

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 107 of 2014

STATE

-v-

ATISH NATH SHARMA

Counsel : Ms. S. Seruvatu for the State  
Mr. A.R. Singh for Accused

Dates of Trial : 18<sup>th</sup> and 19<sup>th</sup> of July, 2018

Date of Summing Up : 19<sup>th</sup> July, 2018

SUMMING UP

Ladies and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me as the Judge who presided over this trial to sum up the case to you. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my

summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the Accused person.

2. I will direct you on matters of law which you must accept and act upon.
3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. In other words you are the judges of fact. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The counsel for Prosecution and the Defence made submissions to you about the facts of this case. That is their duty as counsel. But it is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions, and your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions, but I will give them the greatest weight when I come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the Accused person is innocent until he is proved guilty. The burden of proving his guilt rests on the Prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the Accused guilty, you must be satisfied so that you are sure

of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.

9. Your decisions must be solely and exclusively upon the evidence, which you have heard in this Court and upon nothing else. You must disregard anything you might have heard or read about this case, outside of this Courtroom. Your duty is to apply the law as I explain to you to the evidence you have heard in the course of this trial.
10. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
11. As Assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.
12. In assessing the evidence, you are at liberty to accept the whole of the witnesses' evidence or part of it and reject the other part or reject the whole.
13. An incident of rape would certainly shock the conscience and feelings of our hearts. It is quite natural given the inherent compassion and sympathy with which human-beings are blessed. You may, perhaps, have your own personal, cultural, spiritual and moral thoughts about such an incident. You may perhaps have your personal experience of such a thing, which undoubtedly would be bitter. You must not, however, be swayed away by such emotions and or emotive thinking. That is because you act as judges of facts in this case not to decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law to which every one of us is subject to. I will deal with the law as it is applicable to the offences with which the Accused-person is charged, in a short while.

14. It would be understandable if one or more of you came to this trial with certain assumptions as to what constitute rape, what kind of person may be the victim of rape, what kind of person may be a rapist, or what a person who is being, or has been, raped will do or say. It is important that you should leave behind any such assumptions about the nature of the offence because experience tells the courts that there is no stereotype for a rape, or a rapist, or a victim of rape. The offence can take place in almost any circumstances between all kinds of different people who react in a variety of ways. Please approach the case with open mind and dispassionately, putting aside any view as to what you might or might not have expected to hear, and form your opinion strictly on the evidence you have heard from the witnesses.
  
15. I must emphasize that the assessment is for you to make. However, it is of paramount importance that you do not bring to that assessment any preconceived views or stereotypes as to how a Complainant in a rape case such as this should react to the experience. Any person who has been raped, will have undergone trauma whether the Accused were known to her or not. It is impossible to predict how that individual will react, either in the days following, or when speaking publically about it in Court or at the Police Station. 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.
  
16. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. They are of course an important part of the case. The agreement of these facts has avoided the calling of number of witnesses and thereby saved a lot of time of this Court.
  
17. The agreed facts of this case are that:
  1. It is agreed that the complainant in this matter is Preeti Pooja Sharma.
  2. It is agreed that the Accused is Atish Nath Sharma.
  3. It is agreed that the complainant and the Accused are related as cousins.

4. It is agreed that on 9th August 2014 the complainant, left Suva to go to Votualevu ATS Quarters in Nadi to visit the Accused, his wife and son.
  5. It is agreed that the complainant arrived at the Accused house at Votualevu ATS Quarters in Nadi at around 4.30 pm on 9th August 2014.
  6. It is agreed that at around 7.00 pm, the Accused and the complainant went to the Bula Festival in Nadi Town.
  7. It is agreed that the complainant and the Accused then left for Nadi Town to attend the Bula Festival
18. I have given you a copy of the Information which contains one count of Rape. Please refer to it. The Information read as follows:

*Statement of Offence*

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

*Particulars of Offence*

**ATISH NATH SHARMA** between the 9th day of August, 2014 to 10th day of August, 2014 at Nadi in the Western Division, penetrated the vagina of **PREETI POOJA SHARMA**, with his penis without the consent of the said **PREETI POOJA SHARMA**.

19. I will now deal with the elements of the offence of Rape in this case. A person rapes another person if the person has carnal knowledge with or of the other person without other person's consent. Carnal knowledge is to have sexual intercourse with penetration by the penis of a man to the vagina of a woman to any extent. So, that is Rape under Section 207 (2) (a) of the Crimes Act.

20. Consent as defined in Section 206 of the Crimes Act, means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Simply put, if somebody does not resist physically it does not necessarily mean that she or he had given consent. Different people react differently to situations. You don't necessarily need violence, kicking, and shouting etc.
21. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a complainant who saw, heard and felt the offence being committed. In this case, for example, the Complainant was a witness who offered direct evidence as to what she saw, heard or felt.
22. In evaluating evidence, you should see whether the story told in evidence is probable or improbable; whether the witness is consistent in her own evidence or with her previous statement.
23. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in Court. You have seen how the complainant's demeanor in the witness box when answering questions. How was she when she was being examined in chief, then being cross-examined and then re-examined? Was she forthright in her answers or was she evasive? How did she conduct herself in Court? In general, what was her demeanor in Court? But, please bear in mind that many witnesses are not used to giving evidence and may find Court environment distracting.
24. You must bear in mind that the evidence comes from human beings. They cannot have photographic or video graphic memory. The witness can be subjected to the same inherent weaknesses that you and I suffer insofar as our memory is concerned.

25. In testing the credibility of a witness, you can see whether there is 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 complaint is prompt, that usually leaves no room for fabrication.
26. 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, complaint Complainant made to police is genuine and what weight you attach to her complaint to police.
27. You may also consider whether there is a reason or motive on the part of the Complainant to make up an allegation against the Accused. If she had such a motive, then you may think that this allegation has been fabricated.
28. Please remember, there is no rule in Fiji for you to look for corroboration of complainant's story to bring home an opinion of guilt in a case of sexual nature. Complainant's evidence alone is sufficient if you believe that she told the truth in court. The case can stand or fall on the testimony of complainant, depending on how you are going to look at her evidence.
29. I will now deal with the summary of evidence in this case. In doing this I do not propose going through all her evidence. Her evidence will be fresh in your minds so I will only highlight the important parts of the evidence you should consider. If I refer to only some aspects of a witness's evidence it does not mean that the rest is unimportant. You must weigh up and assess all the evidence in coming to your decision on this case.

#### **CASE FOR THE PROSECUTION**

30. Madam and gentleman Assessors the Prosecution called only one witness, Preeti Pooja Sharma (Preeti), the Complainant in this case.

31. Preeti in her evidence said that she had come to Nadi to visit the Accused who is her cousin to celebrate *Rakshabandan* and later, on an invitation of the Accused, she accompanied him to the Bula Festival in Nadi Town. At the Bula Festival, she wanted to go on one of the rides but the line was too long so the Accused took her to Farmer's Club.
32. At Farmer's Club the Accused ordered beer and insisted that Preeti drink so she had two glasses of beer. After Farmer's Club Preeti told this Court that the Accused instead of taking her back to the Bula Festival stopped a vehicle and went to a shop where he bought 4 small bottles of vodka cruisers and 3 to 4 small bottles of beer. After which the Accused took her to Wailoaloa Beach.
33. Whilst sitting at Wailoaloa Beach, the Accused drank and offered Preeti alcohol to drink but she did not drink. She said that when she was handed a bottle, she pretended to drink but, when the Accused was not looking, she poured the alcohol.
34. After two to three hours, around midnight, Preeti got tired and wanted to leave. She stood up and told the Accused that she wanted to go home. Then Accused pulled her right hand, grabbed from her shoulders and pushed her down to the sand. Then he got on top of her. She told this Court that all the body of him was on top of her so that she wouldn't be able to push him off and she couldn't move at all. Using his other hand, he pulled up her black t-shirt and pulled down her bra so that her breast was open. He then started kissing and biting her breast. Then using one hand he tried to take off her jeans and with the other free hand he held her down. She tried to get him off but she couldn't. He was successful in getting one leg off the jeans and then he took off her blue greenish panty down to her ankles. Then using one hand holding Preeti down, he unzipped his pants with the other and took out his erected penis. Then he inserted two fingers into her vagina. She felt the pain. Then he inserted his penis into her vagina. At this time Preeti said that she was in pain and that she screamed. She said that she felt more pain when he inserted his penis into her vagina and that she was a virgin and told the Accused that she had never had sex before. She said "*I had never done anything like that before so when he was trying to force himself inside it hurt a lot more*". She asked the Accused what and why he was doing this. She said that



Accused was having sexual intercourse for about 10 to 15 minutes. She said he heard something and then he got up.

35. After he has had sexual intercourse, he told her to get up, clean herself off so that they could go home. She kept screaming at him and asking him why he did that and then he told her to stop crying and stop yelling at him and just fix herself up or just leave her there. Accused asked her to calm down if she wanted to go home. She complied because she wanted to get back.
36. After a while they walked down to the road and stopped the car and had gone home. Once they had reached home, she went straight to the room and locked the doors. She called the police. She told police that she won't come out until they were inside the house. Police officers arrived within an hour and when she came out of the room Accused kept asking why she had called the police and what he had done. She told the police that he had raped her. Then the police officers took him to the station and then they took her to the hospital. At the hospital, the doctor examined her, inserted something to see if her hymen is intact or not. She said she got three stiches in her vagina because it was torn. She also told this Court that she would not come out until the police were in the house. When the police arrived, then she told the Police that she was raped by her own cousin.
37. Under cross examination, she admitted that she drank two glasses of beer at the farmers club but denied that she was drunk or had consumed alcohol at the beach. She denied that the proposition that her version of events as was narrated in court is not consistent with an allegation of rape. She denied that she never screamed or struggled. She said that Accused is her cousin and had gone out with him many times. She told this Court, *'I didn't think for a second that he would do something like that to me, if anything, I thought if something like that would happen, he would be there to stop it'*.
38. That is the case for the Prosecution. At the close of the Prosecution case, you heard me explain to the Accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against

him to the requisite standard or he could give evidence in which case he would be cross-examined.

39. As you are aware, Accused elected to exercise his right to remain silent. By remaining silent, he was exercising his constitutional right. You must not hold against him for his silence and infer that he remained silent because he was guilty. He does not have to prove innocence or anything at all. The burden is always on the prosecution.

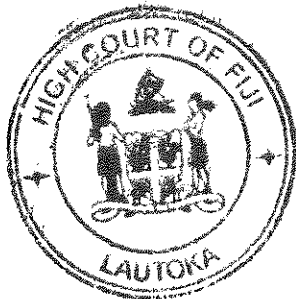
## **ANALYSIS**

40. Ladies and gentleman Assessors, the Accused Mr Atish Nath Sharma is charged with one count of Rape.
41. Prosecution says that the Accused has had sexual intercourse with the Complainant without her consent. Accused completely denies the allegation.
42. First, you have to be satisfied that the evidence given by Complainant is truthful and believable. If you are satisfied that the evidence she gave in court is truthful and trustworthy you can safely act upon her evidence in coming to your conclusion.
43. You must decide whether you are sure the Accused penetrated the vagina of the complainant and that she did not consent to sexual intercourse with the Accused. Complainant does not dispute that she went with the Accused who is her cousin to the Bulla festival on her free will. She does not also deny that she was drinking alcohol with the Accused at the Farmers Club.
44. Ladies and gentleman Assessors, it is suggested on behalf of the Accused that the alleged offence of Rape never happened. Defence says that it would not have been possible for the Accused to rape the complainant the way she described in

court that it happened. The Defence Counsel suggested that the Accused was really drunk and in his drunk state he was physically weak and it was impossible for him to overpower the Complainant while having his body weight on her, and hold both her hands with one hand, and with the other free hand lift up her black t-shirt, pull down her bra and kiss and bite her breast. It is up to you to form your own opinion on that.

45. Prosecution says, on the other hand, that Complainant is a genuine and honest witness. They say that Complainant's version is credible and consistent because she made a prompt complaint at the first available opportunity within hours and demanded a medical examination. She said that she was a virgin and had some injuries on her vagina after the incident.
46. During the course of Complainant's evidence it was suggested to her that she could have yelled and otherwise objected to what the Accused were doing. It was also suggested that she could have received injuries. You heard the Complainant's explanations. In his closing remarks Defence Counsel submitted to you that her failure to protest, demonstrates that she was not telling the truth.
47. You should not assume that there is any classic or typical response to an unwelcome demand for sexual intercourse. The experience of the Court is that people who are being subjected to nonconsensual sexual activity may respond in variety of different ways. You consider whether the version of the Defence is consistent and believable. What you should not do is judge the intentions or inclinations of the complainant on this occasion by the application of generalised assumption about people's behavior. What you should do is reach conclusions based upon evidence.
48. You watched Complainant giving evidence in court. You decide if her evidence is credible and believable.
49. It is up to you to decide whether you could accept the version of the Defence and it had created a reasonable doubt in the Prosecution case.

50. If you accept the version of the Defence you must find the Accused not guilty. Even if you reject the version of the Defence, still the Prosecution should prove its case beyond reasonable doubt. Remember, the burden to prove the Accused's guilt beyond reasonable doubt lies with the Prosecution throughout the trial, and never shifts to the Accused, at any stage of the trial.
51. If you accept the Prosecutions' version of events, and you are satisfied that the Prosecution has proved the case beyond reasonable doubt, so that you are sure of Accused's guilt you must find him guilty of the charge.
52. You may now retire to deliberate on the case, and once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.
53. Any re-directions?



**AT LAUTOKA**

**19<sup>th</sup> July, 2018**

**Aruna Muthge**

**Judge**

**Solicitor: Office of the Director of Public Prosecution for State**  
**Aman Ravindra Singh Lawyers for Defence**