

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 60 OF 2017

BETWEEN : **STATE**

AND : **SATISH CHAND**

Counsel : *Mr. A. Singh for the State*
Accused appeared in person

Hearing on : *05th – 06th of October 2020*

Summing up on : *09th of October 2020*

SUMMING UP

(The name of the complainant will be suppressed and referred to as the PW1 or S.D)

Ladies and gentleman 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 10 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.
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 offences the accused is charged with and matters that will enable you to decide whether or not the charges are 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 a count each of rape and sexual assault.

COUNT 1

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

Satish Chand, on the 27th of February 2017 at Lautoka, in the Western Division, penetrated the vagina of S.D, a 10 year old, girl with his finger.

COUNT 2

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210 (1) (a) and (2) of the Crimes Act 2009.

Particulars of Offence

Satish Chand, on the 27th of February 2017 at Lautoka, in the Western Division, unlawfully and indecently assaulted S.D by kissing her neck and causing a love bite.

18. Now I will deal with the essential elements of the offence of Rape alleged in the counts. Section 207(1) of the Crimes Act reads as;

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

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

(2) A person rapes another person if —

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of

the person's body that is not a penis 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 S.D with his finger,
 - (iii) S.D was below the age of 13 years at that time.
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. The second element is penetration of the S.D's vagina with the accused's finger. 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.
22. To prove the third element of the alleged offence of rape, the prosecution should prove that S.D was below the age of 13 years at the time of the alleged incident.
23. 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.
24. The alleged second count is of Sexual Assault. Section 210 of the Crimes Act states that;
 210. 1) An person commits an indictable offence (which is triable summarily) if he or she—
 - (a) unlawfully and indecently assaults another person;

25. Elements of the offence of Sexual Assault are that:
- [a]. The accused,
 - [b]. Unlawfully and Indecently
 - [c]. Assaulted the Complainant.
26. The Accused is guilty of Sexual Assault, if he unlawfully and indecently assaulted the victim. The word “unlawfully” simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act indecent. Assault can be defined as an application of unlawful force on another’s body.
- You should ask yourselves:
- a) Whether you consider the force which was used could have been sexual because of its nature; and
 - b) If the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, that use of force is in fact sexual in nature.
27. If you are satisfied beyond reasonable doubt that the prosecution has proved all the elements of sexual Assault as explained above, then you must find the accused guilty of sexual assault. If, you have a reasonable doubt with regard to any of those elements concerning the offence of sexual assault, then you must find the accused not guilty.
28. Though there were certain facts agreed by the accused when represented by a counsel, those should be ignored as the accused elected to appear in person for the trial.

Summary of Evidence

29. The PW1, S.D is the sole witness as to the alleged incidents. 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 is 13 years old class 8 student and lives in Buabua with her grandmother.
- ii) She was born on the 07th of August 2006 and her Certificate of Birth is marked and produced as PE1. Accordingly, she was born on the 08th of August 2006.
- iii) In February 2017, she was schooling at AKP School in Ba and was residing with her grandmother in Tauvegavega. She was in class 4 then. Her mother was residing at Koripita in Lautoka. On the 24th of February 2017, a Friday she has come to Lautoka to visit her mother and has stayed with her.
- iv) She knew Satish, since she came to Koroipita. She states that Satish is well known to her mother even before. She calls him uncle and her mother calls him brother.
- v) Satish has invited her and her mother to the birthday party of his daughter which was held on the Sunday the 26th of February night. Having gone to the party, they have stayed the night at Satish's house.
- vi) On the following morning, the 27th of February, 2017 she has woke up around 8.00am and had breakfast at around 9.00am. Then her mother has told her to go to her place with Satish and give Satish \$8.00 from her purse. Accordingly, she has gone to her place with Satish and gone in asking Satish to wait outside. When she was looking for her mother's purse, Satish has come from the behind and held her by her waist. She has pushed him aside and having remembered where the purse was when taking that out, Satish has come from behind and having held her lowered her panty and inserted his finger in to her vagina. While doing so, he has kissed and bit her on the right side of her neck. She has got scared and having pushed him aside has rushed out of the house, asking him to close the door and come.
- vii) Satish's house is 250m away from their house. They were on the opposite sides of the main road. In between there is a bus stand on the main road. When she came to the bus shelter, Satish was coming bit far behind her.

At the bus shelter, she has met Susan aunty, and was asked about her schooling. Thereafter she has rushed home. Though she wanted to tell her mum, she was scared that she will assault her and has not told anything. After sometime, Aunty Susan has come with few others to her place and asked her and Satish to come to her office and has taken her in her vehicle asking Satish to come walking with another person.

- viii) Aunty Susan has taken her to her office and she was questioned by Aunty Susan and another lady at a room whereas Satish was questioned by another person in another room. Aunty Susan has asked her what happened to her neck and she has got frightened and said that it was a mosquito bite. When she asked further, she has told her the truth that Satish having held her from the back inserted his finger into her private part and bit her on the neck.
- xi) Then Aunty Susan having informed her mother, they have gone to the police station to report the matter. She was examined by a doctor on the same day. The witness identifies the accused as Satish.

30. In answering the cross examination posed by the accused, the witness states;

- i) The night before the alleged incident, as she recalls, her, her mother, Shivani, Satish, his wife and their 4 children were at Satish's house.
- ii) The witness has earlier stated that she could not recollect the exact clothes she was wearing at the time of the alleged incident. The accused queries if she cannot recollect the clothes she wore, how could she recollect his face? The witness explains that the incident happened to her and she could recollect the person who did that to her.
- iii) She states that she could not see any injury from the insertion of the finger as she was scared at the time. She has had red mark on the right side of her neck due to biting by him. By the time she met Aunty Susan, the injury on her neck was painful.

- iv) When it was suggested that while washing the dishes at his place on the previous night, she has talked with his daughter about the birth marks and this injury on her neck was already there, the witness states that she did not wash the dishes or do any work at his place on the previous night, did not talk anything about the birthmarks with his daughter and that this injury on the neck was not there in the previous night.
- v) She admits that she told Aunty Susan initially, that the mark on the neck was from a mosquito bite, as she was scared at the time.
- vi) The accused suggests that someone asked her to come and tell these things in court and the witness denies it.

31. The next witness the PW2 called by the prosecution was Ms. Sharin Sanjana Lal, the mother of the PW1. Her evidence was that;

- i) In February, 2017 she lived in Koroipita, working as a cook in a restaurant. She knew Satish Chand as he was a cousin of hers and a neighbor and was associating him like a family member of hers.
- ii) Her Daughter S.D was schooling in Ba and resided with her mother. On the 24th of February, S.D came to spend time with her. There was a birthday function on Sunday, the 26th at Satish's house, as it was his daughter's birthday.
- iii) She has gone there with her daughter and stayed the night there. They have got up around 8.00am and having had breakfast around 9.00am, she has asked her daughter S.D to go to her place with Satish and bring \$8.00 from her purse as Satish wanted to buy something and was short of that amount.
- iv) S.D has gone with Satish and after about ½ an hour, S.D has come running. She has asked her where Satish is and was told by S.D that he is coming. At around 12 noon, Susan the manager of the housing complex, has come and taken S.D to her office. After a while, she has gone to ask why S.D was taken and was informed by Susan of what Satish did to her daughter. Then they have gone to the police station to report the matter and also to the hospital thereafter.

v) She identifies the accused as Satish, whom she has mentioned.

32. In answering the cross examination of the accused, the witness stated that;

- i) When she saw that S.D was nervous when she came running, she has asked her why, but S.D has not said anything to her.
- ii) The accused queries that when there were many people in his house that morning why was S.D sent with him and the witness answers that when she was about to send S.D , Satish told him that he is going that way and he will accompany her and come back.
- iii) The witness states that they both went together. The Accused suggests that he went first and the witness denies it. Again the Accused asks the witness whether she knew where he went to and the witness states that he went to her house with S.D to get the money.
- iv) In answering the questions by the court, she states that she went to Susan's office to see why she has taken S.D. At Susan's office, S.D told everything to Susan when she went in. S.D has told her that when she went inside the house, Satish came, held her from the back, kissed her, pulled her panty down and inserted his hand inside.

33. The PW3 was Susan Radhika Naidu. She was the Assistant General Manager at the Community Development Charitable Trust, a non-governmental organization. She states that;

- i) Her institution provides housing for poor and destitute families and currently provide housing for 242 families, 1100 people, in the Koroipita and apart from that also support education, social development, peoples' wellbeing and income development in the Koroipita community. She has been a part of this organization since 2010.
- ii) In 2017 too, she was holding the post of Assistant General Manager and on the 27th of February 2017, while doing a community visit, around 9.00 – 10.00am, she has seen a child on the road. Since they adopt a strict policy

of children attending school regularly, she has stopped the vehicle and spoken to S.D. She has looked rather apprehensive and fugitive. She was constantly pulling up her shirt and doing her hair like to cover something. She has noticed a red mark on the S.D's right side of the neck and asked what it was. S.D has told that it was a mosquito bite. Then she has observed Satish Chand following S.D at about 2 to 3 meters away from her signaling S.D like what's going on. She has stopped Satish too and asked where he has been to and he looked nervous and told that he went to the shop.

- iii) Satish stays at the South Central side of the community and S.D was staying at the far South of the community. When she met S.D and Satish, both of them were heading towards Satish's house. The mark on the right neck of the S.D looked like caused by an intimate relationship. It was quite visible and was about 1 inch in size.
- iv) Then she has let them go but felt something was not right. She has gone to the office and briefed that to her team mates and having discussed it went with two of them to Satish's house around mid-day. She brought S.D with them in the vehicle and asked one of her team mates to walk to the office with Satish. At the office, she has queried S.D with another team-mate of hers. At first S.D has been evasive but later broke down into tears and told the incident to them.
- v) She has told them that her mum sent her home to get some money and at home when taking the money Satish has grabbed her from the back and kissed her. Then he has pulled her undergarment down and put his finger inside her.
- vi) Then she has called the mother of the S.D and having told her of the incident, has taken them to the police station to report the matter. She, through another has helped S.D to be taken to the Hospital for the medical examination too.

34. In answering the cross examination by the accused, the witness states that;

- i) When she saw the marks on S.D, she asked her what happened. By the time she met them it was around 9.00 – 10.00am. She has come back to his place at around 12.00 – 1.00pm.

- ii) The accused suggests that she came back around 2.00pm and the witness state that it could have been earlier.
35. The final witness called by the prosecution was PW4, Dr. Sudhiksha Singh. Her evidence was that;
- i) She is a qualified doctor, having got her MBBS from the University of Fiji in 2014. She has followed a post-graduate Diploma in Public Health in 2019.
 - ii) In February 2017, she was practicing at the Lautoka Hospital. She identifies and produces a Medical Examination Form, marked PE2. The said document relates to the examination of S.D on the 27th of February 2017.
 - iii) On examination of S.D, she has found that there is a bruise on the right side of the neck alleged to have caused by forceful kissing. On examination of the vagina, the hymen was not intact but there were no bleeding or any other injuries in the area.
 - iv) The doctor opines that it is possible for the hymen to be damaged without any visible bleeding and insertion of a finger as alleged could cause such. As for the nature of the injury it was recent and caused less than 24 hours ago.
 - vi) The witness confirms that the injuries were compatible with the given history of the incident.
36. With leading the evidence of PW1 to PW4, the prosecution closed their case. The Court being satisfied that there is sufficient evidence adduced by the prosecution covering the elements of the alleged offences, decided to call for defense, acting under the virtue of section 231(2), of the Criminal Procedure Act, explaining and giving his due rights to the accused.
37. The accused having understood his rights elected to give evidence and to call a witness on his behalf. His evidence was that;
- i) He did not do anything.

- ii) About a week before the alleged incident, he has scolded the mother of the PW1, the PW2 of not doing any work at his house. But admits that PW2 together with S.D came to their house and stayed with them on the night of the 26th of February 2017.
- iii) On the day of the alleged incident, his brother came to pick him up and he went to see his mother with him. Having spent about 1 and ½ hours with the bedridden mother, he returned home.
- iv) When the court queried of the time he left, he states that he could not see the time as he got out of the house quickly as his brother told that his mother is very sick. That was the only time that his brother called him that day.
- v) When he left home S.D was there at his home and when he came back too S.D was there at his home. He met Susan while he was waiting for his brother to pick him up. He saw Susan speaking to S.D.

38. In answering the cross examination, posed on behalf of the prosecution, the accused states that;

- i) In 2017, he was residing in house no. 121 in Koroipita, Lautoka.
- ii) House no. 33 where PW2 resides is about 300m away from his house.
- iii) In 2017, he has had a good relationship with the PW2.
- iv) His mother was staying in Tavakubu, which is about 15 minutes' drive from his house. He has spent about an hour with his mother that day. He has come back within 1 and ½ hours that day. When his brother called he has stepped out of the house and rushed to the bus stand.
- v) He has met Susan at the bus stand. Susan was speaking to S.D. Having spoken to S.D. Susan asked him where they are.
- vi) He admits that he did not tell the police that he went with his brother.
- vii) The accused denies the allegations and states that PW2's relations are trying to frame him due to jealousy.

39. The accused called a witness on his behalf. That was his brother Atish chand. His evidence was that;
- i) He is uncertain of the date. It was a school day as he dropped his children to school and did some hires in the taxi and came to pick Satish to take him to see their mother.
 - ii) That morning he has called Satish at about 8.00 – 8.30am and told him to come to the bus stand at 10.30am and picked him from there at 10.30am.
 - iii) The witness states that he called Satish 2 hours before and if someone says that he only called Satish just before coming to pick him up, that it is a lie. The accused suggests that he called at 8.00 – 8.30 and asked him to come to the road and the witness denies that and states that he picked up Satish only at around 10.30am.
40. In answering the cross examination posed by the prosecution, the witness states that;
- i) He cannot recollect the date or the month of the relevant incident. It happened in 2017. All he can say is that Satish was with him on that day from 10.30am to 12.00noon. He is not aware where the accused went, before 10.30am on that day.
 - ii) He cannot say whether the accused committed the alleged offence or not.
41. 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.

42. 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 proved and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offence has been proved beyond a reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.
43. The Accused has indicated his stance and it was 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.
44. 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.

45. Any re-directions? *no*

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

47. Your opinion should be;

Whether the accused is guilty or not guilty of the alleged count each of Rape and of Sexual Assault?



Chamath S. Morais
JUDGE

Solicitors for the State : *Office of the Director of Public Prosecutions.*
Solicitors for the Accused : *The Accused appeared in person.*