

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 85 OF 2015

STATE

v

SUNIL CHAND PRAKASH

Counsel: Ms L. Latu for State
Mr. S. Khan for Accused

Dates of Trial: 19th to 22nd February, 2019
Date of Summing: 25th February, 2019

SUMMING UP

Madam Assessors 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 the counsel. They were their arguments, which you may properly take into account when evaluating the evidence. 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. 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 deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law that accused person is innocent until he is proven 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 an 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. However, the doubt must not be based on mere speculation.
9. Your opinions 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 court room. Your duty is to apply the law as I explain it to you to the evidence you have heard in the course of this trial. 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' cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true.
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. 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.

12. 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.
13. 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.
14. 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.
15. In assessing the evidence, you are at liberty to accept the whole of the witness' evidence or part of it and reject the other part or reject the whole.
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.
17. The agreed facts of this case are that:
 1. That the Victim in this matter is Keshni Lata, 23 years old at the time of offending and resides at Rarawai, Ba.

2. That Accused is Sunil Chand Prakash, 39 years old at the time of offending, also residing at Rarawai, Ba.
 3. That the Victim is married to the Accused younger brother and they are neighbours.
 4. The on the 24th October 2014, at about 2.00 pm the Victim was at home with her children.
 5. That on the above mention date, the Accused had sexual intercourse with the Victim.
 6. That the Victim was medically examined by Dr. Anaseini Maisema on 24th of October 2014.
 7. That the Accused was arrested and caution interviewed on the 25th of October, by DC 2944 Ashwin Prakash in English language.
 8. That the Accused was formally charged on the 30th of April 2015 by DC 3016 Kamal in the English language.
18. The accused is charged with one count of Rape. The Information reads as follows:

Statement of Claim

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

Particulars of Claim

SUNIL CHAND PRAKASH, on 24th day of October 2014 at Rarawai, Ba, in the Western Division, had carnal knowledge of **KESHNI LATA**, without her consent.

19. I will now deal with the elements of the offence of Rape. A person rapes another person if:
- (a) The person has carnal knowledge with or of the other person without other person's consent; or
 - (b) The person penetrates the vulva, vagina or anus of other person to any extent with a thing or a part of the person's body that is not a penis without other person's consent; or

(c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

(d) The person knew or believed that the complainant was not consenting, or he was reckless as to whether or not she was consenting.

20. Insertion of penis fully into vagina is not necessary. Slightest penetration is sufficient to satisfy this element.
21. 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. Consent obtained by force, threat or intimidation is not voluntary. Different people react differently to situations. You don't necessarily need violence, kicking, and shouting etc. to show that one is not consenting.
22. According to the Crimes Act, the offence of Rape requires proof that the complainant did not consent. The offence may or may not be accompanied by force or the threat of force, but please note that it is no part of the Prosecution's obligation to prove that the accused used force or the threat of force.
23. If you accept that the complainant was not consenting you must ask yourself did the accused know that she was not consenting, and if not, was that a reasonably held belief, or was the accused reckless in going on knowing that she might not be consenting. In the circumstances of this case you consider whether the accused knew or it was reasonable for him to believe that she was consenting.
24. In evaluating evidence, you should see whether the story relayed 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 that evidence was called for the Prosecution or for the Defence. You must apply the same tests and standards in applying them.
25. In the course of cross-examination, Prosecution and Defence counsel referred to previous statements of witnesses recorded by police. A previous statement made by a witness is not evidence in itself unless it is adopted and accepted by the witness under oath as being true. You can of course use those statements to test the consistency and credibility of the witness if you are satisfied that such a statement was made.

26. I now wish to direct you on recent complaint evidence. You heard that the complainant said that she relayed the incident to her husband Arvind soon after he returned home. Arvind gave evidence and said that he received a complaint from the complainant that she was raped by Sunil. Arvind was not present when the alleged incident happened and therefore, he is not capable of giving evidence as to what actually happened between the complainant and the accused. What Arvind heard from the complainant is not evidence as to what actually happened between the complainant and the accused. Recent complaint evidence is led to show consistency in the conduct of the complainant and is relevant in assessing her credibility. If you find Arvind to be a credible witness, then you may use the complaint he received to test the consistency and credibility of the complainant.
27. You must apply the same principle when you evaluate the evidence of the doctor about the history she received from the complainant at the medical examination.
28. Documentary evidence is evidence presented in the form of a document. In this case, the medical report is an example if you believe that such a record was made. You can take into account the contents of the document if you believe that contemporaneous recordings were made at the relevant time upon examination of the Complainant.
29. I will now direct you as to how you should deal with evidence presented by the doctor as an expert witness. Usually, witnesses are not allowed to express opinions. They are allowed to give evidence on what they have seen, heard or felt by physical senses only. The only exception to this rule is the opinions of experts. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their opinions expressed on a particular fact to aid court to decide the issues/s before court on the basis of their learning, skill and experience. In this case, the doctor gave evidence as an expert witness. Doctor's evidence is not accepted blindly. You will have to decide the issue of rape before you by yourself and you can make use of doctor's opinion if her reasons are convincing and acceptable to you; and, if her opinion had been reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence led in the case. You have to bear in mind that the expert evidence does not implicate the Accused or link him to the alleged offences even if you decide to rely on it. You can only use doctor's opinion to test the constancy of Complainant's story.
30. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in Court. You have seen how the witness' demeanor in the witness box when answering questions. How did they conduct themselves in Court? In general, what was their demeanor in Court? But, please bear in mind that many witnesses are not used to giving evidence and may find court environment distracting.

31. Proof can be established only through evidence. Evidence can be direct evidence that is the evidence of a person who saw it or by a victim 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. You are also free to draw reasonable inferences if such inferences are based on facts proved by evidence and reasonable in the circumstances of this case.
32. In testing the credibility of a witness, you can consider 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. If there is a delay, you should look whether there is a reasonable explanation to such delay.
33. 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 the complaint she eventually made.
34. In testing the consistency of a witness you should see whether he or she is telling a story on the same lines without variations and contradictions. You should also see whether a witness is shown to have given a different version elsewhere and whether what the witness has told court contradicts with his/her earlier version. You must however, be satisfied whether such contradiction is material to the core issues of this trial and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter. If it is shown to you that a witness has made a different statement or given a different version on some point, you must then consider whether such variation was due to loss of memory, faulty observation or due to some incapacitation of noticing such points given the mental status of the witness at a particular point of time or whether such variation has been created by the involvement of some another, for example by a police officer, in recording the statement where the witness is alleged to have given that version.
35. You must remember that merely because there is a difference, a variation or a contradiction or an omission in the evidence on a particular point or points that would not make witness a liar. You must consider overall evidence of the witness, the demeanor, the way he/she faced the questions etc. in deciding on a witness's credibility.
36. You may also see whether there is a motive or obvious reason to fabricate a false allegation against the accused. If there is an obvious reason or motive to make up a case, then you may think that the evidence against him has been fabricated.

37. 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. The case can stand or fall on the testimony of complainant, depending on how you are going to look at her evidence.
38. I will now deal with the summary of evidence in this case. In doing this, I do not propose going through all the evidence. It should still be fresh in your minds. If I refer to only some aspects of a witness' evidence it does not mean that the rest is unimportant. You must weigh up and assess all the evidence in coming to your decision in this case.

PW 1 Keshni Lata (The Complainant)

39. Lata said that in 2014 she was living in Rarawai, Ba, with her husband Arvind Chand and her four children. She got married in 2006, when she was 16.
40. On the 24th of October, 2014, about 2.00 pm she was washing clothes inside the house. All her children were inside the house and the doors were closed. She said that Sunil bumped the door and came inside the house. Sunil took a glass of Rum and Cola from the washing machine and forced her to drink. She did not drink. She pushed the glass away and the glass fell off. Then he picked it up and put it inside his pocket.
41. Then he forcefully pulled her inside the bathroom. She told him that she was going to yell out. Then he assaulted her and said that if she said this to anybody he will assault her. He slapped her on her left cheek and scratched one of her hands. Then he forcefully opened her clothes. She did not like it. Then he pushed her. She fell down. Then he forcefully inserted his penis into her vagina and had sex with her. She said "no" to him but he did not listen to her. After that he ran away to the garden. Her small son Adrian saw him. She said that Sunil spent 10 minutes in her house that evening.
42. Lata said that when Sunil came, the children were inside the house. Sunil told them to go out as he force opened the door. After Sunil left, she wore her clothes and sat inside her bedroom. She told her husband about the incident and also informed Sunil's wife. She said that when her husband returned back from town at about 5.00 pm, her youngest son Adrian told the husband first and then she also informed the husband regarding the incident. Adrian told her husband that 'dada', meaning uncle, came inside and he ran away from the house. She informed the husband that Sunil pushed the door, came inside and forcefully had sex with her.
43. Lata said that she didn't tell the husband first because she got scared as Sunil, when he was inside the house, had told her that he will kill her. After she had told her husband, husband got angry and called Sunil inside the porch and inquired about

incident. Sunil denied the allegation. Then they went to the Police Station and then to the hospital on the same day. She was examined by a female doctor. She informed the doctor that Sunil forcefully had sex with her, slapped her and also scratched one of her hands. She said that Sunil is her brother-in-law and a fatherly figure to her.

44. Under cross-examination, Lata said that there are two doors in her house and that she had locked both doors earlier because her kids were inside the house. She said that she gave her first statement to the Police on the 25th of October, 2014, and gave a second statement, 8 months later on 10th June, 2015.
45. Lata agreed that in her first statement to police she had told that:
- Sunil Chand came and called her name, but she did not respond to him at that time.
 - as he entered the house, she was told to send the kids outside the house she then asked him why she should send the kids outside the house.
 - he made her lie down in the bathroom forcefully.
 - Sunil took the kids outside and gave them lollies and locked both the doors.
46. Lata admitted that in her statement to police she had not told that:
- she will yell out and he then assaulted her.
 - he scratched her one of her hands,
 - after sex he ran outside, he ran to her garden and her youngest son Adrian saw him.
 - she had told Sunil's wife about the incident.
 - Sunil had threatened to kill her.
47. Lata admitted that she in her second statement to police she had told that:
- Sunil had threatened to kill her.
 - her husband called Sunil inside the porch at her house.
48. Lata admitted that she did not start yelling but only said that she will start yelling. She admitted that her husband and Sunil did not get along well because of the rumour that she and the accused were having an affair, and as a result had a confrontation between accused's wife, herself and her husband, and that the accused was not allowed into her house alone and that the children knew about that.
49. Lata said that both the doors were closed and there was no chance to run away. She denied that this was an affair that got caught. She denied having had sex with Sunil on two previous occasions. She admitted that she knew that Sunil's wife was not

home at that time. She admitted that Sunil ejaculated inside her and that she had a Tubal ligation done in 2013. She admitted making a second statement to police after 8 months and told the police that she did not scream ; that she did not tell the husband straight away because she was afraid of Sunil's threat and that she never had an affair with Sunil. She said that she gave her 2nd statement because Sunil was not being charged. She said that her husband went 3 times to police before Sunil was charged. She denied that she was having an affair with Sunil and that the sexual intercourse was consensual. She denied that she had never created a scene because there was an affair. She denied the proposition that Sunil knew of her tubal ligation, that's why he ejaculated inside her.

50. Under re-examination, Lata said that she told about the incident to Sunil's wife when her husband called Sunil to the porch. She said that Sunil's wife then slapped her. She said that when she was bathing, Sunil used to peep and he had said that her breast looked nice and that is how the rumour of her having an affair with Sunil started and the animosity with her husband began.

PW 2 Dr. Anaseini Maisema

51. Dr. Maisema medically examined Keshni Lata at the Ba mission Hospital on the 24th of October, 2014. She filled up the Fiji Police Medical Examination Form which she tendered as PE.1. Her first impression of the person to be examined was that the patient seemed calm.
52. Referring to the specific medical findings at D.12, the doctor said that she found no specific injuries during the vaginal examination. There was an abrasion or a friction on the surface on her left fore-arm. She also observed a swollen left cheek with a dash and tender.
53. Giving her opinion on possible cause of the injuries, the doctor said that they could have been caused by an accident or infliction depending on force, instrument, direction of the object that's coming towards the patient and also on the direction at which it's received by the body. Within those abrasions, there was 1 cm laceration or a cut, a bit deeper than other abrasions, possibly caused by a blunt force.
54. She further said that it is possible that the injuries could have been caused by a blunt object or by a sharp object just brushing through the skin. Describing possible causes of swollen left cheek, the doctor said that it could have been resulted from an inflammation after an impact of a blunt object. The patient had two signs of inflammation, one was swelling and the other one was pain on touch. The injury on the fore-arm could have been resulted from a light friction of a sharp object and the one on cheek from an impact of a blunt object. Doctor said that the patient had relayed that she had tubal legation done in 2013, which is a permanent form of contraception for female.

55. Under cross-examination, the doctor agreed that rubbing an arm on a rough cement floor would have caused an abrasion depending on the impact and the force. She also agreed that the swollen left cheek could be caused by a very forceful slap on the face. She agreed that the patient had said that when *she tried to stop him, he hit her twice on the right forearm*, but the injuries she found were on the left. She opined that in rape cases the victim does not always suffer from some kind of mental distress, shock, anger or agitation. She agreed that the patient was calm. She agreed that while having very forceful and rough sex, it would not be uncommon to have some vaginal damage. Doctor agreed that she did not find any vaginal damage in this case. By looking at her vaginal findings, the doctor agreed that it is possible that her finding is consistent with consensual sex. Further elaborating on her opinion under re-examination, the doctor said that it really depends on the reaction of the victim. If the victim feels helpless and was just lying down, any injuries could not be found.

PW 3 Arvind Chand

56. Arvind is the husband of Keshni Lata. He said that On the 24th of October, 2014 at about 1.00 pm, he went to town leaving her four children and wife at home after celebrating Diwali at night.
57. He returned home at 5.00 pm. His small son ran towards the road, and told that '*Dada, chased us out from the house and he locked the door*'. He said 'Dada' means uncle, his elder brother Sunil Chand. He came inside and growled at his wife and just asked, *what happened?* Then she said Sunil entered the house, he chased the kids outside and he gave something to drink forcefully and then he raped her. Arvind got very angry. Then he called Sunil Chand and talked this matter in the house to settle the matter then and there. Sunil took oath in Ramayan and denied everything. Then he called the Police.
58. Under cross-examination, Arvind admitted giving a statement to police on 25th October, 2014. He admitted that in his previous statement to police it is not recorded that '*Dada came, chased us outside and locked the door*'. He also admitted that his wife had told him that '*Sunil raped her*' is also not recorded in his previous statement to police. He stressed that he had told the police everything although those parts are not recorded. He said that when he entered the house, his wife was crying. He admitted that it was not written in his statement. He said that he could not remember giving a second statement to police on the 10th June, 2015. He later admitted giving a second statement. He admitted that there is nothing in his statement saying that Sunil Prakash was peeping through the bathroom and all he said was that her breast is nice.

PW. 4 Corporal Ashwin Prakash

59. Cpl. Ashwin interviewed Sunil on 25th of October, 2014. He said that he is not sure who the Investigating Officer in this case was. He said that the accused denied the allegation at the interview but he admitted having had consensual sexual intercourse with the complainant on the 24th October, 2014 and also on two previous occasions. By looking at the charge statement, Ashwin agreed that the accused was charged on 30th April, 2015, roughly six months after the incident.
60. That is the case for the Prosecution.
61. When the Prosecution had closed its case, you heard me explain to the Accused his rights in defence that he could remain silent and say that the Prosecution had not proved the case beyond reasonable doubt; he could give evidence and be subjected to cross examination and call witnesses on his behalf.
62. You are aware that the accused elected to give evidence under oath although he had nothing to prove in this case. By electing to give evidence, he assumes no onus of proof. That remains on the Prosecution throughout. He is under no obligation to prove his innocence. You heard evidence of the witnesses called by the Defence. Defence's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.

Case for Defence

DW 1 Sunil Chand Prakash (The Accused)

63. Sunil said that the complainant Keshni Lata is married to his brother Arvind Chand and they were living just beside his house compound.
64. On 24th October 2014, his wife went to town and he was alone at home. At about 12.30 pm., his friend Satman and his son brought the tractor home. When they were coming, Keshni saw them and she started to go back home. Keshni had come to his house asking for ice. Then he started drinking kava with Satman and his son. At 2 o'clock Satman and his son went.
65. Sunil said that he had known Keshni even before her marriage and, prior to the alleged incident, she had an intimate relationship with him for one year. He admitted having had sex with Keshni at her place on two previous occasions before the alleged incident. On the first occasion, he had sex with her around 10 pm, when her children were sleeping and Arvind was not home, and the second time, the children and Arvind were not home. He said that he ejaculated inside on both

occasions because Keshni had told him that he can ejaculate inside because her baby bag was closed.

66. Answering a question posed by court, Sunil said that he started the relationship at the end of 2013. He denied having had forceful sex, offering Rum and Cola or threatening to assault or kill or dragging or assaulting Keshni whilst having sex on that day 24th October, 2014.
67. Describing his side of the story, Sunil said that when Satman and his son left, he saw Keshni doing some kind of action (gesture) indicating that she had taken the kids outside. Then he went to her house through the back door and met her beside the bathroom. Explaining the reason why they used the bathroom to have sex instead of the bedroom, when even the children were outside, Sunil said that when he had sex with Keshni on her bed on the first occasion, he did not like the smell of the children's urine on the bed. Even Keshni was smelling (baby) bad so he made her bath inside the bathroom before having sex with her. He was having sex in the bathroom for 10 to 12 minutes including the time spent on the bath. They were having "quick sex" because his wife was supposed to return home by 2.30 pm.
68. Sunil said that Keshni received injuries when her husband assaulted her so badly. His wife, pundit Krishneel Maharaj and one neighbor Emi were present during the assault. He said that this false allegation was made because she was forced to do so by her husband and family members.
69. Under cross-examination, Sunil admitted that he had never told police that Keshni was at his compound and that she started leaving before Satman and the son arrived. He also admitted that his counsel didn't question Keshni about her being present at his place before the incident. He admitted that the facts that he preferred to have sexual intercourse in the bathroom because he didn't like the bad smell of the bed, and that he made her bath before the sexual intercourse because she also smelt bad were not in his caution interview. Sunil said that he had instructed his counsel about the reasons why he preferred to have sex in the bathroom. Sunil agreed that he gave only his wife's name and never gave any other names of anyone who witnessed his brother assaulting Keshni.
70. Under re-examination, Sunil said that he was only answering the questions put to him by the police at the caution interview.

DW 2 Krishneel Ravitesh Maharaj

71. Maharaj said that he is a Pundit, Indian Priest from 2013. Sunil is his friend from 2012. Arvind Chand is also his friend because he normally goes to their places to do some prayer ceremonies and Keshni Lata knew him very well.

72. He remembers 24th October, 2014, because it was the day after Diwali. Around 5 pm. he went to Sunil's home to do a prayer ceremony. Before going to Sunil's home, he went to Sunil's brother Arvind's house. He saw Arvind assaulting his wife with a cane knife (from blunt side) while she was on the ground. Then he dragged her towards the porch and continued to assault with the knife, and was also kicking her and punching her. Emi and the crowd were watching the incident. He then went to Sunil's place to do the prayer.

DW 3 Emi Nasa Korowati

73. Emi said that she, on 24th of October, 2014, the day after Diwali, went past Arvind and Sunil's house between 5.00 – 6.00 pm to bring the cattle she saw Arvind and his wife fighting. Arvind was beating his wife with a stick.
74. Under Cross-examination, Emi said she saw Arvind hitting Keshni's legs and her back. She and his small son were the only people witnessing this incident.
75. Under reexamination, Emi said that their houses were just close to the road and she was watching this incident from the road.

DW 4 Satman Singh

76. Satman said that he knows Arvind and Sunil well and had not enmity against them. On 24th October, 2014, the day after Diwali, he went to Sunil's house with his son about 12.30 pm. and was repairing his tractor and having grog between 12.30 – 2.00 pm. He said that when he entered Sunil's house he saw Sunil's wife going from Sunil's compound to her house.
77. Under cross-examination, Satman said he did not record a statement with police as to what he saw on that day. He said that the only reason why he came to give evidence is to save Sunil. He said he came to know about this incident after 2 or 3 months later.

DW 5 Aman Sigh

78. Aman Singh is the son of Satiman Singh. He had come from Suva to give evidence. On the 24th October, 2015, the day after Diwali he met Sunil at around 2 pm. in his compound in front of his house and left this place around 2.15 pm. His father was also with him. He said that during his stay he noticed that Sunil was trying to communicate with someone from the back. So he turned around to see Arvind's wife using sign language trying to communicate something from the window of her house which is situated at the back of Sunil's house. After that, everything went in a rush and Sunil was trying to make them move from there. So within 15 mins they

finished the grog and left from there. On the way they met Sunil's wife on the way walking.

79. Under cross-examination, Aman said that the only reason why he came to give evidence is to save Sunil. He said that he heard about the case and realized that he is part of the incident and came by himself without a summon being served.

DW 6 Rita Ashwini Prakash

80. Rita is the wife of the accused. She said that her house is at the back of Arvind's house about 5 meters away. On 24th October 2014, she came from town at about 2.25 pm. She saw the curtains and the doors closed at Arvind's house and all his children outside. Her husband was not to be seen home. Then she called out his name. She then saw her husband returning from that place entering her compound. Then she asked her husband *where have you been? Have you gone there again?* Husband did not reply. She questioned her husband because she had caught Keshni with her husband. There was a confrontation after this incident between her, Keshni and Arvind.
81. At around 5 – 5.30 pm on the 24th October 2014, she saw Lata slapping her son when he informed his father that his uncle (dada) come home. Then she told Arvind that the children are saying the truth. Then Arvind asked her to give a slap to his wife if it's the truth. She slapped her and then Arvind started assaulting Keshni while questioning and he also suddenly took a knife.
82. Under cross-examination, Rita said that she saw Arvind beating his wife on her thighs with a knife from its blunt side. She said that she told police about Arvind using a knife although it is not recorded in her statement.
83. Under re-examination Rita said that police asked if Arvind assaulted with a weapon and she told that he used a knife.

84. That is the case for Defence

Analysis

85. Accused Sunil Prakash is charged with one count of rape. To find the accused guilty of rape in this case, the Prosecution must prove beyond reasonable doubt that the accused penetrated complainant Keshni Lata's vagina with his penis, without her consent.
86. Accused does not deny sexual intercourse with the complainant. Therefore there is no dispute as to the first two elements of the offence of Rape. The only dispute is in relation to the consent. The complainant says that the accused forcefully had sexual

intercourse with her, without her consent. The accused on the other hand says that he had an affair with the complainant and that the sexual intercourse was consensual. The case turns on one word against the other. The resolution of the dispute depends on whether you accept the complainant as a truthful witness.

87. Prosecution called four witnesses and the Defence called six witnesses including the accused. Prosecution's case is substantially based on the evidence of the complainant. If you are satisfied that the evidence she gave in court is truthful and believable, then you can safely act upon her evidence in coming to your conclusion. No corroboration is required.
88. Prosecution says that the complainant told the truth in court when she said that she was forced to have sexual intercourse with the accused. To support its version and to prove complainant's consistency, Prosecution relies on recent complaint evidence and medical evidence.
89. Complainant says that she complained to her husband Arvind shortly after his arrival at home and on the same day reported the matter to police, and thereafter, to doctor at the medical examination. The complainant admits that she complained to her husband after her son had informed about accused's arrival at her house. Complainant's explanation for the delay is that she was threatened not to tell anyone and she was in fear of the threats.
90. Arvind gave evidence that he received the complaint on the same day. There is no dispute that the complainant went to the police station and relayed the incident to the doctor on the same day. If you believe that complainant had made a prompt complaint, you can use recent complaint evidence to test the consistency of the complainant's conduct.
91. Prosecution says that the medical evidence is consistent with a forceful sexual intercourse because the complainant had received some external injuries on her arms and left cheek. You heard what the complainant and doctor had to say about those injuries. Defence says that complainant received those injuries when she was assaulted by Arvind. Prosecution denies that the complainant was assaulted by her husband. Defence called witnesses (Maharajh, Emi and Rita) to show that the complainant was assaulted by Arvind. Prosecution says that the witnesses called by the Defence are untrustworthy. It is for you to form your own opinion on that. If you are satisfied that those injuries were received by the complainant as a result of a forceful sexual encounter, then you may think that medical evidence supports complainant's version that she was raped.
92. Defence argues that nil injuries in complainant's vagina indicate that there was no force used during sexual intercourse. You heard what doctor had to say about that. Doctor said that it really depends on the reaction of the victim. If the victim feels


helpless and was just lying down, no injuries could be found. Having considered other evidence led in trial, you decide if nil injuries in her vagina discredited the version of the prosecution at all.

93. There is no dispute that the sexual intercourse took place in the bathroom when there is nobody in the house and there was a bed in the bedroom. Complainant said that she was dragged into the bathroom and pushed her to the floor. You heard accused's explanations why he preferred to have sex in the bathroom when there was a bed. Prosecution says that accused's explanation is not consistent with his previous statement to police at the caution interview. You decide what version is to believe and what weight to be attached to complainant's evidence that she was forced into the bathroom and raped.
94. Defence argues that complainant's conduct is consistent with a consensual sexual intercourse. Defence relies on certain pieces of evidence to support its argument. Firstly, Defence says that complainant's evidence is inconsistent with her previous statements to police. Complainant had made two statements to police. The Defence Counsel in the course of his cross examination highlighted certain inconsistencies in relation to both statements. He argues that complainant has not been consistent and therefore you should reject her evidence. Prosecution does not deny that there are some inconsistencies. However, the State Counsel argues that none of those inconsistencies are material to the central issue at hand and therefore not sufficient to discredit the version of the complainant. In light of the directions I have given to you in relation to previous inconsistent witness statements, you decide if those inconsistencies are material enough to reject the version of the complainant.
95. Secondly, the Defence argues that the complainant did not create a scene or ran out because she had consented to having sexual intercourse. Defence further says that there was an affair and an intimate relationship between the accused and the complainant and the alleged incident is nothing but one incident of that relationship and that is why she did not create a scene. Complainant denies such a relationship and, in her explanation, she said that she told the accused that she will yell and thereafter she was threatened and assaulted and she was in fear. In light of directions I have given in the Summing- Up, you decide if she had provided a reasonable explanation for not creating a scene.
96. You had the opportunity to observe the demeanor of the Complainant. You decided if she is a credible witness.
97. Accused in his evidence denies that the sexual intercourse was without complainant's consent. He says that it happened within a relationship and he went to complainant's house on her invitation. To support his version, Defence called Satmen and his son Aman who said that the complainant was seen in the compound of the accused shortly before the alleged incident. Prosecution says that

evidence of Satmen and Aman is inconsistent and not reliable. Prosecution also says that accused's version is not consistent with his answers at the caution interview.

98. Thirdly, the Defence argues that the version of the complainant is not reliable that is why the police took six months to charge the accused. It is not in dispute that the alleged incident took place on 24th October, 2014 and the accused was charged approximately six months thereafter on the 30th April, 2015. The investigating Officer was not called by the Prosecution. It was revealed that there were two investigating officers. The interviewing officer was unable to explain why the accused was not charged immediately after the incident. In the absence of any reasonable explanation for the delayed charge, you are not here to speculate as to why the police did not charge the accused for six months.
99. Fourthly, Defence relies on subsequent conduct of the complainant at the medical examination that she was calm and not distressed.
100. Before I conclude, I will tell something about the allegation of fabrication. The accused said that this allegation was made by the complainant because she was forced to do so by her husband and family members. The Defence Counsel argues that this is a case of an affair that got caught. It is for you to form your own opinion on that. If you are satisfied that Arvind had a motive for his wife to be forced to make up a false complaint against his own brother, then you may think that this allegation has been fabricated.
101. If you believe the version of the Defence, you must find the accused not guilty. Even if you don't believe the version of the Defence, Prosecution must still prove the charge beyond reasonable doubt. Remember, the burden to prove the charge rests on the Prosecution. Accused is under no obligation to prove his innocence or prove anything at all.
102. If you are satisfied that the version of Prosecution is credible and believable, then you have to be satisfied that each element of the offence of rape as charged had been proved beyond reasonable doubt.
103. If you are sure that the accused has had sexual intercourse with the complainant without her consent, then you can find the accused guilty of rape as charged.
104. That concludes my summing up of the law and the evidence in this particular trial. We have now reached the stage where you must deliberate together and form your individual opinions on whether the charge has been proved. On your return you will be asked to separately state in Court your opinion whether the accused is guilty or not guilty of the charge.
105. Any re-directions?




Aruna Aluthge
Judge

AT LAUTOKA
25th February, 2019

Solicitors: Office of the Director of Public Prosecution for State
Office of the Legal Aid Commission for Accused