

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**  
**CRIMINAL CASE NO. HAC 180 OF 2015**

**STATE**

**VS**

**ANIL KUMAR**

**Counsel** : **Ms. M. Chowdhury** for the **State**  
**Ms. T Kean** for the **Accused**

**Hearing** : **11<sup>th</sup> October** and **13<sup>th</sup> October 2016**

**Summing Up** : **14<sup>th</sup> October 2016**

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**SUMMING UP**

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Madam and Gentlemen Assessors,

[1] We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear more. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.

- [2] As the presiding judge, it is my task to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give you on matters of law. It is also important to note that, if I give you a caution, you have to take it also into consideration, in coming to your opinion.
- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful and reliable. You will then apply relevant law, to the facts as revealed by such credible evidence. In that way you arrive at your opinion.
- [4] During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent view.
- [5] In forming your opinion, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinion. You must take all evidence into consideration, before you proceed to form your opinion. There are no items of evidence which could safely be ignored by you.
- [6] It is also important to note that, in forming your opinion on the charge against the accused, it is desirable that you reach a unanimous opinion; that is, an opinion on which you all agree, whether he is guilty or not guilty. However, the final decision on questions of fact rests with me. I am not bound to conform to your opinion. However, in arriving at my judgement, I shall place much reliance upon your opinion.
- [7] I have already told you that you must reach your opinion on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] The evidence is what the witnesses said from the witness box, the documents, the things received as prosecution or defence exhibits and any admissions made by the parties.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.

- [10]** A few things you have heard in this Courtroom also are not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted that particular suggestion as true. The opening and closing submissions made by State Counsel are not evidence. The closing submission made by the Defence Counsel is not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.
- [11]** As I already indicated to you, another matter which will be of concern to you is the determination of truthfulness of witnesses, and the reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified.
- [12]** Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13]** You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence and may find Court environment distracting. Consider also the likelihood or probability of the witness's account.
- [14]** The experience of the Courts is that those who have been victims of rape react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others will not. The reason for this is that every victim has his or her own way of coping. 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.
- [15]** The experience of the Courts is that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. Victim's reluctance to report the incident could be also due to shame, coupled with the cultural taboos existing in their society, in relation to an open and frank discussion of matters relating to sex, with elders. There is, in other words, no classic or typical response by victims of Rape.

- [16] Another consideration may be; has the witness said something different at an earlier time or whether he or she is consistent in his or her evidence? In assessing credibility of the testimony of a witness on consistency means to consider whether it differs from what has been said by the same witness on another occasion. Obviously, the reliability of a witness who says one thing one moment and something different the next about the same matter is called into question.
- [17] In weighing the effect of such an inconsistency or discrepancy, consider whether there is a satisfactory explanation for it. For example, might it result from an innocent error such as faulty recollection; 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. Credibility concerns honesty. Reliability may be different. A witness may be honest enough, but have a poor memory or otherwise be mistaken.
- [18] 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.
- [19] Lady and gentlemen, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [20] Having placed considerations that could be used in assessing credibility of the evidence given by witnesses before you, 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.
- [21] 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 to the single charge of Rape. 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 commonsense and wide experience which you have acquired living in this society.

- [22] 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.
- [23] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of Primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [24] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [25] In order to illustrate this direction, I will give you an example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [26] It does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.
- [27] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove. That burden rests on the prosecution to prove the guilt of the accused.
- [28] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offence charged. The fact that the accused has given evidence and called a witness does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence.
- [29] I have said that it is the prosecution who must prove the allegations. Then what is the standard of proof or level of proof, as expected by law?

- [30] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond reasonable doubt. This means that in order to convict, you must be sure that the prosecution has satisfied beyond a reasonable doubt of every element that goes to make up the offence charged. I will explain these elements later.
- [31] It is for you to decide whether you are satisfied beyond a reasonable doubt that the prosecution has proved the elements of the offence and the other matters of which you must be satisfied, such as identity, in order to find the accused guilty. If you are left with a reasonable doubt about his guilt, your duty is to find the accused not guilty. If you are not left with any such doubt, then your duty is to find the accused guilty.
- [32] You should dismiss all feelings of sympathy or prejudice, whether it is sympathy for victim or anger or prejudice against the accused or anyone else. No such emotion has any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinion.
- [33] Let us now look at the information.
- [34] There is one charge preferred by DPP, against the accused:

## **FIRST COUNT**

### ***Statement of Offence***

**RAPE:** Contrary to Section **207(1)** and **(2)(a)** of the Crimes Decree 44 of 2009.

### ***Particulars of Offence***

**ANIL KUMAR** on the **30<sup>th</sup> day of April 2015** at Nasinu in the Central Division had carnal knowledge of **TALEI ULUIVITI** without her consent.

- [35] I shall now deal with the elements of the offence of Rape. In order to prove the count of Rape, the prosecution must prove beyond reasonable doubt that the accused penetrated Talei Uluiviti's or the complainant's vagina, by his penis. The slightest penetration is sufficient to satisfy this element.
- [36] A person of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was over 13 years of age at the time of the alleged offending and therefore, had the capacity to consent.

In the circumstances, the prosecution must also prove that the complainant did not consent to the alleged sexual penetration.

[37] Apart from these elements of the offence of Rape, the identity of the person who is alleged to have committed the offence must also be proved by the prosecution. What it means is that it was this accused and none other had penetrated the complainant's vagina on that date and time. There must be positive evidence as to the identification of the accused.

[38] If you are satisfied beyond a reasonable doubt that the accused penetrated the complainant's vagina with his penis, then you must find him guilty.

[39] In our law, no corroboration is needed to prove an allegation of Sexual Offence and Rape is obviously considered as Sexual Offence.

[40] If you find that the prosecution failed to establish any of these elements in relation to the single count of Rape, then you must find the accused not guilty to the charge.

[41] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

[42] The parties have consented to treat the following facts as "*agreed facts*" without placing necessary evidence to prove them:

1. *It is agreed that ANIL KUMAR [hereinafter referred to as 'Mr Kumar], was 44 years old at the time of the alleged offence.*
2. *It is agreed that Mr Kumar was interviewed under caution on the 1<sup>st</sup> day of May 2015 by DC 3180 Nicklesh in the English Language at the Nasinu Police Station and WDC 2364 Maraia was the witnessing officer.*
3. *It is agreed that Mr Kumar was formally charged by WDC Niadera at the Valelevu Police Station on the 1<sup>st</sup> day of May 2015 in the English language.*

[43] The prosecution, in support of their case, called only the complainant. The accused gave evidence and called the medical officer who had examined the complainant.

### **Case for the Prosecution**

#### **[44] Evidence of the Complainant Talei Uluviti**

- (i) *In her evidence the complainant stated that on 30<sup>th</sup> April 2015 at about 7.00 to 7.30 a.m. she had gone to visit her friends Litiana*

*and Bonbon, who lived in Nuqa Place at Valelevu with another friend called Sharon. At Nuqa place, she found that her two friends were asleep and then she started to eat some biscuits. After eating biscuits, she too slept with them. Then there was a knock on the door and when the complainant opened it, she found another girl called Johanna. The complainant let her come in and then they started to chat. By this time Litiana and Bonbon were up. Johanna invited them to visit her church.*

- (ii) At that time the accused also came into the house. When the complainant asked who it was from Litiana, she was told that he owned the house they were in. The accused then locked the door and told them that “no one to go out”. The girls were in the bed room at that time and then Johanna called some of her male friends who were there in the vicinity of the house, to open the door.*
- (iii) The accused got angry over this and punched Johanna on her leg and threw her out of the house after opening the door. The complainant and other girls were in the sitting room and were nervous upon seeing the incident. Then the accused, having closed the door again, threatened the girls that he would slap or punch them if they open it.*
- (iv) Describing the incident of rape, the complainant said then the accused went into the bathroom, took out his clothes and was wearing only a towel. Then he forcibly pulled the complainant into his room and ripped her top off. At that time he was holding a knife in his hand and said that he would cut her breast, if she did not take her clothes off. She then took off her pants and panties. The complainant was lying on the bed and the accused was kneeling beside her on the bed. He inserted his penis into her vagina for few minutes and she felt pain.*
- (v) Then he got up and left the room. The complainant too went out of the room and had a wash. Then the accused said that he is not afraid of the law or of Police.*
- (vi) Her friends were sleeping at this time and she did not tell about them of the incident until she reported it to the Police.*



[45] That was the case for the prosecution. You then heard me explaining several options to the accused. I explained to him that he could remain silent or give sworn evidence and call witnesses on his behalf. He could also address Court. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests on prosecution at all times. But he opted to offer evidence under oath and also to call the medical witness, in support of his denial. He also tendered the medical report of the complainant marked as **D.E. No. 1**.

### Case for the Accused

#### [46] Evidence of the Accused

- (i) *The accused is a taxi driver by profession. He works in the night and used to return to his house to sleep in the morning.*
- (ii) *On 30<sup>th</sup> April 2015, at about 6.00 a.m. he returned to his home at Ogo place in Valelevu. He found Liti and Bonbon were there. He knew them as for the past one year they used to visit his house and also stayed there for few days from time to time. When he reached home they were sleeping in his sitting room. His house is a one room house and had a partition in between sitting and bed room. They knew how to open the door as it had no lock but only a bolt.*
- (iii) *The accused then woke them up, had breakfast with them. Then the complainant too came in. The girls started to talk about themselves. Then another girl joined them. The accused then went to have a shower and told the girls that he would sleep and not to make noise. At that time, there were some men drinking home brew on the other side of the road. The girl who came last called these men into the house saying they are her cousins.*
- (iv) *The accused got angry and chased the girl who came last away. He told her not to return to his house. He also locked the door from inside. He then asked the three girls to wake him up at 2.30 p.m. and he went to sleep. The three girls also slept.*
- (iv) *He woke up at about 10.00 or 10.30 a.m. when the Police came to his house. He learnt that a charge of common assault was levelled against him by the girl, who he threw out earlier in the morning. The Police wanted him to come with them and at about 4.30 p.m. he was told by the Police of the allegation of Rape. He denied the allegation.*

**[47] Evidence of Dr. Nitik Ram**

- (i) This witness is attached to CWMH Hospital as its Registrar of Obstetrics and Gynaecology Department for the past 4 years and holds a M.B.B.S. degree. Currently he is in the 3<sup>rd</sup> year of a 4 year M.Sc degree programme. He examined the complainant on 30<sup>th</sup> April 2015 at 7.20 p.m.*
- (ii) During the examination, it was observed by the medical witness that there were no injuries on her body or in the vaginal area except for a bruise on her right breast, caused by one of her friends whilst at play. Her hymen was dilated and open.*
- (iii) In explaining his opinion that he “cannot rule out recent intercourse” the witness explained that if the complainant was sexually aroused and her vagina is lubricated she would not have any injuries after sexual intercourse. If there was forceful intercourse, then, he would expect some injury and it is in a rare case that there would be no injuries. An injury to hymen would heal only within 48 hours to 7 days as there is a good blood supply to vaginal wall. He tendered the medical report prepared by him, marked as **D.E. No. 1.***

**Analysis of all evidence**

- [48]** The prosecution relied only on the evidence of the complainant to prove its case while the accused offered evidence and called a witness.
- [49]** Firstly, you must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by the complainant is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the single count of Rape, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved the elements of the offence of Rape and also identity of the accused, beyond a reasonable doubt.
- [50]** It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on the prosecution also on the evidence of the accused. You must consider his evidence also for its consistency and also the probability of his version. If you find the evidence of the accused is truthful and

reliable, then you must find the accused not guilty of the charge of Rape, since the prosecution has again failed to prove its case.

- [51] However, I must caution you that if you reject the evidence of the accused as not truthful and also unreliable that does not mean the prosecution case is automatically proved. They have to prove their case independently of the evidence placed before you by the accused, and that too on the evidence they presented before you.
- [52] With this caution in mind, we could proceed now to consider the evidence of the prosecution as well as that of the accused for its truthfulness and reliability.
- [53] At the beginning of this summing up, I described some considerations you might want to apply to the evidence in order to satisfy yourselves as to the truthfulness and reliability of the evidence. One such consideration is the consistency of the evidence.
- [54] In dealing with the issue of consistency, I shall first refer to the prosecution's case and particularly to the evidence of the complainant.
- [55] Evaluating the complainant's evidence for its truthfulness, you have to consider whether her allegation was consistently made. The complainant said in her evidence that she had not told any of her friends as to the incident but directly reported to the Police. The evidence revealed that the Police came to the accused's house, upon a complaint lodged by the other girl, who was chased out by the accused, for assault. Then the complainant made her accusation against the accused.
- [56] It is your duty to consider in the light of these items of evidence whether the complainant is consistent about the allegation she made before you in her evidence and whether it was made on the first available opportunity and also without undue delay.
- [57] On the issue of consistency of the complainant's evidence, the following items of evidence could also be considered. During cross examination, it was elicited from the complainant that she told Police that the accused used a rolling pin and that she did not mention about the accused threatening her with a knife. She admitted that she mentioned about the knife for the first time in this Court since the incident and later admitted that the accused had a rolling pin and not a knife.
- [58] It was also elicited during cross examination that she told Police that the accused took her clothes off. In this Court, however, she said in evidence that she herself removed her pants and panties when the accused threatened her with a knife. She admitted that what she said to Police is correct and not the evidence she gave in Court.

- [59] When you consider an inconsistency in evidence of the complainant with the statement made by the complainant to the Police on the same point, you should consider what she said to the Police only to test her consistency. You should not consider what the complainant said to the Police on a particular point as evidence in the case. The statement to Police is not evidence and it should only be used to see whether the complainant is consistent on a particular point.
- [60] These are the inconsistencies in the prosecution case. When you consider what the complainant told Police on a particular point and what she stated in evidence before us on the same point are different to each other, you have to consider whether it was due to her faulty memory, mistaken belief, an error in description, or whether she was deliberately lying under oath. It is for you to decide the effect of these inconsistencies and to decide the truthfulness and reliability of the complainant's evidence. You must also decide what weight you attach to her evidence, in view of these inconsistencies.
- [61] Similarly, you have to consider any inconsistency in the accused's evidence and decide its effect on truthfulness of his evidence. During the cross examination of the complainant, the accused suggested his position to the complainant. Then he gave evidence. The prosecution did not contradict the accused. In considering the accused's evidence on consistency you will have to decide whether it is truthful or not.
- [62] In addition to above mentioned considerations on evaluation of evidence; there is another factor in considering whether the evidence of the prosecution and the accused are truthful and reliable. That is the relative probability of the conflicting versions of events as presented by the parties.
- [63] The evidence of the prosecution is that the accused, having threatened the complainant with a knife, forcibly penetrated her vagina with his penis for several minutes. The accused also admitted that she was there in his house with other girls and he has chased away one girl that morning. The complainant said that she was threatened with a knife and the accused threatened her that he would cut her breast off with it. However, she then admitted in cross examination that the accused had only a rolling pin.
- [64] If the accused had only a rolling pin, then he could not have threatened to cut her breast off with that rolling pin. She admitted that she mentioned about knife for the first time in Court. She also did not know what the accused did with a rolling pin. The accused denies having a rolling pin as he says he never made *roti* in his house.
- [65] The evidence reveals that the Police arrived upon the complaint of the girl who was earlier chased out by the accused. Neither the accused nor the complainant

expected the Police to arrive at the house. The complainant was missing from her parent's house for over two weeks. The complainant admitted that her mother would be upset if she came to know that the complainant was in an Indian man's house. There was the incident of chasing one girl out by the accused after the assault. Did the complainant built up on this incident; claiming rape, in order to avoid her mother's anger? She said "yes" when it was suggested to her.

- [66] Is it probable that the complainant made up this story of rape as she admitted and that is why she gave inconsistent evidence? Is it probable that she forgot about the details of the incident after 18 months since the incident? If so why she claimed that he had a knife and threatened to cut her breast off when she cannot recollect the details accurately? Was it due to her young age or due to some other reason? These are some of the probabilities you may consider.
- [67] The accused paints a different picture. He totally denied any wrong doing. It is his claim, that the complainant with the other girls fabricated this story for two reasons. The accused claimed that the girls had no place to go and they, with the connivance of the complainant, made this allegation of rape, so that they could remain in his house. In addition, and more importantly, the accused elicited from the complainant that she feared that her mother would be upset if she found out that the complainant had slept in an Indian man's house and therefore said she was raped.
- [68] It is therefore, your responsibility to decide whether these admissions by the complainant makes the accused's case more probable, in its truthfulness and reliability than the prosecution.
- [69] In addition, the accused relied on the evidence of the medical officer who examined the complainant on the day of the alleged incident. This kind of evidence is given to help you with scientific matters about the witness has expertise. As you have heard, experts carry out examinations which are relevant to the issues you have to consider. They are permitted to interpret results of the examinations for our benefit, and to express opinions about them, because they are used to doing that within their particular field of expertise. You will need to evaluate expert evidence for its strengths and weaknesses, (*if any*) just as you would with the evidence of any other witness. Remember, that while experts deal with particular parts of the case, you receive all the evidence and it is on all the evidence that you must make your final decision.
- [70] The report prepared by the medical witness is marked by the accused as **D.E. No. 1**. There were no injuries on the body of the complainant and on her vagina. He said in evidence that he would expect to see some injury in the vagina if there was forceful penetration. But he observed none. He also said rarely such a situation might occur.

As already noted, the accused totally denied the allegation of rape. In the light of the medical evidence, it is your duty to consider whether the denial of the accused is more probable than the claim of penetration by the complainant.

- [71] The complainant also claimed that she was kicked and slapped by the accused at the time of the alleged incident. The medical report does not support this claim. She was examined by the medical officer only after 12 hours. Is it probable the complainant was assaulted but had no tell-tale marks or she fabricated this story to have more support on her claim that the accused raped her?
- [72] There could be many other probabilities you would like to consider arising out of the evidence placed before us. You may consider all these probabilities and should decide which one is the more probable one, based on your common-sense.
- [73] Another consideration in evaluating evidence for its truthfulness and reliability is the manner of each witness in giving evidence. Please consider the manner in which the complainant and the accused gave evidence and faced their cross examinations. You would have noted during cross examination, the questions had to be repeated as the complainant did not answer them for some time. You may also consider the way she faced examination in chief. You would consider whether the complainant and the accused, when they answered the questions whether they did it with confidence, without undue delay or whether they did ponder over a question for a long period thinking of an answer.
- [74] I must caution you over one other important matter. When I present the accused's version, alongside the version of the complainant, you might get an impression that the accused must prove that the complainant fabricated this allegation to face her mother or made up this allegation to take occupation of his house. That is wrong. He is under no legal duty to disprove the case for the prosecution or to prove his innocence. He is not even under a legal duty to offer evidence. He could have remained silent. However, when he does give evidence, then, as already directed, it must first be evaluated for its credibility and reliability.
- [75] So far, I have directed you on the assessment of credibility of the witnesses for the prosecution and of the accused. If you reject the evidence and preferred to accept the prosecution evidence as truthful and reliable then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the elements of the offence beyond a reasonable doubt.
- [76] The prosecution must prove that the accused penetrated the complainant's vagina with his penis. As already noted the complainant had said that the accused inserted his penis into her vagina for few minutes and she felt pain. I have already referred to the medical evidence on this issue when I directed you to consider the probabilities

of version of events. If you accept it as sufficient proof of penile penetration of the complainant's vagina, then in addition, the prosecution must prove that the accused penetrated her vagina without her consent.

- [77] I shall now direct you on the issue of consent. It is our law that consent of the woman must freely and voluntarily be given. She must have the necessary mental capacity to give consent. It is important to note that mere submission to sexual act without physical resistance by the woman cannot be considered as consent. Even if there is consent, if that consent is obtained by force, threat, fear of bodily harm, or exercise of authority then also it cannot be considered as consent acceptable to law.
- [78] The prosecution wants you to believe that it was due to the threats with a knife and physical assault on the complainant that she had silently endured the alleged sexual aggression by the accused. The complainant's evidence is that she was threatened to undress by the accused with a knife in his hand. He also threatened to cut her breast off. She was kicked and slapped. However, during cross examination she admitted that the accused only had a rolling pin and not a knife. When asked as to what the accused did with the rolling pin, she said "I don't know".
- [79] If the accused had no knife, then the threat of cutting her breast off with it does not arise. If the complainant cannot remember what the accused did with a rolling pin, then there is no evidence of threat of physical harm issued by the accused even if he did have a rolling pin. The medical report **D.E. No. 1** did not reveal that she had any tell-tale marks, which are supportive of her claim that she was kicked and slapped. It is in consideration of these items of evidence; in the light of the legal provisions I already explained, you have to decide, whether she consented for the alleged sexual act of the accused.
- [80] In relation to the issue of consent, there is another aspect you must consider. As I have already directed you earlier on my summing up, the prosecution must prove that there was no consent by the complainant or the accused was reckless about it. What that means is whether the accused realised that there was a risk that she was not consenting but carried on with his act anyway when in the circumstances known to him it was unreasonable to do so.
- [81] If you are not sure that he would have realised she was not consenting then you must proceed to consider whether the accused might have been reckless as to whether she consented. Then you must consider, whether he genuinely believed she was consenting. If you think so, then you must find the accused not guilty of Rape. If you do not accept that he thought she was consenting when you consider all the circumstances, then you could convict him of Rape.

**[82]** I shall now direct you on another important issue of the case. You will recall that I have already directed you on this topic by referring to the identity of the accused. It is a vital component of the prosecution case and if it had failed to prove the fact that it was this accused and no other had penile penetration of the complainant's vagina, then you must find the accused not guilty of the count of Rape.

**[83]** The prosecution relies on the complainant's evidence to prove that it was the accused and no other who penetrated her vagina. The evidence of the complainant before us is that the alleged incident took place in the morning. The accused is not a known person and she saw him for the first time on that morning. She had seen him in close proximity. Whether there was sufficient identity of the accused at that time and whether there is a mistake in identifying the person are questions of fact you have to consider and decide in the light of available evidence.

**[84]** In summary and before I conclude my summing up, let me repeat some important points in the following form:

- i. If you accept the accused's denial of the prosecution's version of events, then you must find the accused not guilty of the single charge of Rape;*
- ii. If you reject the accused's denial and his version of events, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution;*
- iii. If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charge of Rape;*
- iv. If you find the prosecution evidence is both truthful and reliable then only you must consider the elements of the charge of Rape was proved beyond reasonable doubt. If so, then you must find the accused guilty of the count of Rape. If not, then you must find the accused not guilty of Rape.*

**[85]** If you have any reasonable doubt about the prosecution case as a whole or an element of the offence, including identity of the accused, then you must find the accused not guilty.

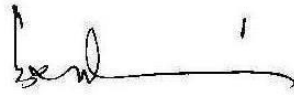
**[86]** Any re directions the parties may request?

**[87]** Madam and Gentlemen assessors, this concludes my summing up of law and evidence. Now you may retire and deliberate together and may form your individual opinions on the single count of Rape against the accused. When you have reached



your individual opinions you will come back to Court, and you will be asked to state your opinion.

[88] I thank you for your patient hearing.



**ACHALA WENGAPPULI**  
**JUDGE**



**At Suva**

**This 14<sup>th</sup> Day of October 2016**

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