outgoing call history of her mobile phone.
60. You may recall that the learned counsel for the defence then cross examined the complainant about the events that took place at her home, when the police came on the night of the 28th of June 2018. According to the complainant, two police vans came to her place. One from Raiwaqa Police Station and other one from Valelevu Police Station. The complainant said that she told the police that the intruder was in the house. She had told the police that the

intruder was dangerous and he would kill the police officers. She said that because she was scared that he might attack the police as well.

61. You have heard that the learned counsel for the defence then cross examined the complainant about the injuries that have been recorded in the medical examination report of her. She was taken to the medical examination on the early hours of the morning of 29th of June 2018, that was few hours after the alleged incident. The medical examination report is tendered by the parties as an admitted fact. Therefore, you are allowed to take the contents of the medical examination report as proven facts beyond reasonable doubt. The complainant has reported to the police not only about the sexual assaults, but also about certain physical assaults. The complainant had not have any shower before she attended to the medical examination. Neither she wash or brush her mouth before she attended to the medical examination. The complainant then went through the specific medical findings and the appendix of the medical examination report and confirmed the injuries as recorded in the medical examination report.
62. The complainant said that there is no record in the medical examination report about any injuries, bruises or marks on her neck, lips, skull, knee, on her buttock, wrist of her hands, chest, vaginal area or waist area of her body.
63. You have heard that the learned counsel for the defence then suggested to the complainant that the scratches marks on her arms and thighs could have been done by her. For that the complainant said that no one would do such as it would be painful. She admitted that she can reach to her thighs with her hands, but she denies that she can reach to her arms with her other hand.
64. The complainant said that she was never charged and prosecuted for a fraud related offence in the Nadi Magistrate's Court. Moreover, she said that she never acted as an intermediary in order to find male clients to sex workers in Nadi. Furthermore, the complainant said that she never knew someone by the name of Farisha Bi and the owner of the Night club called, Raniga.

65. The complainant said that she was not given a copy of the medical report and made her statement to the police on the 1st of July 2018.
66. During the re- examination, the complainant said that accused strangled her neck very hard. Moreover, the accused sucked her lips hard for long and it was painful. The complainant further said that it was painful when the accused held her hair. He held her wrist and waist tightly.
67. The second witness of the prosecution is Virisila Duguci. She had received a call from the complainant on the night of the 28th of June 2018, stating that she was raped. The complainant did not mention who was the perpetrator. The complainant was crying when she called and told Virisila that she was raped. Virisila then called her mother and arranged a taxi to go to the place of the complainant. On her way, she had gone to Raiwaqa Police Station and reported it to the police. The complainant was on the call throughout her journey until she reached to the complainant's house. At the Raiwaqa Police Station, the complainant had spoken to the police officers *via* the mobile phone of Virisila. The police then asked Virisila to take a lead in her taxi, and the police followed her. She led the police to the complainant's house. When she reached the complainant's house, she saw the complainant was standing outside the house. The complainant was shivering and crying and said that she was scared. The police went into the house and brought the man. Then the complainant, the accused and the police went to the police station. Virisila, her mother and other church member went back home in the same taxi.
68. Virisila came to know about the complainant when she attended to prayer sessions in Nadi with her mother. She knows the complainant for over a period of 15 years now.
69. During the cross examination, Virisila said that she was 15 years old when she came to know about the complainant. She has been meeting the complainant at prayer sessions in Suva for five years. She knows that the complainant was living at Vesida Place. She received the call from the complainant at 12.06 a.m. The complainant asked her to come with the police. The complainant told Virisila "Come to Vesida place with the police."

70. According to the outgoing call record of the complainant for the month of June 2018, she has not called Virisila at any time during that month, apart from the three calls she made on the 29th of June 2018. When Virisila went to the house of the complainant, she did not tell Virisila that the man who raped her was inside the bathroom. She only told her that she was scared.
71. The last witness of the prosecution is Sgt. Edward Ofati, who was the Investigation Officer of this matter. You may recall that he explained the role of the Investigation Officer, stating that the duty of the Investigation Officer is to investigate the case and find out the truth of what has really happened. According to Sgt. Ofati, he came to know about the accused on the following day that was on the 29th of June 2018, by then another officer of the police had attended to the initial investigation of the case. The accused had been referred to the medical examination on the afternoon of 29th of June 2018. The accused was not attended by a doctor until the afternoon of 29th of June 2019. The medical examination report of the accused was received by the police. However, Stg. Ofati said that he was not aware of the explanation given by the accused in his medical examination report. He said that his job was to investigate what the complainant had told.
72. Moreover, Sgt. Ofati said that he did not find any inconsistencies between the statement made by the complainant and the medical examination report of the complainant. He said that he made up his mind to charge the accused by simply looking at the injuries recorded on the medical report and the statement of the complainant. He never investigated whether the complainant had made up this allegation of sexual assault.
73. Sgt. Ofati further said that the evidence of broken bed, baby oil, settee, pillows, and bed sheet were not properly disclosed to the defence. He said the police lost the photographs of the scene of the crime as the computer in which the photos were stored got corrupted. Finally, Sgt. Ofati said that there has been a fundamental breach of constitutional rights of the accused during the investigation.

Evidence of the Defence

74. At the conclusion of the prosecution case, the accused was explained about his rights in defence. The accused opted to give evidence on oath.
75. Let me now take your attention to the evidence given by the accused. You heard that he explained about his educational, professional, family and social background in his evidence. He is related to the complainant as he is a cousin of her late husband. He had been closely associated with the complainant and her late husband. Apparently, it was the accused who organized the funeral of the late husband of the complainant.
76. After the judgment of the High Court of Lautoka in relation to the property at Kennedy Avenue, the complainant had approached the accused through a person called Father John. The accused never knew about this Father John until he had approached the accused on behalf of the complainant to discuss a settlement to the property in May 2018. As a consequence of this approach the accused had met the complainant on the 12th of May 2018 at the McDonald Restaurant in Suva. During that meeting, the complainant had discussed about a solution to the issues relating to the property. The accused said that he never discussed anything about purchasing of framing equipment from the complainant as he never owned or had a farm.
77. Subsequent to this meeting on the 12th of May 2018, the accused and the complainant had continued their conversation over the phone regarding the property. The complainant wanted to know when would he visit Suva to meet her. Once she had called him and asked “When will you come to Suva, boy?”. On the 28th June 2018, the accused came to Suva to attend few matters. He had to visit the party headquarters, to meet someone to collect something and then attend to a wedding in the evening. He had received two missed calls from the complainant. He had then called her around 11.00 a. m. and told her that he was coming to Suva. He had told her that he would call her once he is in Suva.

78. After attending to his business in Suva, the accused had given a call to the complainant around 5.00 p.m. The complainant had then told him that she is living at the new place. She had asked him to give her call when he reaches to Vinod Patel at Centre Point. Once he reached there, he called her again, then she gave the directions to come to her home. He managed to find her place and entered into the compound and parked his car near the car of the complainant. He had mistakenly gone to the landlady's flat. He then went to her place. The main purpose of his visit was to meet her children and discuss about the proposal as they are also beneficiaries of the property. When he entered into the house, he asked for the children for which she said that the son was not at home, but he would be back. The accused then asked her a towel to get cleaned as he wanted to perform his evening prayers. Once he done his prayers, he said that he wanted to change his clothes to go to the wedding. He used the room of her son to get changed. She was friendly and offered him a cup of tea and boiled kumala. When he was about to leave, she insisted him to wait for a while for the son or asked him to come back soon without having his dinner at the wedding. The accused had promised her that he would come back after the wedding if she is still awake. He left the shirt he was wearing before and his medicine bag.
79. Around 10.00 p.m. he had given a call and checked if the gate was still open for him to come. He then went to her home. Once he went there, he found the son was still not at home. He was upset as he wasted his time. He really wanted to talk to the children as he would get busy and will not find a time again. He then went to get cleaned to perform his night prayers and get change into the previous shirt. While he was putting his shirt, the complainant came from behind and held him. He asked her "what are you doing" and went to the settee. She then started to touch his penis over his trousers. The accused got up and went to the kitchen to have his medicine. He said that he would go back to Nadi. The complainant then suggested to have another cup of coffee as it would be a long drive back to Nadi in the night. While the accused was having the coffee, the complainant came and sat next to him and told that if she scream and people found him with her in the night alone at home, his reputation would be gone. Having threatened as such, the complainant started to touch his penis and unzipped his trousers. She then started to masturbate his penis. The accused told her that he cannot get erection. The complainant then started to perform oral sex, saying that she is experience to

get any man erected. Even after performing oral sex on him, the accused could not get the erection. So he got up and went to the bathroom to get himself cleaned. When tried to come out after having the wash, he found that he cannot open the door. He heard a voice of a male and the accused. Then some movements of steps outside of the house He was stuck there for about 20 to 25 minutes. All of a sudden, the door was opened and a group of men entered, claiming that they were police officers. They assaulted the accused and took him to the police station.

80. The accused explained about his health issues. He has been suffering from diabetic over a decade and high blood pressure. He has been suffering from erectile dysfunction due to his medical condition.
81. During the cross examination by the learned counsel for the prosecution, the accused denies all these allegations against him, saying that he never did such. According to the evidence of the accused, his wife and family never interacted with the complainant. His medical and health conditions have not affected his professional work as he still operates his dental surgery. He further said that he did not inform the doctor who conducted the medical examination on 29th of June 2018 that he was suffering from erectile dysfunction. He said that the purpose of the medical examination was for his injuries and also he had not been charged by then. In respect of the medical examination that he had done at the Zen Medical Centre, the accused had given blood twice and the report was made on the 12th of July 2019.
82. The next witness of the defence is Doctor Sailasa Misimisi. You may recall that he explained his educational and professional experience. He then explained that he conducted a medical examination of the accused. First he has gathered the history of the accused's conditions and then conducted a full account and renal function test, a HbA1C test for glyrated hemoglobin test, a test for thyroid function, prolactin level and another test of DHEAS.
83. The Doctor Misimisi then explained the result of those tests. The thyroid stimulating hormone is elevated towards hypothyroidism. Hypothyroidism is responsible for many things in the body including the sexual function, specially in erectile dysfunction. Erectile

dysfunction is the inability to achieve and maintain erection sufficient to sexual performance. Thyroid hormone controls libido which is the desire to have sex.

84. He then explained that the testosterone level of the accused is lower than the normal reading of his age. Testosterone and hypothyroidism play a significant role in achieving and maintaining erection of the penis. You may recall that Doctor Misimisi then explained about the other two tests that he conducted and said they are normal. He then explained that the Fiji does not have more advance testing, hence, his examination was limited to historical facts and the laboratory test result in order to come to his opinion.
85. According to the history provided by the accused, he would have been suffering from this condition for the last ten years, accumulating it in the last two years.
86. During the cross examination, Doctor Misimisi said that he has no data or any findings to confirm when was the accused diagnosed with diabetes apart from the history given by the accused. Moreover, he has no data or any findings to confirm that the accused has been suffering from erectile dysfunction for the past four years apart from the history given by the accused. Since the doctor has not done any test on the accused in 2018, he could not know whether the accused had the erectile dysfunction in 2018. Doctor Misimisi further said that children also could suffer from erectile dysfunction.
87. Doctor Misimisi then said that his findings on the report are based on his observation, his talking with the patient and the clinical laboratory test. His opinion that the accused has been suffering from erectile dysfunction for last 4 years are based on the history given to him by the patient and also on the tests carried out by him. He further said that he would stand by the statement that he said that the erectile function of the accused for the last 4 years is zero.
88. You have heard the evidence of Farisha Bi. According to her evidence Mehmum Nisha had acted as an intermediary for her to find client to provide sex services in Nadi. This happened some years ago. The last witness of the defence is Roshila Devi Maharaj. She owned a night

club called Raniga in Nadi during the period between 2002 to 2005. A person called Mehmun Nisha used to come to her club regularly during that period.

89. I have summarized the evidence presented during the cause of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence. What I did only to draw your attention to the main items of evidence and help you in reminding yourselves of the evidence.

Analysis and Directions

90. The prosecution alleges that the accused came to the complainant's house pretending that he was not well and wanted to stay in the night. He then forcefully dragged her into his room and physically assaulted by slapping, strangulating her neck, pinching, snatching and scratching her body. He has then threatened her and forced her to lick his thighs, genitals and anus. The accused had then forced her to perform oral sex on him. He had then inserted his penis into her vagina and had sexual intercourse with her without her consent. The prosecution alleges that the accused had penetrated into the vagina of the complainant three times during the course of the events that have allegedly unfolded on the night of the 28th of June 2018. Having done the said sexual intercourses with the complainant, he had then forced her to perform oral sex on him again.
91. In contrary, the defence claims that the accused never engaged in such sexual and physical assaults on the complainant. According to the accused he had come to her house in order to discuss a settlement for the property matter that the complainant has involved with her brother-in-law. The accused was the intermediary between the complainant and her brother-in-law. He wanted to discuss the property issue with the complainant and her children. However, the complainant had lured him into her house under the pretext that her children would come soon. When the accused came to her home, the complainant had made a sexual advancement by touching and then masturbating his penis. When the complainant said that he has an erectile dysfunction, the complainant had started to perform oral sex on him. However, the accused had not achieved an erection.

92. The accused has not denied his presence at the house of the complainant during the time material to this incident. This alleged incident has allegedly taken place between the complainant and the accused in private. Therefore, it is your duty to determine whether this alleged incident actually took place as claimed by the prosecution. In order to do that you have to evaluate the evidence presented by the prosecution and the defence.
93. The prosecution and the defence presented their evidence in the forms of direct evidence, documentary evidence and expert evidence.

Direct Evidence

94. In some instances, you may find that some facts can be proved by direct evidence. For example, if there is reliable evidence from a witness who actually saw or felt the accused was committing the offence; or if there is a video recording of such an incident that plainly demonstrates his guilt; or if there is reliable evidence of the accused himself having admitted it, these would all be good examples of direct evidence against the accused.

Documentary Evidence

95. The evidence presented in the form of documents is considered as documentary evidence. In this case, the prosecution and the defence tendered certain documents as admitted facts. Moreover, the defence tendered certain numbers of documents as the exhibits of the defence.

Expert Evidence

96. It is the general rule that witnesses are normally not allowed to give opinion and only allow to give evidence on what they have seen, heard, or felt by their physical sense. However, the exception is that the evidence of expert witnesses. Expert witnesses are those who are learned and experts in a particular subject or field with relevant experience. Such witnesses are allowed to give evidence of their opinion.

97. In this case you have heard the evidence of Dr. Sailasa Misimisi. He is a medical doctor and gave his professional opinion and finding about the test that he has conducted about the medical condition of the accused.
98. Expert evidence is permitted in a criminal trial to provide you with scientific and professional information and opinion, which is within the witness' expertise, but which is likely to be outside your experience and knowledge. It is by no means unusual for evidence of this nature to be called; and it is important that you should see it in its proper perspective, which is that it is before you as part of the evidence as a whole to assist you with regard to the certain physical and medical condition of the accused.
99. With regard to this particular aspects of the evidence you are not experts; and it would be quite wrong for you as assessors to attempt to and/or to come to any conclusions on those issues on the basis of your own observations or experiences. However you are entitled to come to a conclusion based on the whole of the evidence which you have heard, and that of course includes the expert evidence. You should bear in mind that, having carefully considered, if you do not accept the evidence of the expert, you do not have to act upon it.

Evaluation of the Evidence

100. I now take your attention to the direction of evaluation of the evidence. The evaluation of evidence consists with two main steps, the determination of the reliability and the credibility of the evidences and the witnesses.

Reliability of Evidence

101. You must be satisfied that you can rely on the evidence as reliable evidence. In order to do that, you have to be satisfied that evidence is free from mistakes, errors and inaccuracies. If you find the evidence is free from such mistakes, errors and inaccuracies, you can take the evidence into consideration as reliable evidence.

Credibility of Evidence

102. The assessment of credibility of evidence does not concern with unintended inaccuracy, mistakes or errors. It is focused on the lies or inaccurate facts that are intentional and motivated attempts to deceive. The credibility depends on the individual who gives evidence, his or her motivations, his or her relationship to and the reaction to the particular situation.
103. Evaluation of the reliability and credibility of evidence will assist you to determine what evidence you may accept and what part of the evidence you may refuse. In doing that, you may accept or reject such parts of the evidence as you think fit. It is for you to decide whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.
104. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking in the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with his or her own evidence but also with other evidence presented in the case.
105. It is your duty to consider the demeanour of the witnesses, how they react to being cross examined and re-examined and were they evasive, in order to decide the credibility of the witness and the evidence.
106. Moreover, you must bear in your mind that 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 accurate in another thing.

Evidence of the Defence

107. I now kindly draw your attention to the evidence adduced by the defence. The accused elected to give evidence on oath and also called three witnesses for the defence. The accused

in his evidence denies this allegation and claims that he has been suffering from erectile dysfunction, hence, he was not able to achieve and maintain erection sufficient to engage in a sexual intercourse. Furthermore, he explained his version of the events that took place on night of 28th of June 2018. Doctor Misimisi in his evidence explained the test that he has carried out in respect of the health and physical condition of the accused and his opinion and findings of the said test.

108. The remaining two witnesses of the defence gave evidence in relation to the character of the complainant. I will explain you the law relating to the character evidence in a while.
109. It is for you to decide whether you believe the version of the accused. Defence is not required to establish the version of defence beyond reasonable doubt. In this case, the accused is not required to prove beyond reasonable doubt that he has been suffering from erectile dysfunction. Moreover, the accused is not required to prove his version of the events, beyond reasonable doubt. If the accused establishes that his version of the defence is or may reasonably be true, although they are not convinced that it is true, then you have to find the accused not guilty of these offences as charged. Accordingly, if you consider that the account given by the defence is or may be true, then you must find the accused not guilty of these offences as charged.
110. If you neither believe nor disbelieve the version of the accused, yet, it creates a reasonable doubt in your mind about the prosecution case. You must then find the accused not guilty of any of these offences as charged.
111. Even if you reject the version of the defence that does not mean that the prosecution has established that the accused guilty of these offences. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the accused has committed these offences as charged in the information.

Evaluation of Evidence of Prosecution

112. As I explained you before, you have to take the evidence of the prosecution into consideration in order to determine whether the evidence given by the complainant is reliable. In doing that you must carefully consider whether the evidence of the complainant is free from mistakes, inaccuracies, and errors. If you find such or have reasonable doubt of the existence of such mistakes, inaccuracies and errors, then you must find which part of the evidence is infested with such mistakes, inaccuracies and errors. Then you can proceed to determine whether such unreliability of evidence have affected the whole or part of the evidence given by the complainant.
113. Likewise, you have to take the evidence of the complainant into consideration in order to determine the credibility of her evidence and also the credibility of the complainant. In doing that you have to determine whether the complainant lied, intentionally provided inaccurate facts or intentionally provided facts in order to deceive. When you determine the credibility of the complainant and her evidence, you could take into consideration whole of the evidence presented during the course of the hearing. You could further take into consideration the motivation, the relationship and the reactions of the complainant when you determine the credibility of her evidence.
114. If you find such or have reasonable doubt of the existence of such lies, intentionally provided inaccurate facts or intended attempts of deceive, then you must find which part of the evidence is infested with such lack of credibility. Then you can proceed to determine whether such evidence have affected the whole or part of the evidence given by the complainant.

Evidence of Character

115. You have heard that the learned counsel for the defence questioned the complainant asking whether she was prosecuted for an offence of fraud, which she denies. Moreover, the learned counsel for the defence questioned the complainant asking whether she had ever been engaged in arranging sex workers to male customers, which also denied by the complainant.

116. The accused in his evidence said that he was aware that the complainant was charged and prosecuted in the Nadi Magistrate's Court for an offence of fraud. Moreover, the third witness of the defence said that Mehnum Nisha used to arrange male customers for her to provide sex services for money. The fourth witness of the defence said that Mehmun Nisha used to be a regular customer at her Night club that she owned in 2002 to 2006 in Nadi.
117. The defence presented these evidence in order to challenge the credibility of the complainant. If you accept or may be accepted the version of the defence in respect of the character of the complainant, you must then proceed to assess whether and to what extent her previous character may assist you in assessing the evidence of the complainant.

Evidence of Recent Complaint

118. You have heard the evidence that the complainant had called Virisila and told her that she was raped. Virisila then proceeded to the house of the complainant with the police. According to Virisila, the complainant had only told her that she was raped, and did not tell her who had raped her or the details of the incident.
119. This form of evidence is known as evidence of recent complaint. It is not an evidence as to what actually happened between the complainant and the Accused. Virisila was not present and witnessed what happened between the complainant and the Accused.
120. You are entitled to consider the evidence of recent complaint in order to decide whether or not the complainant has told the truth. You may have heard that Virisila said that the complainant had not called her on her mobile phone during the month of June apart from the three calls that the complainant made to her on the 28th and 29th of June 2018. It is for you to decide whether the evidence of recent complaint helps you to reach a decision, but it is important that you must understand that the evidence of recent complaint is not independent evidence of what happened between the accused and the complainant. It therefore cannot of itself prove that the complaint is true.

121. Madam and Gentleman Assessors, you have heard that the complainant said in her evidence that the accused penetrated into her vagina with his penis before he poured baby oil into her vagina. As informed by the learned counsel of the prosecution it is not an incident relating to any of the charges in the information. Hence, you must not take that evidence into consideration against the accused. Moreover, you have heard that the complainant said that the accused inserted his finger into her vagina after he poured baby oil into her vagina. Once again I must advise you that it is not an incident relating to any of the charges in the information. Hence, you must take that evidence into consideration against the accused.

Final Directions

122. Ladies and Gentleman, I now take your attention to the final directions of the summing up.

Count Three

123. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count three, you can find the accused guilty of the said offence of Rape.

124. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count three, you must find the accused not guilty of the said count of Rape.

Count Four

125. If you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault as charged under count four, you can find the accused guilty of the said offence of Sexual Assault.

126. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault as charged under count four, you must find the accused not guilty of the said count of Sexual Assault.

Count Five

127. If you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault as charged under count five, you can find the accused guilty of the said offence of Sexual Assault.
128. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault as charged under count five, you must find the accused not guilty of the said count of Sexual Assault.

Count Six

129. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count six, you can find the accused guilty of the said offence of Rape.
130. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count six, you must find the accused not guilty of the said count of Rape.

Count Seven

131. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count seven, you can find the accused guilty of the said offence of Rape.
132. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count seven, you must find the accused not guilty of the said count of Rape.

Count Nine

133. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count nine, you can find the accused guilty of the said offence of Rape.
134. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count nine, you must find the accused not guilty of the said count of Rape.

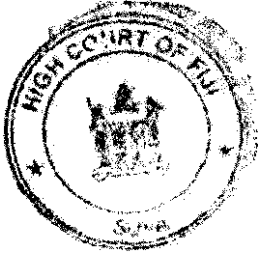
Count Ten

135. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count ten, you can find the accused guilty of the said offence of Rape.
136. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count ten, you must find the accused not guilty of the said count of Rape.

Conclusion

137. Madam and Gentleman Assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.

138. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



A handwritten signature in black ink, appearing to be "R.D.R.T. Rajasinghe".

R.D.R.T. Rajasinghe
Judge

At Suva
29th August 2019

Solicitors
Office of the Director of Public Prosecutions for the State.
R. Patel Lawyers for the Accused.