

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

High Court Criminal Case No. HAC 178 of 2016

BETWEEN : STATE

AND : 1. AVINESH PRASAD  
2. NISCHAL CHAND

Counsel : Mr Niudamu for the State  
Ms S. Khan for the first Accused  
Mr M. Anthony for the second Accused

Dates of Hearing : 15 and 16 July 2019

Closing Speeches : 17 July 2019

Date of Summing up: 19 July 2019

SUMMING UP

Ladies and gentleman assessors,

1. I must now sum up the case to you. You must then retire to consider your opinions. I will direct you on the law that applies. You must accept those

directions I give you on matters of law. You are to decide the facts of the case, based on the evidence that has been led before this court. You will then apply those directions to the facts and give me your opinions as to whether the Accused persons are guilty or not guilty in respect of each count.

2. You are bound by the directions I give you as to the law. But you are not obliged to accept any opinion I may express or appear to have expressed while going through evidence. If you do not agree with that opinion you will ignore it and form your own opinion with that evidence.
3. You must base your opinion only and only on the evidence given by the witnesses. But a few things that you heard in this court are not evidence. Opening submission, closing submissions, statements, arguments and comments made by the counsel and this summing up are not evidence. I must say that the purpose of the closing speech is to outline the evidence that each party rely on to fall in line with their respective arguments. It is not an exercise to introduce new evidence or to give evidence from bar table. If you heard any new information which you did not hear in the evidence given by the witnesses in this case, you must disregard such information. For example, in this case no evidence was presented that money was given or accepted to have sexual intercourse. So, if you heard a counsel stating such thing you must disregard that as it is not evidence given by a witness.
4. You may act only upon the evidence given by the witnesses in this case and nothing else. But you may consider those submissions and arguments only as a guidance to understand the case put forward by each party when you evaluate evidence and the extent to which you do so is entirely a matter for you.
5. If you have acquired any knowledge about the facts of this case outside this court room, you must exclude that information from your consideration. Make sure that external influences play no part in forming your opinion. You will also not let any sympathy or prejudice sway your opinions. Emotions have no

role to play in this process and do not let anger, sympathy, prejudice or any other emotion shroud the evidence presented in this court room. You only have to consider the evidence adduced in respect of each element of the offences. You must not form your opinion based on the emotions, sympathies, prejudices, speculations and morality. As I said before you only have to consider the evidence given by the witnesses in this case and nothing else to form your opinions.

6. I will give you only a summary of evidence. I will not go through every word uttered by the witnesses in this case, and if I leave out something that seems to be important, nothing stops you from taking that into account. Because you decide the facts.
7. After this summing up, you may give your individual opinions as the representatives of the community. You may reject or accept any evidence in forming your opinion. Your opinions need not be unanimous. And you need not give reasons for your opinions.
8. Your opinions will assist me in giving my judgement. I will give the greatest weight to your opinions in my judgement. However, I am not bound to conform to your opinions.

Ladies and gentleman assessors,

9. I will now mention some considerations that may assist you in evaluating evidence. As I said before you may reject the whole evidence of a witness, accept the entirety or even accept only a part of a witness's evidence and may reject the rest. You have to decide whether a witness has spoken the truth or correctly recalled the facts and narrated them.
10. You have seen the demeanour of the witnesses and how they gave evidence in court. You have seen whether they were forthright or evasive in giving

evidence. But you may also bear in mind that some witnesses have good memory, some may not remember every detail and it is also likely that some may perceive the same incident differently and narrate differently. You have to use your common sense in assessing the reliability and credibility of witnesses. Remember, that many witnesses are not comfortable in giving evidence in a court room, they may act in anxiety and get distracted in this environment.

11. Generally, complainants of sexual offences react differently when they got to narrate the traumatic experience they have gone through. Some may display obvious signs of distress, anxiety and restlessness, but some may not. Every witness has their own way of expressions when they give evidence about an experience, specially a traumatic one. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in court is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
12. Another consideration may be; has the witness said something different at an earlier time or whether he or she is consistent in his or her evidence? In assessing credibility of the testimony of a witness on consistency means to consider whether it differs from what has been said by the same witness on another occasion. Obviously, the reliability of a witness who says one thing one moment and something different the next, about the same matter is called into question.
13. In weighing the effect of such an inconsistency or discrepancy, consider whether there is a satisfactory explanation for it. For example, might it result from an innocent error such as faulty recollection; due to lapse of time or else could there be an intentional falsehood. Be aware of such discrepancies or inconsistencies and, where you find them, carefully evaluate the testimony in the light of other evidence. A witness may be honest enough but could have a poor memory or otherwise be mistaken.

14. Does the evidence of a particular witness seem reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony or to an exhibit.
15. I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
16. When you have decided the truthfulness and reliability of evidence, then you can use that credible evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the Accused is guilty or not. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as assessors, in determining a question of fact, should utilise your common sense and wide experience which you have acquired living in this society.
17. It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence charged.
18. In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of Primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.

19. But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
20. In order to illustrate this direction, I will give you an example. Imagine that when you walked into this Court room this morning, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that you will understand the relationship between primary facts and inferences that could be drawn from them.
21. According to the law the prosecution must prove its case beyond reasonable doubt. For the prosecution to discharge its burden of proving the guilt of the each Accused, it is required to prove beyond reasonable doubt that he is guilty. The burden of proof remains on the prosecution throughout the trial. For this purpose, the prosecution must prove every element of the offences beyond reasonable doubt.
22. The Accused persons need not prove their innocence. The fact that the Accused persons did not give evidence does not imply any burden upon them to prove their innocence. It is not their task to prove their innocence. The burden is on the prosecution to prove the guilt of each Accused. That means you must be satisfied that the state has proved every element of the offence beyond reasonable doubt. That doubt should be a reasonable one and if you are left

with a reasonable doubt you must find that particular Accused not guilty for the respective count. If you are not left with any such doubt and if you are sure that the prosecution proved every element of a particular offence, you must find that particular Accused guilty for the respective count.

Ladies and gentleman assessors,

23. We will now look at the offences that the Accused persons are indicted for. There are two counts of assault with intent to commit rape and another count of rape against the first Accused and one count of rape against the second Accused in the Information filed by the Director of Public Prosecutions as follows;

**First Count**

*Statement of Offence*

ASSAULT WITH INTENT TO COMMIT RAPE: Contrary to Section 209 of the Crimes Act 2009.

*Particulars of Offence*

Avinesh Prasad on the 7<sup>th</sup> day of September 2016, at Lautoka, in the Western Division assaulted Mary Elizabeth Fong with intent to commit rape.

**Second Count**

*Statement of Offence*

ASSAULT WITH INTENT TO COMMIT RAPE: Contrary to Section 209 of the Crimes Act 2009.

*Particulars of Offence*

Avinesh Prasad on the 7<sup>th</sup> day of September 2016, at Lautoka, in the Western Division assaulted Sera Tuivaga with intent to commit rape.

**Third Count**

*Statement of Offence*

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

*Particulars of Offence*

Avinesh Prasad on the 7<sup>th</sup> day of September 2016, at Lautoka, in the Western Division inserted his penis into the vagina of Mary Elizabeth Fong without her consent.

**Fourth Count**

*Statement of Offence*

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

*Particulars of Offence*

Nischal Chand on the 7<sup>th</sup> day of September 2016, at Lautoka, in the Western Division inserted his penis into the vagina of Mary Elizabeth Fong without her consent.

25. You should consider each count separately. You must not assume that one Accused is guilty of the other counts just because you find him guilty to one count.
26. I will first explain what matters you must take into consideration to determine whether the offence of assault with intent to commit rape. The prosecution must prove beyond reasonable doubt;
- a. The accused,
  - b. Assaulted the complainant
  - c. With the intention to rape.



27. The first element is the identity of the Accused person. The identity of the first Accused is an admitted fact by the parties.
28. The prosecution must prove that the complainant was assaulted in respect of the second count.
29. Thirdly the prosecution must prove beyond reasonable doubt that the assault was done with the intention to commit rape. This element is concerned with the state of mind. It is not possible to have direct evidence regarding an Accused person's state of mind. However, you can construe the state of mind of the Accused from the facts and circumstances you would consider as proved. You should consider all the evidence and draw appropriate inferences to ascertain whether the Accused had the intention to rape the complainant when she was assaulted.
30. Intention has to be judged by the acts or words of a person or of the circumstances that surrounds a particular act. The law says that person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events. You decide intention by considering what the Accused did, you should look at the actions before, at the time and after the act.
31. There is one count of rape for each Accused. I will now remind you the elements that need to be proved by the prosecution beyond reasonable doubt in respect of the offence of rape;
- a. the Accused;
  - b. penetrated the vagina of the complainant with his penis;
  - c. without the consent of the complainant; and
  - d. the Accused knew or believed that the complainant was not consenting; or the Accused was reckless as to whether or not she was consenting.

27. The first element is concerned with the identity of the person who committed the offence. As it was said before the identity of the Accused persons is an admitted fact.
28. The second element involves the penetration of the complainant's vagina with the penis. The law states that even the slightest penetration of the vagina is sufficient to constitute the offence of rape. Therefore, it is not necessary to have evidence of full penetration or ejaculation. The prosecution must prove beyond reasonable doubt in respect of each count of rape that the particular Accused penetrated the vagina of the complainant with his penis to any extent.
29. The third and the fourth elements are based on the issue of consent. To prove the third element of the offence of rape, the prosecution should prove that the complainant's vagina was penetrated without her consent.
30. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. For 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. Consent obtained through force, threat or intimidation, fear of bodily harm, or by use of authority is not considered as consent given freely and voluntarily. Submission without physical resistance by the complainant alone, to the act of the other person will not constitute consent.
31. The complainant must have the freedom to make the choice. It means she must not have pressured or forced to make that choice. The complainant must have mental and physical capacity to make that choice. Further, the consent given by the complainant may have been limited to a particular sexual activity and not for another sexual activity. Also, the consent can be withdrawn at any time. It is an ongoing state of mind and its revocable once given. Consent of a person for sexual intercourse cannot be assumed.
32. In addition to proving that the complainant did not consent to the Accused to insert his penis into her vagina, the prosecution should also prove that, either

the Accused knew or believed that the complainant was not consenting; or the Accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.

33. The Accused was reckless, if the Accused realized there was a risk that she was not consenting and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the vagina, you may find that the Accused was reckless as to whether or not the complainant was consenting. In other words, you have to see whether the Accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

24. If you believe that the prosecution proved the relevant elements in respect of each offence you may find that particular Accused guilty for the respective offence or offences. Likewise, if you believe that the prosecution failed to prove the relevant elements of any offence you must find that particular Accused not guilty for that offence or offences.

25. I will now take your attention to the agreed facts, which are before you. Those are the facts that the prosecution and the defence have agreed upon without any dispute. Hence, you can take them into consideration as the facts that are proven beyond reasonable doubt. There are two sets of facts filed in respect of each Accused.

Ladies and gentleman assessors,

26. Now I will refresh your memory and give a brief outline of the evidence adduced in this case. However, you should consider the entirety of the evidence adduced in this case when forming your opinions. The prosecution called 6 witnesses to prove the case against the Accused persons.

27. The first prosecution witness was Mary Elizabeth Fong. According to her evidence on 06 September 2016 she had gone to Hunters night club in Lautoka with her cousin, Sera Tuivaga. They met the first and the second Accused persons at the nightclub and had started drinking rum and cola. Later they decided to go to White House nightclub in Nadi and on their way they bought more drinks from Rifle Range. Mary Fong said that they went to Lomolomo beach instead of going to Nadi and started drinking at the beach. She further gave evidence as follows;

“When I went to squat the tall guy came to me. I suddenly pulled up my pants. After that the tall guy told me that I was the one who bought the drinks why are you moving away from me. Then I told him that we just came to drink and that you told us that we were going to White House. Then he said just once and I told him no, we were just told to come and have drinks and go to White House but not come to Lomolomo. When I move at the back he pulled my hair to the corner. When he pulled my hair then he held onto one stick and he banged the left side of my head. Then after that I blacked out.”

28. Mary Fong further said that when she woke up she saw that the second Accused holding on to her hands and the first Accused on top of her. She said that she felt his penis inserted into her vagina. She also said that her pants and the panty had been removed at that time and she was only with her pink top.

29. The witness gave evidence that the first Accused said something to the second Accused in Hindi and left. She said then the second Accused tried to hassle her and she tried to run away as she could not find her cousin. She further said that when she was hiding in the water the second Accused came and pulled her hair and told her that he will hit her again with the same stick. She gave evidence as follows;

“After that I could not do anything. I was weak so I just lie there. I do not know what to do. So then he came on top of me. He then inserted his penis into my vagina. Then he saw the Police torch in the car and

then he ran away. After that I saw the Police car but I was not sure who it was. I ran into the water to hide. Then the Police man came to me to pull me out.”

30. Mary Fong said that she did not consent for them to sexually harass her. She further said that the incident occurred 07 September 2016 early in the morning.

31. The witness admitted that she had a fight with another girl at the Hunters nightclub when she was cross examined by the Counsel for the first Accused. Mary Fong said that she started the fight inside the club and she was not physically harmed. Under cross examination she said that she had three bottles of rum and cola and a jug of rum and cola at the club with her cousin. Also, she said that later she had about 7 bottles of rum and cola when they bought drinks from Rifle Range. It was suggested to the witness that she was offered money to have sex as follows;

Q: I put it to you that you were in fact offered some money to have sex with Accused 1?

A: No I never plan to sell my self, If that’s what you mean.

Q: I am putting it to you witness?

A: No I did not plan to do that. They planned to. They offered drinks. We never said. They offered drinks, we never insisted of giving ourselves.

Q: I put to it to you that you had sex with Accused 1 on your own freewill?

A; No I can’t, because he hit the stick on my head and I was knocked out.

32. When Mary Fong was cross examined by the counsel for the second Accused she said that she was not forced to go to Lomolomo. She admitted that she insisted to have more drinks. She denied that her cousin got involved in the fight. She admitted that she fought with another girl and exchanged punches. The witness admitted that they were thrown out of the club by the bouncers.

Under cross examination the witness said that Lomolomo beach was dark at that time and there were no lights. The witness denied that she agreed to have consensual sexual intercourse with the second Accused.

33. When the counsel for the second Accused referred to the Police statement of the witness she said that the statement is incorrect as it does not state that she ran to the water before the second Accused had sexual intercourse with her. Further the witness was cross examined as follows;

Q: You have also said in your examination in chief that you alleged that the short boy pulled your hair from the water and forcefully, he threatened you first with a stick?

A: He forcefully pulled out my hair first.

Q: And he forcefully had sex with you?

A: Yes

-Then she was referred to her statement where she has stated " I then went with him and he made me lie down on the beach again and he was on top of me about to have sexual intercourse with me again when he saw the Police man come with a torch and he ran away."

Q: So, he didn't have sexual intercourse, or he didn't forcefully have sexual intercourse with you correct?

A: Yes.

34. Mary Fong further admitted under cross examination that Sera, her cousin was not there at that time.

35. During re-examination by the State, Mary Fong was asked whether it is her Police statement or what she said in court is the correct version. She said that the evidence she gave in court is the correct version.

36. The Prosecution called Sera Tuivaga, who is the cousin of Mary Fong to give evidence. She said that when she was drinking at Hunters night club on 06

September 2016 the Accused persons came to them. She said that the first Accused introduced himself as a Policeman who got a transfer from Taveuni to Lautoka. The witness said that when they were at the Hunters nightclub a girl came and tried to punch Mary. Sera said that she punched that girl and the security officers came and dragged three of them outside the night club. She said that they were dragged by the collar of their T shirts. She further said that Mary fought again with the other girl outside the nightclub.

37. According to Sera, the two Accused persons had proposed them to go to White House nightclub. However, she said that they finally came to Lomolomo beach instead of going to Nadi. Sera said that she did not want to get off first. However later they had started drinking rum and cola at the beach according to her evidence. Sera gave evidence that Mary was talking to the first Accused. Then they had told her and the second Accused to go to the main road to bring a taxi. She further said that when she was walking to the main road with the second Accused, he had told her that he wants to have sex. She said she did not agree. She said then the second Accused ran back to the first Accused.

38. Sera Tuivaga further gave evidence that she also ran back to the beach to get Mary. She said then she saw the first Accused trying to pull Mary's pants and Mary was trying to push him away. She also said that when the second Accused complained to the first Accused that she did not want to have sex with him, the first Accused came and punched her on her chest and back. According to her evidence then she had fallen on the sand and Mary had started running.

39. She said then the first Accused ran after Mary. Then the second Accused had tried to pull down her pants and she had struck his head with a stick. Sera said that the second Accused then ran after Mary and the first Accused and she ran towards the main road. She had then reported to the Police post that Mary was being raped.

40. According to Sera's evidence she had gone back to the beach with the Police and they had found Mary near a mangrove patch. Sera said that Mary was

shivering and she was scared of her. The witness further said that when the Police officers lifted Mary she was not wearing pants and one of the Police officers took of his pants and gave it to Mary.

41. When Sera was cross examined by the counsel for the first Accused she said that all what she told the Police was not recorded in her statement. She denied that Mary was punched at the nightclub by a girl and she said that it was she who punched the other girl. In response to the questions put by the counsel for the first Accused, the witness said that she did not drink much. It was suggested to the witness that she went with the boys as they paid her to have sex with them. However, Sera denied the suggestion. Further she denied that they made up a story when it was suggested that Mary's mother was angry and that was the reason to make up a story.
42. When the witness was cross examined by the counsel for the second Accused, she said that Mary also punched the other girl. She also admitted that Mary and the other girl were throwing punches at each other. She further admitted that she and two other bouncers tried to stop the fight. Sera admitted under cross examination that the bouncers held by the arms when they separated Mary and the other girl. The witness also agreed that the beach was pitch dark.
43. Sera admitted that she did not see the second Accused assaulting or raping Mary. When it was suggested that she did not see Mary struggling, she said that she was present there. She denied that Mary had sexual intercourse in exchange of money. She further denied that she made up a story.
44. The prosecution witness Manasa Kamanalagi gave evidence that on 7 September 2016 between 1 am – 2 am the first Accused requested him to drop him at White House nightclub in Nadi with two other i-Taukei girls. The witness said that he knew the first Accused prior to that. He said that when they reached Lomolomo he was asked by the first Accused to take them to Lomolomo beach. He also said that when they got to the beach one of the girls refused to get down and had asked the witness to wait there. However, he said



later the girls got off his vehicle when the first Accused assured that his brother will pick them up from there. The witness said that they were drunk but they were aware of what they were doing.

45. Under cross examination the witness responded to the counsel of the first Accused that the girls did not appear scared or they were not forcefully dragged out of the car.

46. When the counsel for the second Accused cross examined the witness, he said that the second Accused was sitting at the back seat with the two girls and everyone was happy.

47. The prosecution witness, Cpl 2737 Miliano gave evidence that on 6 September 2016 he was based at Lautoka Police station and he was on road block duties from 9 pm. He said that at around 2.30 am on 7 September 2016 an i-Taukei girl came to Lomolomo Police post requesting for assistance. He said her name was Sera Tuivaga. He said the girl was worried, frightened and shivering. He said that the girl complained that her sister is being raped or attempted to be raped by two Indian boys. He also said that he requested the assistance of K9 unit and proceeded to the scene with Sera and another officer. The witness said special constable Maciu had found the other girl and when he went to the girl she was shivering and there was sand all over her body. He also said that the girl was only wearing a top. According to the witness the name of that girl was Mary.

48. In response to a question put by the counsel for the first Accused the witness said that Sera appeared normal and she did not smell any alcohol in her breath.

49. When the witness was cross examined by the counsel for the second Accused the witness said that he cannot recall whether Sera complained to him about any assault by the Accused persons. He further said that he could not recall whether Mary appeared drunk that time.

50. The next witness for the prosecution was Constable 2843 Maciu Temo. He said that on 7 September 2016 between 2 am and 3 am he was on mobile patrol with

his K9 dog. He said that upon receiving a call from Lomolomo Police post he proceeded to attend a report of rape at Lomolomo beach. He said that he found an i-Taukei girl lying in the beach only wearing a T shirt. He said the name of that girl is Mary.

51. When the witness was cross examined by the counsel for the first Accused the witness said that he is sure that Mary had not passed out from drinking. He said that when he approached her she stood up and started crying.
52. The prosecution called Dr Teri Mataiasi Fesaitu and he said that on 7 September 2016 he was based at Lautoka hospital and he examined two persons relating to this case. The witness said that one of the persons he examined was Mary Elizabeth Fong. He gave evidence that he observed swelling on the anterior part of Mary Fong's forehead. He said that it was sore when touched. He has further observed imprints of fingerprints on left and right arms. According to the witness firm gripping has caused those marks. Further he said that the abdominal area was sore when touched. He has not observed any vaginal bruising or lacerations. Hymen had not been intact as she had a child before. However, he said that her inner thighs were sore when touched. He also said that upon examination he noted that the vaginal area was covered with sand.
53. The witness said that in his opinion blunt trauma or physical assault would have caused the swelling of the forehead. Further he said that the other injuries suggest possible sexual assault. He further explained that although there were no genital injuries sexual assault cannot be excluded. The witness tendered the medical report of Mary Fong as prosecution exhibit 1.
54. Dr Fesaitu further gave evidence that he examined one Sera Tuivaga. He said she was not in a lot of pain or a lot of discomfort when he examined her. He has observed that the left side back rib cage or the back of her chest had been sore when touched. He said there were no swelling, bruises or lacerations. His opinion was that the injury was recent, and it is caused by blunt trauma, and

he related the cause of the injury to this case as physical assault. The medical report of Sera Tuivaga was tendered as prosecution exhibit 2.

55. During the cross examination of the witness by the counsel for the first Accused, Dr Fesaitu said that genital injuries will be found only in about 20% of the victims of sexual assaults and in other cases no genital injuries will be present. He said that just because some do not have genital injuries, sexual assault cannot be excluded. Further in response to a question by the counsel for the first Accused the witness said that he cannot recall whether Mary Fong told him about any other fight that she was involved in a club. He said that the injuries on the upper arm of Mary Fong could be explained by other causes as well.

56. Under cross examination by the counsel for the second Accused Dr Fesaitu said that to the best his recollection Mary Fong did not inform him of any other fight or about being escorted out of a night club by bouncers. The witness said during cross examination that if a person was involved in a fight at a club or if a person was thrown out of a night club it could cause gripping marks, but it will depend on how that person was handled. The witness further said that he did not observe any physical marks on Mary Fong's thighs or he has not documented that she was under the influence of liquor when he examined her. He further said that he can neither confirm, nor exclude possibility of sexual assault. Dr Fesaitu confirmed that there were no injuries on Sera Tuivaga's forehead.

57. That was the case for the prosecution.

58. After the closure of the prosecution case the Accused persons were explained their rights. You must bear in mind that although those options were given, still the burden is on the prosecution to prove the guilt of the Accused persons and they need not prove their innocence. The Accused persons opted to remain silent and no witnesses were called for the defence.

Ladies and gentleman assessors,

59. It should be noted that in our law no corroboration is needed to prove a sexual offence. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters. In other words, the prosecution can solely rely on the evidence of the complainant without any supporting evidence whatsoever in sexual offences. It is for you to decide how credible and consistent is the evidence of the complainant.

60. The prosecution case in respect of first and second counts was that the first Accused, Avinesh Prasad assaulted Mary Elizabeth Fong and Sera Tuivaga with intent to commit rape on 07 September 2016. In respect of the third count the prosecution case was that the first Accused inserted his penis in to the vagina of Mary Elizabeth Fong without her consent. Further in respect of the fourth count the prosecution case was that the second Accused, Nischal Chand inserted his penis into the vagina of Mary Elizabeth Fong without her consent.

61. The Accused persons chose to remain silent. I must remind you that you must not draw any adverse inference from the fact that the Accused persons remained silent. It is their right.

62. However, it appears from the line of cross examination that the first Accused denies any assault on the two girls in respect of the first and second counts. The first and the second Accused persons have admitted in their admitted facts that they had had consensual sexual intercourse with Mary Elizabeth Fong. It is for you to decide whether there was consent or not.

63. As it was said before, it is the duty of the prosecution to prove the elements of each offence against each Accused. The Accused persons need not prove their innocence.

64. I have now given you the directions of law and summarized the evidence adduced in this case. Before I conclude my summing up let me remind you some points again.
65. You must consider the case against each Accused separately. This means you must carefully distinguish between the evidence against one Accused and the evidence against the other. Evidence relating to one Accused must not be used against the other Accused. You must not assume that just because you find enough evidence against one Accused, the other one must also be found guilty.
66. What version of facts you accept is a matter for you. If you have any reasonable doubt in respect of the role played by any of the Accused or if you do not find evidence against any Accused, you must find that Accused not guilty in respect of that particular count. You must also bear in mind that merely because you find one Accused not guilty to any particular count, it does not automatically make him not guilty to another count. Similarly if you find one Accused not guilty to any particular count or counts, it does not automatically make the other Accused not guilty to another count or counts. You must consider evidence in respect of each count and each Accused separately when arriving at your opinions.
67. If you believe that the prosecution has proved beyond reasonable doubt the elements of assault with intent to commit rape in respect of the first and second counts you must find the first Accused guilty to those counts. If you find the prosecution has proved the elements of rape in respect of third count you must find the first Accused guilty to the third count. If you find the prosecution proved the elements of rape in respect of the fourth count you must find the second Accused guilty to that count. If not, you must find the respective Accused not guilty to that particular count.
68. You may now retire and consider your opinions. Before you do so, may I ask the counsel of both parties whether you wish to request any redirections?

69. When you are ready with your opinions, the Court will reconvene for you to inform your opinions to court.



A handwritten signature in blue ink, appearing to read "Rangajeeva Wimalasena", is written over a faint, circular blue stamp.

**Rangajeeva Wimalasena**  
**Acting Judge**

**Solicitors**

Solicitors for the State : Office of the Director of Public Prosecutions

Solicitors for the first Accused: Messrs Iqbal Khan & Associates

Solicitors for the second Accused: Messrs AC Law