

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 93 of 2013

STATE

v

- 1. AMITESH ANISH NARAYAN**
- 2. SHAVINDRA SHOMAL DUTT**

Counsel : Ms. R. Uce for the State.
: Mr. M. Anthony and Mr. S.P. Gosai for the
Accused.

Date of Hearing : 18 April 2017
Closing Speeches : 19 April 2017
Date of Summing Up : 21 April 2017

SUMMING UP

(The name of the complainant is suppressed, the complainant will be referred to as "MR").

Madam and Gentlemen Assessors

[1] It is now my duty to sum up this case to you.

ROLE OF JUDGE AND ASSESSORS

[2] In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as

reliable, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

- [3] So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
- [4] You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused persons are guilty or not.
- [5] State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
- [6] You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.
- [7] During the closing speeches the learned Defence Counsel told you that the State had not called the police investigators to give evidence in view of the allegations raised by the complainant against the Police Officer who had written her police statement that the Officer had written things which the complainant had not told the Officer to write. I direct you to

disregard this submission. It is not for the defence or anyone to suggest how the State should present its case.

- [8] Furthermore the Defence Counsel also stated that the State had not tendered the caution interview of the accused persons as part of their case. I also direct you to disregard this submission as well since there is no legal obligation on the State to tender the caution interviews of the accused persons should it not wish to do so.

BURDEN OF PROOF AND STANDARD OF PROOF

- [9] As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused persons to prove their innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.
- [10] The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused persons guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
- [11] Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
- [12] You must decide the facts without prejudice or sympathy to either the accused or the victim. Your duty is to find the facts based on the evidence without fear, favour or ill will.

- [13] Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

AMENDED INFORMATION

- [14] The accused persons are charged with the following offences: (a copy of the amended information is with you).

FIRST COUNT

Statement of Offence

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

Particulars of Offence

AMITESH ANISH NARAYAN, between the 24th day of April 2013 and the 25th day of April 2013, at Nadi in the Western Division, penetrated the vagina of 'MR' with his penis, without the consent of the said 'MR'.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

SHAVINDRA SHOMAL DUTT, between the 24th day of April 2013 and the 25th day of April 2013, at Nadi in the Western Division, penetrated the vagina of 'MR' with his penis, without the consent of the said 'MR'.

- [15] To prove the offences of rape the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:

- (a) The accused persons;
- (b) Penetrated the vagina of the complainant "MR" with their penis;
- (c) Without her consent;
- (d) The accused persons knew or believed the complainant "MR" was not consenting or didn't care if she was not consenting at the time.

[16] The slightest of penetration of the complainant's vagina by the accused persons penis is sufficient to satisfy the act of penetration.

AMENDED ADMITTED FACTS

[17] In this trial the prosecution and the defence have agreed to certain facts which have been made available to you. This means you should consider these facts as proven beyond reasonable doubt.

[18] The amended admitted facts are as follows:

1. **'MR'** (hereinafter referred to as the 'complainant') at the material time resided at Kennedy Hotel, Nadi and was 17 years of age.
2. *Amitesh Anish Narayan (hereinafter referred to as the '1st accused') at the material time resided at Nawaka, Nadi and was 23 years of age.*
3. *Shavindra Shomal Dutt (hereinafter referred to as the '2nd accused') at the material time resided at Nakurakura, Nadi and was 22 years of age.*
4. *On the 24th of April, 2013 the two accused met the complainant at the MH Supermarket in Nadi Town.*

5. *The two accused walked with the complainant to Koroivolu Park in Nadi Town.*
6. *The two accused had sexual intercourse with the complainant at Koroivolu Park.*
7. *The only issue that needs to be determined is whether the said sexual intercourse between the two accused and the complainant was consensual or not.*

- [19] From the admitted facts you will have no problems in accepting as proven beyond reasonable doubt that the complainant was 17 years of age and both the accused person were 23 and 22 years of age respectively. On the 24th of April 2013 the two accused met the complainant at the MH Supermarket, Nadi Town. The two accused with the complainant walked to the Koroivolu Park in Nadi Town where the two accused had sexual intercourse with the complainant. The only issue that needs to be determined is whether the sexual intercourse between the two accused and the complainant was consensual or not.
- [20] In this trial the accused persons have denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused persons who had penetrated the vagina of the complainant with their penis without her consent and the accused persons knew or believed the complainant was not consenting or didn't care if she was not consenting at the time that is between 24th April 2013 and 25th April 2013.
- [21] The first element of the offence is concerned with the identity of the persons who allegedly committed the offence. There is no dispute that it

was not the accused persons as alleged. You are to consider this element of the offence as proven beyond reasonable doubt.

- [22] The second element is the act of penetration of the complainant's vagina by the accused persons with their penis. Like the first element there is no dispute that it was not the accused persons who had penetrated the vagina of the complainant as alleged. You are to consider this element of the offence as proven beyond reasonable doubt as well.
- [23] This leaves you to consider the third element that is of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all.
- [24] If you are satisfied that the accused persons had penetrated the vagina of the complainant with their penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
- [25] You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
- [26] If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused persons had inserted their penis into the complainant's vagina without her consent then you must find the accused guilty as charged.

[27] If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of rape, then you must find the accused persons not guilty of the offence they are charged with.

[28] As a matter of law, I have to direct you that an offence of sexual nature as in this case does not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.

PROSECUTION CASE

[29] The prosecution called three (3) witnesses to prove its case against both the accused persons. The complainant recalled that on 24th April 2013 at about 10.00pm she received a call from the first accused she knows as Michael asking her to meet in Town. She knew the first accused from three months prior to the incident in April.

[30] The complainant walked all the way from Kennedy Hotel to Nadi Town by herself. At MH Supermarket she met the first accused who was waiting for her with the second accused. The complainant did not know the second accused. From MH Supermarket all went to Nadi bus stand arriving there at about 11.00pm. According to the complainant the first accused asked her to go to Koroivolu Park where his transport would come and pick him. At Koroivolu Park the first accused started to wrap her at the back and then pushed her as a result she fell to the ground beside the drain. After this the first accused sat on her thighs and then took off her clothes. She was wearing a top and $\frac{3}{4}$ pant.

[31] The first accused removed his pants, the second accused was standing where her head was and he held and pulled both her hands over her

head. The first accused opened her thighs, his trousers were also open and he was sitting on her. The first accused inserted his penis into her vagina and had sexual intercourse for 10 minutes.

- [32] The complainant was shouting but nobody came to assist her. After the first accused had finished he then held her hands while the second accused removed his $\frac{3}{4}$ pants and came on top of her and had sex with her for five minutes. The complainant tried to push the second accused but couldn't since he was on top of her and the first accused was holding her hands.
- [33] At this time the complainant's sister came and shone her torch light on them. When this was done the second accused stood up the zip of his pants were still open.
- [34] The complainant also stood up, her sister came accompanied by two of her cousins. The complainant said she told everything to her sister of what had happened to her and one of her cousin's then went to the Police Station and brought the Police to Koroivolu Park. When the Police came they questioned the first accused who told them that they were just sitting there and he never did anything. The complainant told the Police that they had sex. The Police Officers then took all of them to the Police Station.
- [35] The complainant further informed the court that she told her sister at the Koroivolu Park the first accused hugged her from the back and she lay down on the ground he then sat on top of her and they had sexual intercourse. No one was at the Park at that time and it was dark.
- [36] The complainant also informed the court that she did not agree to have sex with both the accused persons that night.

- [37] In cross examination the complainant denied she was in a sexual relationship with the first accused prior to the alleged incident. The witness was referred to her police statement which she had given to the Police on 25 April, 2013. The complainant agreed that she had given a police statement and had signed it. However, she disagreed that the police statement was read back to her or she had read it before signing.
- [38] The witness was referred to the last paragraph in her police statement which was read by the witness as follows:
“This is not the first time I had sexual intercourse with Michael as this is the 4th time. I had sexual intercourse with Michael from January 2013 to April 2013.”
- [39] The witness stated that the above was false since she did not say this to the Police Officer who was writing her statement and at no time was the statement read back to her. The statement was given to her for signing and she signed.
- [40] The witness made further reference to her police statement and denied the fact that she had told the Police Officer who was writing her statement that the first accused was her boyfriend. According to the complainant the first accused was just her friend.
- [41] To the suggestion how the Police would have come to know about this fact without her telling the Police Officer the witness stated that maybe the first accused was asked by the Police Officer and he had told them.
- [42] The witness also agreed that she had told the Police Officer that she had known the first accused but she was never asked from which month she had known him. The witness stated that the fact that it was recorded in her police statement that she had known the first accused since January

2013 was also false because she had not given this information to the Police Officer who was writing her statement.

[43] The witness disagreed that she was calling the first accused to meet her that night. According to her it was the first accused who had called her to meet and she agreed. She agreed that the first accused was her best friend but they were not in a sexual relationship.

[44] The witness also said that this was the first time the first accused had sex with her and that he had ejaculated inside her vagina. The witness was again referred to her police statement paragraph 3 line 7 where it was stated:

“Michael penetrated his penis inside my vagina for two times and then he pulled out his penis. Michael never ejaculates inside my vagina.”

[45] The witness informed the court that she forgot what was written in her police statement and that she did not say this to the Police Officer writing her police statement and maybe the Police Officer wrote it after reading her medical report.

Madam and Gentlemen Assessors

[46] The learned counsel for the accused in this regard was cross-examining the complainant about some inconsistencies in the statement she gave to the police immediately after the incident when the facts were fresh in her mind with her evidence in court. I will now explain to you the purpose of considering the previously made statement of the complainant with her evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witness is believable and credible as witness. However, the police statement itself is not evidence of the truth of its contents.

- [47] It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
- [48] If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witnesses.
- [49] The witness further disagreed with the suggestion that the first accused never ejaculates inside her vagina was in respect of previous occasions as well.
- [50] The witness stated that she had told her sister that she had been raped by the first accused and his friend but it was not written in her police statement. She agreed that she did not tell the Police about been raped, however, she told the Police that she was lying down and the first accused had sex with her. The witness also did not tell the Police when the torch light was shone on her that she was naked and the second accused's zip on his $\frac{3}{4}$ pants was open because the Police did not ask her.
- [51] The witness was referred to paragraph 4 of her police statement:

"So I stood up and then put on my clothes again and then also Michael and his friend put on their clothes. While we were standing around at that place my sister and 2 of my other cousin brothers came. My cousin brother, Mala and his friend questioned me what I was doing there at that

time and at the same time Michael answered that we were just yarning there."

- [52] The witness stated that this portion of the statement was true, however, when questioned while she was standing around at that time her sister and two cousin brothers came. The complainant replied that was incorrect since this version was written by the Police. When her sister and her cousins came over she did not tell them that she had been raped by the two accused persons. Her sister had slapped her and that she never told her sister that she had been raped. What she did tell her sister was that they were having sex at the Koroivolu Park. It was after hearing this that her sister slapped her and she cried as a result.
- [53] The witness disagreed with the suggestion that because she was caught by her sister and cousins she made this complaint against the accused persons.
- [54] The witness agreed that after her sister and cousin came there was a commotion and lots of people came to the scene, she was crying after her sister had slapped her. She did not tell the Police that she was slapped by her sister because she was never asked.
- [55] The police statement of the complainant dated 25 April, 2013 has been tendered at Defence Exhibit no. 1.
- [56] In re-examination the witness stated that she never read her police statement after being told to sign she signed it. The complainant confirmed that when she told her sister they were having sex meant the two accused were going out with her and having sexual intercourse.
- [57] The second witness was the complainant's sister Tuliana Marama Nisolevu who informed the court that in the evening of 24 April, 2013 at

about 8.00pm the witness had dinner with the complainant at home. After sometime the complainant was missing from home so her mother asked the witness to look for the complainant and not to come home until the complainant was found. The witness with her two cousins went to Nadi Town to look for the complainant but did not find her so all went to the bus stand. At the bus stand Tuliana asked her cousin to look for the complainant around Koroivolu Park. At the Park the complainant was found with two boys. The complainant walked over to Tuliana.

[58] Tuliana then slapped the complainant and asked her what she was doing there. The reason why she slapped her sister was because the complainant had not informed anyone where she had gone to. The witness observed that the complainant was not okay. The complainant cried saying that both the accused persons had called her. After this one of her cousin's went to the Police Station to report the matter. The Police Officers came and all went to the Police Station.

[59] The witness further informed the court that the complainant told her at the Police Station that the two boys who were with her had forced her to have sexual intercourse.

[60] In cross examination the witness said that at Koroivolu Park there were no lights and it was dark although some families lived nearby at that time of the night no one was around.

[61] The witness was angry when she saw her sister at the Park. The witness was referred to paragraph 4 of her police statement dated 25 April 2013 the witness agreed she signed after reading it:

"I called her name and she stood still. I asked her as to why she came right there. She didn't answer me. I slapped her. One of my cousin rang the Police and the Police came and taken all of us to the Police Station. It

was about after 11pm. From there I came to know that my sister was raped by the two Indo Fijian youth.”

- [62] The witness agreed that she had given her statement to the Police and the complainant told her what had happened to her at the Police Station. At the Park the complainant was not telling her anything so she slapped her. The police statement of the witness dated 25 April 2013 has been tendered as Defence Exhibit no. 2.

Madam and Gentlemen Assessors

- [63] Victims of sexual offences may react in different ways to what they may have gone through. As members of the community, it is for you to decide whether it was acceptable for a child of 17 years to not complain fully to her sister. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full as to what had happened could be due to shame or respect for an elder or shyness when talking about matters of sexual nature. Here according to the complainant she had told her sister everything that had happened to her.
- [64] You are entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The Prosecution says the complainant complained to her sister Tuliana Marama Nisolevu immediately after the alleged incident at the Police Station and therefore she is more likely to be truthful. On the other hand, the defence says that the complainant did not inform her sister immediately after the alleged incident at Koroivolu Park or to the Police Officers who had come to the scene so she should not be believed.

- [65] It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the witness was consistent and credible in her conduct and in her explanation of it.
- [66] The final witness for the prosecution was Dr. Lice Vaniqui, who had examined the complainant on 25 April, 2013. Dr. Vaniqui has 7 years' experience in the medical profession who graduated with MBBS Degree from the Fiji School of Medicine. In 2013 the witness was based at the Nadi Hospital, Maternity Unit. The witness recognized and confirmed the Fiji Police Medical Examination Form which she had completed after examining the victim. This document is marked as Prosecution Exhibit no. 1.
- [67] The Doctor informed the court that after examining the victim her specific medical findings were:
- (a) Hymen not intact. Hymen is a membrane that surrounds or covers the vagina and in this case the hymen was not present;
 - (b) Laceration noted around the vagina measuring 0.5cm by 0.5cm. Laceration means a cut or tear on the skin in this case the laceration noted was seen on the vaginal wall in the inside. The likely reason for the laceration would be sexual trauma. Trauma means blunt injury or having sexual contact with someone not willing. It was because of the history given by the victim that the Doctor correlated the information during the vaginal examination;
 - (c) Discharged noted in the vaginal area. This means fluid was seen the discharge could mean lots of other things, it could have been semen.

A female has to be lubricated well otherwise there will be laceration.
The discharge noted had nothing to do with laceration.

- [68] According to the Doctor if the victim had consented to sex she would have discharged or after being lubricated well enough. In this case this was not so because the victim had vaginal dryness which caused vaginal laceration.
- [69] Finally in the professional opinion of the Doctor the findings coincided with forceful sexual contact.
- [70] In cross examination the Doctor stated that her examination of the victim revealed that she had sexual intercourse before. The Doctor agreed that laceration can happen in consensual sex as well and also that she had not recorded in the Medical Examination Form about dryness in the victim's vagina. As for the discharge noted in the vagina the Doctor was not sure what the discharge was.
- [71] In re-examination the Doctor confirmed that she could not say whether the laceration seen on the vaginal area of the victim was through consensual sex or non-consensual sex. She further clarified that her conclusion noted in the Medical Examination Form was that the laceration seen on the vaginal area was due to forceful sexual contact.
- [72] You have heard the evidence of Dr Vaniqi who has been called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective. The Medical Report of the complainant is before you and what the Doctor said in her evidence as a whole is to assist you.

[73] An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the Doctor. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the Doctor.

[74] You should remember that this evidence of the Doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your decisions, you must reach your decision having considered the whole of the evidence.

[75] That was the prosecution's case.

DEFENCE CASE

[76] At the end of the prosecution case you heard me explain options to the accused persons. They have those options because they do not have to prove anything. The burden of proving their guilt beyond reasonable doubt remains on the prosecution at all times and that burden never shifts. The accused persons chose to remain silent and not call any witnesses. That is their right. You should not draw any adverse inference from the fact that they decided to remain silent.

[77] According to the line of cross examination, the accused persons take up the position that they had sexual intercourse with the complainant with her consent.

ANALYSIS

Madam and Gentlemen Assessors

- [78] You heard the evidence of all the witnesses. If I did not mention a particular piece of evidence that does not mean it's unimportant. You should consider and evaluate all the evidence in reaching your opinion.
- [79] The Prosecution alleges that both the accused persons penetrated the vagina of the complainant with their penis without her consent.
- [80] The accused persons on the other hand say that they had sexual intercourse with the complainant with her consent.
- [81] The complainant gave evidence of how she was asked by the first accused to meet him. The complainant knew the first accused three months prior to the alleged incident. The complainant walked all the way from Kennedy Hotel to Nadi Town. At the MH Supermarket she met the first accused and the second accused from there all went to the Nadi bus stand. At around 11.00pm whilst sitting at the bus stand the first accused asked the complainant to accompany him to Koroivolu Park where his transport would come and pick him.
- [82] According to the complainant at Koroivolu Park the accused wrapped her at the back and then pushed her, as a result she fell to the ground. After this the accused sat on her thighs and then took off her clothes and after removing his pants penetrated the vagina of the complainant. At this time the second accused was standing where her head was and had pulled her hands over her head. The first accused had sexual intercourse for 10 minutes while he was doing this the complainant was shouting.

- [83] After the first accused had finished he then held her hands while the second accused removed his $\frac{3}{4}$ pants and had sexual intercourse with her for 5 minutes. The complainant tried to push the second accused but couldn't since he was on top of her and the first accused was holding her hands. At this time the complainant's sister came and shone a torch light on them the second accused stood up the zip of his pants was still open thereafter the complainant stood up. The complainant's sister came and the complainant told her sister what had happened to her. One of her cousin's who was with her sister reported the matter to the Police. The Police Officers came and took all of them to the Police Station.
- [84] The complainant did not consent to have sex with both the accused persons that night. In cross examination the complainant was referred to her police statement which she had given to the Police immediately after the alleged incident and it was suggested to her that she had not told the truth in court. The complainant attributed the inconsistencies between her police statement and her evidence in court to the Police Officer writing her statement saying that the Officer had written things which she had not told the Officer.
- [85] Furthermore the complainant did not read her statement but was told to sign which she did. The complainant agreed that she did not tell the Police that she had been raped that night by the first accused and that she told the Police that she was lying down and the first accused had sex with her. When her sister and her cousin came over she did not tell them that she was raped by the two accused persons what she told her sister was that they were having sex in Koroivolu Park. After hearing this the complainant's sister slapped her and she cried as a result of the slapping. The complainant clarified when she told her sister they were having sex she meant the two accused persons were going out with her and having sexual intercourse. The complainant's sister Tuliana Marama Nisolevu confirmed that when the complainant was found with

the two accused persons the complainant came to her and she slapped her and asked her what she was doing there. According to this witness the complainant told her at the Police Station that the two accused persons had forced her to have sexual intercourse.

[86] The final witness for the prosecution was Dr Vaniqi who had examined the complainant. Dr Vaniqi in her professional opinion stated that the findings of the vaginal examination of the victim showed forceful sexual contact. In respect of the laceration in the vaginal wall the Doctor stated that such a laceration could have happened as a result of consensual sex as well. The Doctor accepted that she had not recorded the dryness in the victim's vagina in the Medical Examination Form and as for the discharge noted on the vagina the Doctor was not sure what the discharge was.

[87] Both the accused persons have in their defence suggested that they had sexual intercourse, however, it was with the consent of the complainant.

Madam and Gentlemen Assessors

[88] You have seen the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence. In testing the credibility of a witness, you can consider whether there is a delay in making a complaint to someone or to an authority or to Police on the first available opportunity about the incident that is alleged to have occurred. If the complainant is prompt that usually leave no room for fabrication.

[89] Bear in mind a late complaint does not necessarily signify a false complaint any more than an immediate complaint necessarily demonstrates a true complaint. It is a matter for you to determine

whether in this case the complaint made to the complainant's sister and the Police is genuine and what weight you attach to this.

- [90] Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.
- [91] In deciding the credibility of the 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 is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.
- [92] You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge against the accused persons have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with his or her previous statements or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.

- [93] It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
- [94] If you accept the version of the defence you must find the accused persons not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused persons guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused persons at any stage of the trial.
- [95] The accused persons are not required to prove their innocence or prove anything at all. They are presumed innocent until proven guilty.
- [96] In this case the accused persons are charged with a count of rape each, you should bear in mind that you are to consider each count separately and each accused separately from the other. You must not assume that because one accused person is guilty that the other must be guilty as well.
- [97] Your possible opinions are:-

COUNT ONE: **RAPE** ACCUSED ONE - GUILTY OR NOT GUILTY


COUNT TWO: **RAPE** ACCUSED TWO - GUILTY OR NOT GUILTY

Madam and Gentlemen Assessors

[98] This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of my staff so that the court can be reconvened.

[99] Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.




Sunil Sharma
Judge

At Lautoka
21 April, 2017

Solicitors

Office of the Director of Public Prosecutions for the State.

M/s. Iqbal Khan & Associates for both the Accused.