

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC. 271 OF 2014**

**STATE**

**V**

**SANDEEP NARAYAN DASS**

**Counsel** : Ms. S. Lodhia and Ms. S. Tivao for State  
Ms. T. Kean for the Accused

**Dates of Hearing** : 20 - 22 June 2016

**Date of Summing Up** : 22 June 2016

(The name of the complainant is suppressed. The complainant will be referred to as AS)

**SUMMING UP**

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies for 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 judges of facts.
2. Evidence is what the witnesses said from the witness box in this court room, the exhibits tendered and the admitted facts. Your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard such information.

3. 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 lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
4. 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 evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feeling of sympathy for or prejudice against, the accused or anyone else. No such emotion should influence your decision.
5. 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. Applying your day to day life experience and your common sense as representatives of the society, you should decide whether you can believe what each witness said in court. You may decide that the entire evidence of a particular witness can be believed; or you may decide to believe only a part of the evidence and reject the other part; or you may reject the entire evidence of a witness if you decide that the entire evidence of that particular witness is not capable of being believed.
6. Based on the evidence of witnesses you may decide that certain facts are proved. In addition to those facts you would consider as directly proved, you may also draw reasonable inferences from those proved facts.
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 you and I may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment.
8. In assessing the credibility of a witness, it may be relevant to consider whether there are inconsistencies in his/her evidence or whether he/she had previously made a statement which conflicts with the evidence given in this court. You have to bear in mind that previous statements made out of court are not evidence except for those parts that are put to a witness as inconsistent versions. As I have already told you, evidence is only



what came out from the witness box. When a counsel attempts to highlight an inconsistency, only the alleged inconsistent part in the statement is put to the witness and that part is all you need to consider when it comes to a previous statement made out of court.

9. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what he/she 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 examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
10. The complainant in this case is 10 years old when she gave evidence. The main task before you in this case therefore is to judge whether what this child witness said in her evidence is true and whether the account of the events she gave is reliable. You may have come across children of that age. You will have an idea of the way they think, talk and the way they describe things. With your life experience, you have to decide whether the complainant was a credible witness and whether you can rely on the evidence given by her.
11. Experience has shown that victims of sexual offences may react in different ways to what they went through. Some, in distress or anger may complain to the first person they see. Some, due to shame, fear, shock or confusion may not complain for some time or may not complain at all. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint.
12. As a matter of law you should remember that the burden of proof always lies on the prosecution. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The accused is presumed to be innocent until proven guilty. The prosecution should prove the guilt of the accused beyond reasonable doubt, in order for you to find him guilty of a particular offence. You must be sure of the accused person's guilt.
13. If you have a reasonable doubt in respect of any element of an offence the accused is charged with, as to whether the prosecution has proved that element, then you must find the accused not guilty of that offence. A reasonable doubt is not a mere imaginary

doubt but a doubt based on reason. I will explain you the elements of the offences in a short while.

14. 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 where all three of you agree on whether the accused is guilty or not guilty; but it is not necessary. May I also inform you that, according to our law, I am not bound to conform to your opinion and the final decision on the facts rests with me. However, you being the representatives of the society in this trial, your opinion will assist me immensely to arrive at my final decision.
15. Let us now look at the Information. DPP has charged the accused for the following offences;

***FIRST COUNT***

*Statement of offence*

**Rape:** Contrary to Section 207 (1) & (2)(b) & (3) of the Crimes Decree No. 44 of 2009.

*Particulars of offence*

**SANDEEP NARAYAN DASS** on the 5<sup>th</sup> of July 2014 at Nasinu in the Central division penetrated the vagina of AS a child under the age of 13 years by inserting his fingers into the vagina of the said AS.

***SECOND COUNT***

*[Representative Count]*

*Statement of offence*

**Sexual Assault:** Contrary to Section 210(1)(a) of the Crimes Decree No. 44 of 2009.

*Particulars of offence (b)*

**SANDEEP NARAYAN DASS** between the 1<sup>st</sup> of July 2012 to the 14<sup>th</sup> of July 2014 at Nasinu in the Central Division, unlawfully and indecently assaulted AS by playing with his penis in front of the said AS before ejaculating onto her.

***THIRD COUNT***

*Statement of offence*

**Assault Causing Actual Bodily Harm:** Contrary to Section 275 of the Crimes Decree No. 44 of 2009.

*Particulars of offence (b)*



**SANDEEP NARAYAN DASS** on the 15<sup>th</sup> of July 2014 at Nasinu in the Central Division assaulted AS thereby causing the said AS actual bodily harm.

16. The accused had pleaded guilty for the third count. Therefore, you need not provide your opinion in respect of the third count. However, you should not assume that the accused is guilty of the other counts because he had pleaded guilty for this third count. Further, when you consider the two remaining counts, you must not assume that the accused is guilty of the other count just because you find him guilty of one count. You should bear in mind to consider the two counts separately.
17. You would notice that the second count in the Information is a representative count. When it comes to a representative count, the law says that it shall be sufficient for the prosecution to prove that at least one offence was committed between the dates specified in the count. In count two the prosecution alleges that during the period between 01<sup>st</sup> July 2012 and 14<sup>th</sup> July 2014 the accused sexually assaulted the complainant on several occasions. If you are satisfied that the prosecution has proved beyond reasonable doubt at least one incident between that period, which satisfies the elements of the offence of sexual assault, you should find the accused guilty of the second count.
18. Now let me summarise the evidence led by the prosecution and the defence. Please remember that I will not be reproducing the entire evidence of the case. I would only refer to the evidence which I consider important to explain the case and the applicable legal principles. If I do not refer to certain evidence which you consider as important, you should still consider that evidence and give it such weight you may think fit.

***Case for the prosecution***

19. Prosecution case is that the accused inserted his finger inside the complainant's vulva or vagina on 05/07/14 and that the accused masturbated on her on several occasions during the period between 01/07/12 and 14/07/14. The first incident relevant to the second count took place on a day which the complainant did not go to school and stayed home with the accused as she was sick. The complainant, her brother and the doctor who examined the complainant on 16/07/14 gave evidence for the prosecution.

20. The complainant said that she was living at Newtown between 01/07/12 and 14/07/14 with her mother, her brother and the accused who was her stepfather. She said during that period, on a day she did not go to school and was bathing inside the bathroom, the accused came inside, removed his cloths and he put some white thing on her main part which came out from his main part. The complainant was referring to the genitals by the words 'main part'. She said she was naked when the accused did this to her. According to her the accused had done the same thing to her on several occasions during the above period and it had taken place in the sitting room and the bedroom as well. During this period the accused was not working but her mother was working in a garment factory. She said her father was in jail.
21. One morning when she was sleeping in the sitting room, the accused asked her whether her mother had left for work, and she said yes. Then the accused took her inside the room and removed her clothes. He also removed his clothes and got on top of her on the bed. Then he put the white thing on her main part. He kissed her and then he put his finger in her main part. She said the accused put his finger insider her main part only a little bit and she showed the first phalange of her index finger as the extent to which the accused's finger went inside. Then her brother called the accused and came inside the room. When the brother came inside, the accused pushed her down. She then put on her clothes. She told her brother everything after her brother called her outside and inquired from her. She told him that the accused was doing bad things to her. She also told her mother that the accused was doing bad things to her and the mother told her to inform her if it happens again. She had also told her father about it. She said, when the accused was putting his finger inside her main part, blood was there. She felt bad when this was happening and she cried.
22. She said the accused hit her on 15/07/2014 with a belt and a spoon on her hand, legs, back and her eyes. He hit her for her to read. She was taken to a doctor and she did not speak to the doctor. She does not know whether her father spoke to the doctor. She identified the accused in open court.
23. During cross examination she agreed that the accused worked as a carpenter. On Saturdays and Sundays she stays home with her mother and on Saturdays the accused goes for carpentry work. She said 05/07/14 was a Saturday and the accused would go to work on Saturdays. She agreed that the accused was very strict on her and her brother. She admitted that she and her brother did not like to stay with the accused because he



used to smack them. She said their neighbour took her to the police station. She said she did not say anything to the police officer and the police officer just wrote her statement. She said her father spoke to the police officer who wrote her statement, but in her absence. She admitted that if the neighbor did not take her, she would not have gone to the police station.

24. Second prosecution witness was the complainant's brother who is 14 years old. He said on 05/07/14 when he was sleeping in the sitting room, he heard his sister crying and then he saw the accused on top of his sister through a hole in the tin wall which separated the bedroom and the sitting room. He shouted "oye" and entered the room. Then he saw the complainant lying on the floor and she was naked. The accused was covering him with a blanket. When he asked her what happened, first she did not say anything as she was so scared. After 5-10 minutes when he asked her again, she told him everything. He said the complainant told him that the accused was putting his main part into her main part. He told his mother about the incident the next day and the mother told him to inform her if the accused do it again. He said the accused hit him and the complainant on 15/07/14 because of their studies.
25. During cross examination, he said that a person from the social welfare office recorded his statement at the police station. But after he was shown the statement he admitted that one WPC Visha recorded his statement. It was also pointed out to him that it is stated in the police statement that they told another person about the incident and that his mother did not say anything when they told the mother about the incident. Then when it was put to him that what is stated in the police statement is different from his evidence, he said he did not say that to the police. He agreed that he and his sister were brought to the police station only because they were assaulted by the accused. He said his mother used to go to work on Saturdays and that the accused and mother do not leave the house together when they go to work.
26. Third witness for the prosecution was Dr. Elvira Ongbit. She examined the complainant on 16/07/14 and the relevant medical report was tendered as PE 01. She had noted that the complainant's hymen was intact; a slight swelling on the external urethral opening; and a superficial abrasion on the inner lip of both labia minora. She said the swelling she noted was an injury caused in the form of rubbing. The abrasion found on the labia minora was very close to the vaginal opening and the labia minora is inside the genitalia. She said one of the causes for this injury can be rubbing of the fingers. She

said the abrasion was 4 to 7 days old and that it is possible for it to bleed when it was a fresh wound. She said the hymen will lacerate if anything goes through the vaginal opening. She had noticed hematoma on left lower eyelid and on the right forearm and a slight abrasion on the middle back. She said if a white liquid to come out from male genitalia, it could be semen or some genital discharge of the person who has a sexually transmitted disease.

27. During cross examination, she said the abrasion and the swelling could not be caused by toilet papers and she can't say whether it was the patient's fingers or anyone else's finger that caused the abrasion. She said she can confirm that a finger was not inserted in the patient's vagina because the hymen was intact.
28. During re-examination she said that if a finger was slightly placed in the vagina at the vaginal opening then the hymen would be still intact. She said it is not possible for the injuries to be older than 4 to 7 days.
29. Answering questions posed by the court, she said vagina is part of the female genital tract and vulva is a part of the female external genitalia and labia minora is found inside the vulva.

### *Case for the Defence*

30. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving his guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to give sworn evidence and call one witness.
31. The accused denies both allegations. He says that 05/07/14 was a Saturday and he left for work around 7.30am that morning and that the complainant's mother was at home on Saturdays. He also says that during the period between 01/07/12 and 14/07/14 he stayed home with the complainant only once when she was sick and the complainant's mother also came home that day around 1.00pm.
32. Accused said in his evidence that between 01/07/12 and 14/07/14, he lived at Khalsa Road with his wife who is the complainant's mother and his step children, that is the complainant and her brother. He said during that period he was employed as a carpenter



for 6 months and he worked in a car wash. He said he worked Monday to Saturday and he would commence work at 7.30am. He said his wife was employed in a garment factory and they leave for work together. His wife did not go to work on Saturdays and was at home with the children. He said 05/07/14 was a Saturday and nothing happened before he left for work that morning. He said during the period between 01/07/12 and 14/07/14, he stayed home with the complainant only once when she was sick and his wife also came home at about 1.00pm that day. He said he is a very strict person and he used to beat the two step children when they don't listen to him. He smacked the complainant on 15/07/14 because she did not listen to him. He said the children's father doesn't like him. He said he did not rape the complainant and did not sexually assault the complainant.

33. During cross examination he said the complainant was scared of him. When it was suggested to him that the complainant does not have a reason to make up the allegations he said the complainant and the brother wanted to be with their father because he was beating them.
34. Next witness for the defence was the wife of the accused who is also complainant's mother. She said during the period between 01/07/12 and 14/07/14, she was employed in a garment factory and she worked from Monday to Friday and did not work on Saturdays and Sundays. She and the accused leave for work together at half past seven and the accused used to work on Saturdays. She said the complainant had told her that the accused used to beat the complainant and that the complainant did not like that.
35. During cross examination she said she left the house at Khalsa Road where her children lived after the accused left that house in 2014 because her husband came to live in that house and started causing trouble. She said the complainant or her brother did not tell her that the accused sexually assaulted the complainant, but one day when she came home after work, the neighbours were swearing at the accused that he had raped the complainant. She said the complainant did not say anything when she inquired.

*Admitted facts*

36. In this case, the following facts are admitted by both the prosecution and the defence. You should consider those facts as proven beyond reasonable doubt.

1. *The victim in this case is AS of Khalsa Settlement, 8 years old at the time of the offence and a student of Nasinu Primary School.*
2. *The date of birth of the victim is 5th April, 2006.*
3. *The accused in this case is Sandeep Narayan Dass (alias Aryan) of Jittu Estate, 24 years old at the time of the offence and a carpenter by profession.*
4. *The accused is the step-father of the victim.*
5. *The accused and the victim both resided together in the same house at Khalsa Settlement between 1st July 2012 and 15th July 2014.*
6. *On 15th July 2014, the accused smacked the victim with a belt on her palms.*
7. *The victim was medically examined on 16th July 2014 at MSP Clinic by Dr. Elvira Ongbit.*
8. *The accused was interviewed under caution and charged on 27th September 2014.*

37. To prove the offence of rape, the prosecution must prove the following elements beyond reasonable doubt;

- a) the accused;
- b) penetrated the vulva or vagina of the complainant with his fingers;
- c) without the consent of the complainant or,  
that the complainant was below the age of 13 years at the time of the incident

38. The first element of the offence of rape 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.

39. Second element involves penetration. To establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vulva or vagina of the complainant with his fingers. A slightest penetration is sufficient. You would have noted that the prosecution used the term 'vagina' in a general sense to refer to the complainant's genitalia. However, according to the doctor who gave evidence, in



medical terms, 'vagina' is the tube which commences from the vaginal opening and the vaginal opening is covered by labia minora. She said labia minora is inside the vulva.

40. Law says that 'a child under the age of thirteen years is incapable of giving consent' when it comes to the offence of rape. It is an admitted fact in this case that AS was 8 years old at the time of the alleged incident. Therefore, you should consider that the third element above is proven beyond reasonable doubt.
41. The accused is charged with the offence of sexual assault under section 210(1)(a) of the Crimes Decree in the second count. The elements of the offence under section 210(1)(a) are;
  - a) the accused;
  - b) unlawfully and indecently;
  - c) assaulted the complainant.
42. Again, the first element involves the identity of the accused.
43. The word "unlawfully" simply means without lawful excuse. An act is indecent, if it has some element of indecency and a right-minded person would consider such conduct indecent. Assault is the use of unlawful force.
44. You should also ask yourself, firstly, whether you consider the force which was used could have been sexual because of its nature; and if the answer is yes, whether, in view of the circumstances and/or the purpose in relation to the force used, that using of force is in fact sexual.
45. It is for you to decide whether the prosecution has proven beyond reasonable doubt that the accused masturbated in front of the complainant and ejaculated on the complainant's body at least on one occasion during the period between 01<sup>st</sup> July 2012 and 14<sup>th</sup> July 2014 and then whether you are satisfied that that act is a sexual assault, which is unlawful and indecent.
46. In the event you accept the prosecution evidence that the accused masturbated in front of the complainant and ejaculated on the complainant's body at least on one occasion during the period in question, but not satisfied that the above elements are made out;

then you should consider whether the alleged act satisfies the elements of section 210(1)(b)(ii) of the Crimes Decree. That is, whether;

- a) the accused;
- b) caused the complainant to witness;
- c) an act of gross indecency;
- d) without her consent.

47. If you are to consider the offence under section 210(1)(b)(ii) of the Crimes Decree, you should decide whether the act of the accused is an act of gross indecency and whether he made the complainant witness that act without her consent. You should also consider whether the accused knew or believed that she was not consenting or did not care whether she was consenting or not.
48. The defence says that there are inconsistencies in the evidence of the complainant and of her brother and there are inconsistencies between the evidence of the prosecution witnesses.
49. Defence highlights that, among others;
- a) the complainant said in her evidence that her father was in jail during the relevant time and that her brother said in evidence that the father lived elsewhere;
  - b) the complainant said in her evidence in chief that the accused did not work but admitted during cross examination that he worked as a carpenter;
  - c) the complainant said in her evidence that she told her brother everything but the brother said in his evidence that the complainant told him that the accused was putting his main part in her main part;
  - d) complainant's brother said that he did not tell anyone else about what he saw except their mother and that mother told him to inform her if it happens again, but he had told the police that they told Mona's mother about it and also that when they told their mother, she said nothing;
  - e) the doctor said that the injuries were 4 – 7 days old and the complainant was examined 11 days after the alleged incident of rape.



50. In dealing with inconsistencies, first you have to be satisfied that in fact there is an inconsistency. If you are satisfied that there is an inconsistency, then you should consider whether that inconsistency is material and relevant or insignificant and irrelevant. If you find the inconsistency to be material and relevant, then you must consider whether there is any explanation for that inconsistency. If there is no such explanation or if you are not satisfied with the explanation, again you have two options. You may either conclude that that particular witness is generally not to be relied upon or you may decide to disregard only part of his/her evidence which you consider unreliable.
51. On the other hand, if you consider the inconsistencies to be insignificant and irrelevant, or if you are satisfied with the explanation given, then you may consider such witness as a reliable witness notwithstanding the inconsistency.
52. You heard the evidence of the third witness who was the doctor who examined the complainant. She gave her opinion based on what she observed when she examined the complainant. You may give whatever weight you consider appropriate with regard to the observations and the opinion given by the said doctor.
53. You must remember to assess the evidence for the prosecution and defence using the same yardstick but bearing in mind that always the prosecution should prove the case.
54. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case beyond reasonable doubt remains on the prosecution throughout. Accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate. In the event you disbelieve the accused, that does not make him guilty of an offence charged. The situation would then be the same as if he had not given any evidence at all. You should still consider whether the prosecution has proved all the elements beyond reasonable doubt.
55. Any re-directions?
56. Madam and Gentlemen 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. You may peruse the exhibit if you wish to do so. When you have reached your

separate opinion you will come back to court and you will be asked to state your separate opinion.

57. Your possible opinion should be as follows;

1<sup>st</sup> count – guilty or not guilty  
[rape]

2<sup>nd</sup> count – guilty or not guilty  
[sexual assault – section 210(1)(a)]

If not guilty

Alternative offence – guilty or not guilty

[sexual assault – section 210(1)(b)(ii)]



A handwritten signature in blue ink, appearing to read "Vincent S. Perera".

Vinsent S. Perera  
JUDGE

Solicitors for the State: Office of the Director of Public Prosecution, Suva.  
Solicitor for the Accused: Office of the Legal Aid Commission, Suva