

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

High Court Criminal Case No. HAC 09 of 2016

BETWEEN : STATE

AND : JAINENDRA NARAYAN PAL

Counsel : Mr Babitu for the State
Mr Patrick Kumar for the Accused

Dates of Hearing : 20 & 21 August 2019

Closing Speeches : 22 August 2019

Date of Summing up: 26 August 2019

SUMMING UP

Ladies and gentleman assessors,

1. I must now sum up the case to you. You must then retire to consider your opinion. 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 person is guilty or not guilty.

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. A suggestion put to a witness is 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.
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 has 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 offence. 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 opinion.

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. Subsequent conduct of complainants of sexual offences can vary from person to person. Some, in distress, shame or anger, may complain to the first person they see. Some may react instantly and report because of their maturity, education level, social status, and for other similar reasons. Some may not complain at once due to immaturity, lack of education, and for other similar reasons. A complainant's reluctance to report an incident could be due to many reasons. Some may not even complain at all due to the fear that it may damage family ties. A complainant may not be comfortable to report a matter to close family members due to the respect, fear, or due to the reluctance to openly discuss matters relating to sex with elders.
13. It must be noted that according to the law sexual offences do not require other evidence to corroborate the evidence of the complainant. Which means you can even solely rely on the evidence of the complainant without any other evidence to support it.
14. 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 the credibility of a particular witness, it may be relevant to consider

whether there are inconsistencies in his or her evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. For example, might it result from an innocent error such as faulty recollection; 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. Memory is fallible, and you might not expect every detail to be the same from one account to the next. A witness may be honest enough but have a poor memory or otherwise be mistaken. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.

15. As a matter of law, I must direct you that what a witness said on oath is only considered as evidence. What a witness said in her or his statement to police, that is out of Court and therefore is not evidence. However, previous statements are often used to challenge a particular witness's credibility and reliability because a previous inconsistent statement may indicate that a witness said a different story then, and as a result her evidence might not be reliable. It is for you to decide the extent and importance of this inconsistency.
16. 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.

17. 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.

18. 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.

19. 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.

20. 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 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 offence beyond reasonable doubt.

21. The Accused need not prove his innocence. The fact that the defence called a witness including the Accused does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence. The burden is on the prosecution to prove the guilt of the 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 the Accused not guilty. If you are not left with any such doubt and if you are sure that the prosecution proved every element of the offence, you must find him guilty.

Ladies and gentleman assessors,

22. We will now look at the offence that the Accused is indicted for. The Accused is charged for one count of rape in the Information filed by the Director of Public Prosecutions as follows;

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) of the Crimes Act 44 of 2009.

Particulars of Offence

Jainendra Narayan Pal on the 15th day of December 2015, at Nadi in the Western Division, penetrated the vagina of Vilisita Waqaitubuna, with his fingers without her consent.

23. Now I will explain what matters you must take into consideration to determine whether the offence of rape is proved by the prosecution. The prosecution must prove the following elements beyond reasonable doubt;

- a. the Accused;
- b. penetrated the vagina of the complainant with his fingers;
- c. without the consent of the complainant; and
- d. the Accused knew or believed that the complaint was not consenting; or the Accused was reckless as to whether or not she was consenting.

24. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the Accused and no one else committed the offence. The identity of the Accused is not in dispute in this case.

25. The second element involves the penetration of the complainant's vagina with his fingers. The law states that even the slightest penetration of the vagina is sufficient to constitute the offence of rape. As per the offence that the Accused is charged with in this case, the penetration is not by a penis. The offence is constituted by penetration of the vagina with a thing or a part of the body of the Accused that is not a penis. Therefore, the prosecution must prove beyond reasonable doubt that the Accused penetrated the vagina of the complainant with his fingers to any extent.

26. 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 Accused penetrated the complainant's vagina without her consent.

27. 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.

28. You must bear in mind that the law says consent obtained by false and fraudulent representations about the nature or purpose of the act 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. I must direct you that according to the prosecution evidence it is alleged that the Accused has inserted his fingers into the vagina of the complainant on the pretext that a medical test is carried out. Therefore, the prosecution argues that the complainant's consent to the alleged act was not freely and voluntarily given as it was obtained by false and fraudulent representations about the nature or purpose of the act.

29. In addition to proving that the complainant did not consent to the Accused to insert his fingers 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.

30. The Accused was reckless, if the Accused realised 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.

31. If you believe that the prosecution proved all the elements of the offence you may find the Accused guilty to that offence. Likewise, if you believe that the prosecution failed to prove all the elements of the offence you must find the Accused not guilty to the offence of rape.

32. The prosecution and the defence agreed to certain facts. Those facts are before you in a document titled as final admitted facts. Those facts need not be proved again by the prosecution and you can use those facts to make your opinions without any further proof.

Ladies and gentleman assessors,

33. 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 three witnesses to prove the case against the Accused. After the prosecution case was closed the Accused and another witness gave evidence for the defence.

34. The complainant, Vilisita Waqaitubuna gave evidence that on 15 December 2015 she went to Nadi hospital to do a blood test. According to the complainant

a female had drawn blood from her, and she had been told to wait for the results. The complainant said then the Accused approached her and informed her to come back in the evening for the blood report. He had also informed her that she has STD. Further the Accused had given her his mobile number to call him. When the complainant went back to the hospital around 6 pm, the Accused had asked her to lie down on a bed and to take off her black mini shorts and her orange undergarment. The complainant said that the Accused wore hand gloves and started touching her vagina. She said the Accused inserted two fingers into her vagina. She also said that the Accused told her that he would be able to find out her disease by doing that.

35. According to the complainant, the Accused had then asked her to wear her clothes as it was not safe there and had asked her to go through the back door to another room in the same premises. The complainant said that she did not know it was his hostel room. Further the complainant said that the Accused advised her to tell the security that she is a friend of his cousin. However, she said that although the security officer saw them, nothing was asked by the security officer.

36. The complainant said that after she was taken into a room the Accused asked her to lie on the bed and touched her just like how he did at the lab. She said the Accused wore hand gloves and inserted his fingers into her vagina. Further he had asked her to remove her T shirt as well, to see her breasts to ascertain her disease. The complainant further said that the Accused inserted another object inside her vagina. She described it as a cotton wool. The Accused had told her that he would take it to Lautoka to check for results.

37. She further gave evidence that she was having menses and the Accused told her to go to the bathroom to clean herself. The complainant said that when she was in the bathroom, the Accused came inside the bathroom naked. She said that the bathroom door was closed but it was not locked. She said that the Accused was not wearing hand gloves at that time and he wanted to use his fingers to touch her vagina again. The complainant had pushed him away and

had run back to the room. She said then she wore her clothes and ran out of the hospital.

38. According to the complainant she had thought that the Accused was one of the doctors. She said that when she came home, she realized what the Accused did to her was wrong. The next day she had come to the hospital and had called the Accused to inform him that she is going to see another doctor. The Accused had then given her some pills and had asked her to go back. However, she had met the doctors and had informed about the incident. She further stated that the doctors informed her that she does not have STD.

39. Under cross examination it was suggested to the complainant that there is no bed inside the lab. However, she said that there was a bed beside the blood test room. She denied that she requested the phone number from the Accused. The complainant denied that she was having a sore throat or that she complained to the Accused in the evening that she has a sore throat. It was suggested to the complainant that when she was taken to the room a security officer accompanied her. However, the complainant denied the suggestion and said that no security officer had told her to wait downstairs. The complainant said that the security officer who was present that day was an itaukei security officer and when she came back on the next day, the security officer inquired from her about the reason for her to go to Accused's room.

40. It was suggested to the complainant by the defence counsel that it is compulsory to enter the name in a register before entering a staff room. In response to the suggestion the complainant said that there was no one to register her name as they went through the back door.

41. It was put to the complainant that she has not stated in her police statement that the Accused inserted his fingers into her vagina in the lab. She admitted that it is not mentioned, but she said that only she knows what happened on that day. Further it was asked whether the Accused walked naked from his room to the bathroom and the complainant said that when he entered the

bathroom, he was naked. During the cross examination the complainant admitted that on the second day she did not go to the hospital in the morning and it was around 3.30 pm when she went to the hospital.

42. Dr Teri Fesaitu gave evidence that he saw a patient by the name Vilisita on 16 December 2015. He said that Vilisita came to him to enquire about the results of a STD screening conducted by a Fijian doctor of Indian descend. Dr Fesaitu said that the patient informed him that she had been examined at a dormitory and she was wondering whether it was the normal procedure. The witness said that Vilisita pointed out the Accused as the doctor who performed vaginal examination. He also said that the Accused was not a doctor, but he was a lab technician at the Nadi hospital. Dr Fasaitu said soon before Vilisita was seen, the Accused entered his room and enquired about Vilisita's triage. The witness also said that the Accused told him that the Accused gave Vilisita some amoxicillin. The Accused had further informed Dr Fesaitu not to believe the patient as whatever she is going to tell him is not accurate and true. Dr Fesaitu stated that lab technicians are not allowed to examine patients. He said after hearing the incident from Vilisita he referred her to a female doctor as he did not feel comfortable.

43. Under cross examination Dr Fesaitu said it was unusual for a lab technician to be present during after-hours.

44. At this point I must explain to you what a recent complaint is. In cases of sexual offences, the evidence given by a witness of what he or she was told by a complainant is generally considered as recent complaint evidence. The evidence of recent complaint is not adduced to corroborate the details of the alleged incidents by the Accused, nor it is evidence of facts complained of. It only goes to the consistency of the conduct of the complainant with her evidence given at the trial. It is not evidence that proves what has happened between the Accused and the complainant. But it only enhances the credibility of the complainant and you can use it to decide whether the complainant gave credible evidence.

45. Further it should be noted that recent complaint evidence is not hearsay evidence. Generally, witnesses are only allowed to give evidence on what they saw, heard or felt by their physical senses only. They are not allowed to speak of a story told by a third person who is not called as a witness. Such evidence is called hearsay evidence. However, evidence of recent complaint is not hearsay. Therefore, evidence of recent complaint is considered as admissible evidence.

46. Dr Elenoa Tubuna Daulomani Naika Fesaitu gave evidence that on 16 December 2015 when she was working at Nadi hospital a patient was referred to her by Dr Teri Fesaitu. The witness gave a full account of what she was told by Vilisita. The witness said Vilisita was frightened and confused. She also said that the Accused was a lab technician and lab technicians do not perform any examinations.

47. During cross examination Dr Elenoa confirmed that lab results are not given directly to the patients. She said that she conducted a medical examination of Vilisita. She admitted that there were no signs of forceful penetration upon examination of Vilisita's vagina.

48. That was the case for the prosecution.

49. After the closure of the prosecution case the Accused was explained his rights. The Accused decided to give evidence and to call a witness for the defence. 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 and he need not prove his innocence.

50. The Accused gave evidence that he was working as a lab technician at Nadi hospital in 2015. He said that on 15 December 2015 the complainant came for a blood test. The Accused said that after finishing the test he informed the complainant that the report will be sent to Namaka health Centre. He said the

complainant was unhappy about that. He had then written down his number in a piece of paper for the doctor to call him if he needs the results. The Accused also said that he told the complainant to come in the evening to see a doctor at Nadi Hospital as she wanted to be seen by a doctor in Nadi hospital. The Accused said that the complainant came to the hospital at around 6 pm. The Accused denied taking the complainant to the lab and he further said that there is no bed inside the specimen collection area. He said that when he received a call from the complainant he was preparing for an exam in the lab. He said that later when he went to the washroom, he saw the complainant waiting at the GOPD area. He said when he returned from the washroom the complainant approached him and asked whether he could give her some antibiotic as she was having a sore throat. The Accused said that around that time the pharmacy was closed, and he told her that he has amoxicillin in his quarters. The Accused said that he advised the complainant to wait at the security base for him to go and get the amoxicillin. However, he said when he came through the backdoor of the lab he met the complainant. The Accused had told Vilisita to go to the security base so that a security can accompany them to his quarters.

51. The Accused said that a security officer by the name of Naresh was there and when the Accused was telling him that the complainant is with him, another person named Dharmend had also appeared. The Accused said that all of them accompanied him to his quarters. He said that at the steps that leads to bachelors quarters he asked the complainant to wait with the security until he go and get amoxicillin. The Accused said that the complainant did not enter his room at any time. He further said that within about two minutes he came back and gave amoxicillin to the complainant and they all walked out. The Accused denied that he went to the bathroom naked.

52. The Accused said that the complainant called him on 16 December 2015 and insisted him to give a copy of the results. He said that he refused and hung up the phone. He said that later in the evening when he was going to see Dr Elenoa he met the complainant at GOPD area. He said that the complainant

approached him and threatened him to do something as he refused to give a copy of the report to her. The Accused had then met Dr Fesaitu and had informed him about Vilisita and that he gave her amoxicillin. He also said that when he was going back, the complainant swore at him.

53. During cross examination the Accused admitted that lab technicians cannot examine patients or give medicine. He admitted that amoxicillin is a prescribed medicine. He admitted that it is not normal for a lab technician to give phone numbers to patients. He further admitted that what he did that night was in breach of his role. However, the Accused denied that the complainant came to his room.

54. Further the Accused admitted that he told Dr Fesaitu not to believe the complainant. He said that he told the doctor not to believe the complainant as she threatened him. However, the Accused admitted that he failed to inform the doctor that he was threatened when he was questioned as to why he did not complain to the doctor if the complainant had threatened him. The Accused admitted that he did not have any issue with Dr Fesaitu or Dr Elenoa. He admitted that most of the things he did on 15 December 2015 were questionable.

55. The defence witness Dharmend Singh gave evidence that he was working at Nadi Mortuary on 15 December 2015. He said that when he was going towards the security booth to meet one Naresh, he met the Accused with a girl. He said later four of them walked up to the steps which leads to the Accused's quarters. Then he had gone back to switch on the lights. When he returned in about 2 to 3 minutes, he had met the Accused, Naresh and the girl at the steps again. He said then they all walked towards the hospital and the girl was a few steps in front of them.

56. Under cross examination the witness said that he got to know the Accused when he was working at the hospital. The witness said that he did not meet the

Accused from 15 December 2015 until he received the summons in this case. He said that the girl was wearing long black pants and a white top. When he was asked as to how he remember the details the witness said that he had written the details in a book. When he was asked where the book is, he said that his small daughter played with it.

57. During re-examination the witness said that he does not have any identity card to confirm that he worked for the mortuary and his T shirt is his ID.

58. That was the case 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 only 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 was that the Accused penetrated the vagina of the complainant with his fingers without her consent. As it was mentioned before a person's consent to an act is not freely and voluntarily given if it is obtained by false or fraudulent representation about the nature and purpose of an act.

61. The Accused denied the allegation and said that the complainant made a false allegation when he refused to give a copy of the blood test results.

62. As it was said before, it is the duty of the prosecution to prove the elements the offence against the Accused. The Accused need not prove his innocence.

63. 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.

64. If you believe that the prosecution has proved the elements of rape beyond reasonable doubt, you may find the Accused guilty.

65. If not, you must find the Accused not guilty.

66. 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?

67. 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".

Rangajeeva Wimalasena
Acting Judge

Solicitors

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

Solicitors for the Accused: Patrick Kumar Lawyers