

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 37 OF 2017

BETWEEN : STATE

AND : HARISH RAJ KUMAR

*Counsel : Ms. S. Naibe for the State
Ms. M. Baleilevuka with Ms. E. Wakowako for the Accused*

Hearing on : 14th & 16th of July 2020

Summing up on : 23rd of July 2020

SUMMING UP

Lady and gentlemen assessors;

1. It is now my duty to sum up the case to you. Your opinion is much important to me and I will be considering your opinion to a great extent in preparation of my judgment. In a short while, I will direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the assessors of facts.

2. As the representatives of the society, your duty here is sacred. Your role is to assist this legal system to serve justice. In doing so, you are guided by two equally important principals of prudence. To wit;

i) If a person has committed an offence, he should be meted out with an adequate punishment.

In other words, if you are sure that the accused has committed the alleged offence, then it is your duty to find him guilty. If an offender goes scot-free, he'll be ridiculing this legal system. It is your duty to not to let that happen.

ii) An innocent person should never be punished.

There is a saying that it is better to let 100 offenders go free than to punish one innocent person. That is, unless you are very sure that the accused has committed the alleged offence, you should not find him guilty.

If any of the said principles are violated, it would amount to a failure of the system, thus you have failed in your duty to the society. Having reminded you of your duty let me proceed.

3. Evidence in this case is what the witnesses said from the witness box inside this court room and the admissions made. As I have stated to you in my opening address, your opinion should be based only on them. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

4. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the Counsel for the prosecution or for the defense are not evidence. A suggestion made by a counsel during the examination of a witness is not evidence unless the witness accepted

that suggestion. The arguments and comments made by counsel in their addresses are not evidence. You may take into account those questions, suggestions, arguments and comments when you evaluate the evidence only to the extent you would consider them appropriate.

5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the available evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experiences and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe none, a part or all of any witness' evidence.
7. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses that we all may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes a witness may have other concerns when giving evidence. A witness may be worried that the evidence would incriminate him or reveal a safely guarded secret. Or else he/she might honestly forget things or make mistakes regarding what he/she remembers.
8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the

witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies between the evidence given by different witnesses. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it isn't then you can disregard that inconsistency. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you should not expect a witness to have a photographic memory or every detail to be the same from one account to the next.

9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by the witness is a matter for you to decide.
10. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provide for the inconsistency and consider him/her to be reliable as a witness.
11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only a few guidelines. It is up to you, how you assess the evidence and what weight you give to a witnesses' testimony.

12. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that, that inference is the only reasonable inference to draw from the proved facts. If there more than one reasonable inference to draw, against the accused, as well in his favor, based on the same set of proved facts, then you should draw the most favorable inference to the accused.
13. As a matter of law you should remember that the burden of proof always rests on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond a reasonable doubt, for you to find him guilty. That is, you must be sure of the accused person's guilt.
14. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of the offence against the accused, then you must give the benefit of that doubt to the accused and find the accused not guilty. A reasonable doubt is not a mere or an imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in detail in a short while.
15. You are not required to decide on every point the Counsels in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge is proved against the accused.

16. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not a must.
17. Let us look at the Information. The Director of Public Prosecutions has charged the accused of 3 counts of rape.

COUNT 1

Statement of Offence

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

Particulars of Offence

Harish Raj Kumar, on the 9th day of December 2016 at Lautoka, in the Western Division, had carnal knowledge of Riteshni Radika Singh without her consent.

COUNT 2

Statement of Offence

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

Particulars of Offence

Harish Raj Kumar, on the 12th day of December 2016 at Lautoka, in the Western Division, had carnal knowledge of Riteshni Radika Singh without her consent.

COUNT 3

Statement of Offence

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

Particulars of Offence

Harish Raj Kumar, on the 13th day of December 2016 at Lautoka, in the Western Division, had carnal knowledge of Riteshni Radika Singh without her consent.

18. Now I will deal with the essential elements of the offence of Rape.

Section 207(1) of the Crimes Act reads as;

207. —(1) Any person who rapes another person commits an indictable offence.

Section 207 (2) (a) of the Crimes Act reads as;

(2) A person rapes another person if —

(a) The person has carnal knowledge with or of the other person without the other person's consent;

19. Accordingly, in this case, to prove the offence of Rape as for the alleged count the prosecution must prove the following elements beyond a reasonable doubt.

(i) The accused;

(ii) Penetrated the vagina of Riteshni Radika Singh with his penis

(iii) Without the consent of Riteshni Radika Singh; and

(iv) Either the accused;

knew or believed that Riteshni Radika Singh was not consenting; or was reckless as to whether or not she was consenting.

20. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence.

21. In the second element 'carnal knowledge' means having sexual intercourse or in this case, the penetration of Riteshni Radika Singh's vagina; with the accused's penis. The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of Riteshni Radika Singh with his penis, to any extent.

22. 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.
23. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact, that there was no physical resistance alone, shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;
 - i) by force; or
 - ii) by threat or intimidation; or
 - iii) by fear of bodily harm; or
 - iv) by exercise of authority.
24. Apart from proving that the complainant did not consent for the accused to insert his penis inside 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.
25. It is not difficult to understand what is meant by the words "the accused knew or believed". But you may wonder as to how you could determine whether the accused was reckless. If the accused was aware of the risk that the complainant may not be consenting for him to penetrate her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant's vagina, you may find that the accused was reckless as to whether or not the complainant was consenting. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not.

26. Please remember that no witness can look into an accused's mind and describe what it was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused's state of mind. Knowledge or intention of an accused can only be inferred based upon relevant proven facts and circumstances.
27. If you find a reasonable doubt in respect of any of the above, you shall find the accused not guilty of the count of Rape.

Summary of Evidence

28. The PW1, Riteshni Radika Singh is the main witness for the prosecution. The law requires no corroboration. Therefore you can act on the evidence of a sole witness. However, my direction is that if you are to rely on a sole witnesses' evidence you must be extremely cautious of the credibility and the dependability of such evidence. Her evidence is that;
 - i) Presently she lives in Kulukulu, in Sigatoka with her parents and the partner.
 - ii) She has two children aged 10 years old and 5 months old. In 2016, she was 19 years old and resided at Kashmir, opposite Kamikamica Health Center, with her partner and his mother.
 - iii) The house she lived-in, was a wooden house consisting of 2 bedrooms, a kitchen. The bathroom, toilet and the wash room situated outside the house. They moved there in November and were there till they moved out on the 24th of December 2016.
 - iv) That house they lived in was owned by Harish who is also known as Jagun. Harish resided at the same premises in the front portion. There were two other flats and the witness with her family occupied the middle one and the other was occupied by a Fijian family.

- v) Her husband was working at Wahley's Takeaway in Saweni and her Mother-in-law was working as a domestic at Simla, Lautoka. Her husband used to go to work around 3.00am and return home around 10.00 - 11.00pm. Her mother-in-law used to go to work around 8.00am and returned around 4.30 - 5.00pm.
- vi) In addition to her husband and his mother, there lived her step-father-in-law with them. The witness states that she sees Harish daily as he is at his house. She has spoken to him only if there was an issue.
- vii) On the 09th of December 2016, at about 9.00am she was at home, watching a movie in the bedroom. She was wearing a maroon top, brown ¾ pants with pink undergarments and a black bra. The roof of her room has been leaking and her mother-in-law has informed the landlord to come and fix it. There were two doors to come in to the house. She has kept both of them open for the landlord to come in and fix the leaking.
- viii) The doors were at the kitchen and in one side was the main entrance and another side was the door to go out to the wash room. Her bedroom was at the corner and her mother-in-law's room was in the middle. There was a passage to go to the rooms from the kitchen.
- ix) Her landlord was the Harish, the accused. Harish has come into her bedroom when she was watching a movie. She has not seen him coming. He has come into the room and pushed her down on the bed and pressed her face with a pillow with one hand and has removed her pants and the undergarments with the other hand. Then he has forcefully put his penis into her vagina and raped her. She has seen that was Harish when he went back to his flat, after raping her for 5 minutes. When he pushed her down the bed and removed her clothes covering her face with the pillow, her hands and legs were free and she was struggling to get out but she could not. She has also trying to scream, but couldn't as her face was covered with a pillow. Having raped her, he has threatened her saying 'if you tell

anyone, you will see what I will do to you guys'. Having threatened her, he has left.

- x) When Harish left she has come to the kitchen and cooked. She confirms that she did not come out of the house then. This incident has around 9.00am and there has been plenty of sun light to identify. She did not consent to Harish to have sexual intercourse with her. She has not told this incident to her mother-in-law as she was afraid and has not told her husband as she could not face him.
- xi) On the 12th of December 2016, 3 days after the first incident, at around 9.00am, she has been in her bedroom putting the mattress up. She was wearing a grey and white top with a black skirt, purple undergarments and a black bra. The accused has come in and pushed her on to the bed, covered her face with a pillow with one hand, removed her undergarments with the other hand, put his penis into her vagina forcefully and raped her. He has done so for 5 minutes. She has not seen him coming in and she has recognized him as Harish only when he was leaving. She has not consented to Harish to have sexual intercourse with her. After the sexual intercourse, Harish has slapped her and told her 'you better keep your mouth shut'. Here she states that she saw his face when he slapped her. It should be noted that it is inconsistent with her earlier evidence.
- xi) Her de-facto partner has come around 11pm and she has been in her bedroom then. She has not told him anything as she was frightened and was feeling insecure.
- xii) On the 13th of December, the very next day after the alleged 2nd incident, she has been at home around 11.00am. She has just had a shower and was dressing up in her bedroom. As she has just worn her sports bra, Harish the accused has come into her bedroom, pushed her onto the bed, covered her face with a pillow and raped her for 5 minutes, forcefully by putting his penis into her vagina. She has not seen him coming into the

room but has seen his face when he covered her face with a pillow. She has not consented to Harish to have sexual intercourse with her. After the sexual intercourse, Harish has sworn at her '*manchod*' and threatened 'you better watch out' and has gone.

- xiii) Thereafter she has stayed in her room till her de-facto partner came around 10pm. On that day, he de-facto partner has asked 'what's wrong with you' and 'why are you not telling me anything'. But she has told that she is fine. Thereafter on the 16th of December 2016, while in bed, she has cried out and told him everything. Then he has sworn, slapped and spitted on her. Thereafter around 2-3am, he has taken her to the police station to report the matter. However, she has reported it to have happened with her consent but in fact it was a rape case. She has reported so because Harish was her landlord and her de-facto partner was swearing and slapping, she has thought that it was her fault.
- xiv) On the 24th of December 2016, she has gone to Kulukulu, in Sigatoka to her father's place. At there, her father and the brother has encouraged her to go to the police and tell the truth. Thereafter she has gone and complained to the Lautoka Police Station on the 14th of January 2017.

29. In answering the cross examination by the counsel for the accused, the witness states;

- i) The flat she occupied in Kashmir was separated from the flat which was occupied by the Fijian family only by a single wall. When suggested that the back door of her flat was beside the door of the Fijian family's flat, she states that she is not sure of their door. However, later she concedes to that suggestion and states that the door of the Fijian Family's flat is always closed.
- ii) She agrees that there are neighbors across the fence from the side door and anyone entering through that side door, could be seen by them, she states that it may or may not be.

- iii) She states that it wasn't raining on the 9th of December but was raining on the 8th. She concedes that she has told to the police that it was raining on the 9th and it was incorrect.
- iv) She states that her bed was facing the entrance to the bedroom. On the 9th of December, she was watching TV, sitting on the bed and did not see the accused coming in as her back was towards the entrance to the room.
- v) Harish raped her for 5 minutes and the pillow was there covering her face throughout the sexual intercourse. He was holding the pillow with one hand and removed her pants and the undergarments with the other hand. She was having difficulties in breathing with the pillow pressed on to her face. During that time, her hands and feet were free and she tried to free herself. She states that after the sexual intercourse, when the pillow was removed from her face she saw Harish. Harish's face was just ½ a meter away from hers. It should be noted that this is inconsistent with her evidence before.
- vi) The witness states that she could tell that sexual act took exactly 5 minutes as she looked at the wall clock just as she entered the room.
- vii) Soon after the alleged incident on the 9th of December 2016, she has stated to the police that she went out of the house. She admits that to be correct. It should be noted that this is inconsistent with her evidence before. Further, she admits that what she told in her examination in chief before is incorrect.
- viii) She admits that her elder son was 6 years old in 2016. Though she denied that he was with her during the relevant times later admits that he was there with her. It should be noted that this revelation would have a huge impact on the entirety of her evidence as later she goes on to admit that all these alleged incidents took place when the said 6 year old child was also there in the house with her. She was not alone in the house and she has failed to disclose the presence of the child to the court or to the police

and the credibility and the reliability of her evidence is seriously challenged by that.

- ix) It creates further doubt when the PW1 state that the child did not see or hear anything as he was at the mother-in-laws room and she did not ask the child whether he saw or heard anything but told the child to not to tell anyone.
30. In answering the re-examination by the prosecuting counsel, the witness states that Harish was at home on the relevant days. This is inconsistent with her earlier evidence that Harish was always at home.
31. With leading the evidence of PW1, the prosecution closed their case. Court being satisfied that on the face of it, the prosecution has adduced sufficient evidence covering the elements of the alleged counts, decided to call for a defense, acting under the virtue of section 231(2), of the Criminal Procedure Act, explaining and giving his due rights to the accused.
32. The accused having understood his rights elected to give evidence. His evidence was that;
- i) He is working as a sub-contractor having his own registered private company named Issac Builders.
 - ii) In December 2016, his company was operating and was engaged in a sub-contract of renovating and painting at Jasper High School.
 - iii) Then he was the landlord of the two flats at Sukanaivalu Road, in Kashmir, Lautoka. He lived in the front portion and the rear two flats were rented out. The immediate to his house was a two bedroomed flat and was rented out to the complainant's family. The other flat was a single bed roomed one and was rented out to a Fijian family.
 - iv) At the complainants flat, there stayed the complainant, her son, her husband, her mother-in-law and the mother-in-law's partner.

- v) There were two doors to that flat. One was at the front and the other was at the back to go to wash rooms which were outside. The complainant's flat was just 3 meters away from the neighbor's house.
 - vi) The accused states that he has not entered the complainant's flat since they came into occupation. He has started working at the Jasper High School before the tenants came in and there he has done the painting and tiling. There they have started working at around 7.30 in the morning and worked there till late. On all three relevant days; to wit 9th 12th and 13th of December 2016 he has been working there at the Jasper High School, from the early morning till late evening.
 - vii) The accused states that these false allegations of rape are brought against him because he asked them to move out through his son-in-law who brought them, as they have been drinking alcohol and started creating problems, since they came in.
 - viii) At Jasper High School, he has been doing a sub-contract for the Kumari Builders owned by Mr. Narendra Gopal. He denies having forceful sexual intercourse with the PW1.
33. In answering the cross examination, posed by the prosecuting counsel, the witness states that;
- i) He resides at Sukanaivalu road with his two children and the wife. His other children are married and lives elsewhere.
 - ii) His son-in-law whose name he could not recall, brought these tenants and they moved in, in November and vacated on the 24th of December 2016.
 - iii) He knew the PW1, Ms. Riteshni Radhika Singh as a tenant. He hardly used to talk or interact with them.
 - iv) He has educated only up to class 5 and does not understand English and he cannot read or write in English.
 - v) In recording the Caution Interview, He was questioned in Hindi and he has answered in Hindi. However, the police has recorded in English. The

accused says some of the things recorded in the caution interview are incorrect and fabricated.

vi) The accused denies having forceful sexual intercourse with the complainant on the given dates as alleged.

34. The accused called a witness to testify for him. That was Mr. Narendra Gopal. His evidence was that;

i) He is a contractor by profession and owned a company named Kumari Builders and Construction Limited.

ii) In 2016, he has undertaken a contract to do certain renovations and maintenance work at Jasper High School. The contract was on for about 6 months and having commenced in June, the work was to be completed by the 16th of December 2016. Since he was behind the schedule, he has hired a sub-contractor to do some work for him in December 2016. So hired sub-contractors were the Issac builders, owned by Harish Raj, the accused. The sub-contractors have worked for him from 6th of December to the 16th of December 2016 at the Jasper High School under his supervision.

iii) From 6th to 16th of December 2016, Harish Raj the accused and 4 of his workers, altogether 5 of them from Issac Builders were with him and were working for him from 7.30 am to 7.00pm every day and beyond the given times on some of the days.

iv) The sub-contract he had with the Issac Builders was for him to supply the material and them to supply the man-power for which he paid \$40 per person per day. It should be noted that this is somewhat strange way of sub-contracting. It is up to you to use your day to day experiences and the common sense and decide on the acceptability and the weight ought to be attributed to this evidence.

35. That was a summary of the evidence given by the witnesses. Please remember that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I did not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think appropriate. As I have already explained, which evidence you would accept and which evidence you would not accept is a matter for you and you alone to decide.
36. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proven and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offences have been proven beyond a reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.
37. The Accused has indicated his stance and it was that he was elsewhere at the relevant times of the alleged incidents. In other words he relies on an alibi. The law requires the accused to give notice of his alibi beforehand and the accused in this case has failed to give notice as such. Anyway, my direction is for you to consider his position. Even in case you do not accept the accused's stance as true, you should not consider it in-order to strengthen the prosecution case. The accused need not prove that he is innocent. A person may lie as sometimes as it is easier than telling the truth. Therefore even you decide to not to accept the accused's stance, you should not use it to overlook the weaknesses of the prosecution case if any.
38. With the submission of the accused's stance, one of the three situations given below would arise;
- (i) You may accept his stance and, if so, your opinion must be that the accused is 'not guilty'.

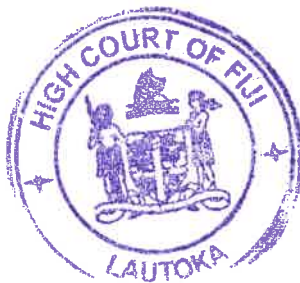
- (ii) Without necessarily accepting his stance you may think, 'well what he says could be true'. If that is so, it means that there is a doubt in your mind and if you can reason it out in your mind, and call it a reasonable doubt, again your opinion must be 'not guilty'.
- (iii) The third possibility is that you reject his stance. But, that itself does not make the accused guilty. Then the situation would then be that you should consider whether the prosecution has proved all the elements beyond a reasonable doubt. If the prosecution has proved all the necessary elements of the offence and also you reject the accused's stance only, you should find the accused guilty of the alleged count.

39. Any re-directions? *- none -*

40. Lady and Gentleman Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the accused. When each of you have reached your separate opinion, you will come back to court and you will be asked to state your opinion.

41. Your opinion should be;

Whether the accused is guilty or not guilty of the alleged 1st to 3rd each count of Rape.



Chamath S. Morais

JUDGE

Solicitors for the State : *Office of the Director of Public Prosecutions, Lautoka*
Solicitors for the Accused : *Baleilevuka Law*