

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

**CRIMINAL CASE NO.HAC 300 of 2018**

**BETWEEN** : **STATE**

**AND** : **UMESH CHAND**

*Counsel* : *Ms. S. Sharma, Ms. J. Fatiaki and Ms. S. Alagendra for the State  
Mr. J. Reddy and Ms. V. Qioniwasa for the Accused*

*Hearing on* : *21<sup>st</sup> of January - 24<sup>th</sup> of January 2019*

*Summing up on* : *25<sup>th</sup> of January 2019*

## **SUMMING UP**

Lady and gentleman assessors;

1. It is now my duty to sum up the case to you. I will direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the Judges of facts.
2. As requested by the prosecution and agreed by the defence, the name of the complainant juvenile is suppressed and she will be referred to as either by her initials LNB or the witness number, PW1.
3. As the representatives of the society, your role is to assist this legal system to serve justice. In doing so, you are guided by two equally important principals of law. To wit;
  - i) If a person has committed an offence, he should be meted out with an adequate punishment.  
In other words, if you are sure that the accused has committed the alleged offences, then it is your duty to find him guilty. I must remind you that it is the duty of the

prosecution to prove all the elements of the alleged offences beyond reasonable doubt. The accused is not required to prove anything as his innocence is presumed by the law.

ii) An innocent person should never be convicted.

There is a saying that it is better to let 100 offenders go free than to convict one innocent person. That is, unless you are very sure that the accused has committed the alleged offence/offences, you should not find him guilty.

If any of the said principles are violated, it would amount to a failure of the system, thus you have failed in your duty to the society. Having reminded you of your duty, let me proceed.

4. Evidence in this case is what the witnesses said from the witness box inside this court room and the admissions made. As I have stated you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.
5. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution or for the defense are not evidence. A suggestion made by a lawyer during the examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those questions, suggestions, arguments and comments when you evaluate the evidence only to the extent you would consider them appropriate.
6. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.
7. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, a part or none of any witness' evidence.
8. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes a witness may have other concerns when giving evidence. A witness may be worried that the evidence would incriminate him or reveal a safely

guarded secret. Or else he/she might honestly forget things or make mistakes regarding what he/she remembers.

9. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies between the evidence given by different witnesses. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you should not expect a witness to have a photographic memory or every detail to be the same from one account to the next.
10. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question of reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by the witness is a matter for you to decide.
11. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provide for the inconsistency and consider him/her to be reliable as a witness.
12. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you, how you assess the evidence and what weight you give to a witnesses' testimony.
13. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that, that inference is the only reasonable inference to draw from the proved facts. If there are two or more reasonable inferences to draw, one or more against the accused, as well as one or more in his favour, based on the same set of proved facts, then you should not draw the adverse inference.
14. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an accused is guilty and the accused is not required to prove

that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. That is, you must be sure of the accused person's guilt.

15. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of the offence against the accused, then you must give the benefit of that doubt to the accused and find the accused not guilty. A reasonable doubt is not a mere or an imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in detail in a short while.
16. You are not required to decide on every point the lawyers in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge is proved against the accused.
17. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not mandatory.
18. Let us look at the Information. The Director of Public Prosecutions has charged the accused for the following offences;

#### **COUNT 1**

##### *Statement of Offence*

RAPE: Contrary to section 207(1) and (2) (b) and (3) of the Crimes Act of 2009.

##### *Particulars of Offence*

Umesh Chand, between the 1<sup>st</sup> day of December, 2017 and 31st day of December, 2017 at Vatuwaqa in the Central Division, penetrated the vagina of LNB, a child under the age of 13 years, with his finger.

#### **COUNT 2**

##### *Statement of Offence*

RAPE: Contrary to section 207(1) and (2) (b) and (3) of the Crimes Act of 2009.

##### *Particulars of Offence*

Umesh Chand, between the 1<sup>st</sup> day of December, 2017 and 31st day of December, 2017 at Vatuwaqa in the Central Division, on an occasion other than the one mentioned in the count 1, penetrated the vagina of LNB, a child under the age of 13 years, with his finger.

#### **COUNT 3**

##### *Statement of Offence*

RAPE: Contrary to section 207(1) and (2) (b) and (3) of the Crimes Act of 2009.

*Particulars of Offence*

Umesh Chand, between the 1<sup>st</sup> day of January 2018, and 12th day of July, 2018 at Vatuwaqa in the Central Division, penetrated the vagina of LNB, a child under the age of 13 years, with his tongue.

**COUNT 4**

*Statement of Offence*

RAPE: Contrary to section 207(1) and (2) (b) and (3) of the Crimes Act of 2009.

*Particulars of Offence*

Umesh Chand, on the 13<sup>th</sup> day of July, 2018 at Vatuwaqa in the Central Division, penetrated the vagina of LNB, a child under the age of 13 years, with his finger.

19. Now I will deal with the essential elements of the offence.  
Section 207(1) of the Crimes Act reads as;

207. — (1) Any person who rapes another person commits an indictable offence.

Section 207(2) (b) of the Crimes Act reads as;

- (2) A person rapes another person if —  
[b] the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent;

Section 207 (3) reads as;

- (3) For this section, a child under the age of 13 years is incapable of giving consent.

Accordingly, in this case, to prove the offence of Rape the prosecution must prove the following elements beyond a reasonable doubt.

- (i) The accused;
- (ii) During the specified period or on the specified day;
- (iii) At the specified place (in this case at Vatuwnqa in the Central Division);
- (iv) Penetrated the vagina of LNB with his finger/tongue(as specified).

The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence.

The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

The fourth element involves the penetration of the LNB's vagina; with the accused's finger or the tongue as specified in the charge. The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of LGJ with his finger or tongue to any extent.

20. Before the commencement of the trial, prosecution and the defence has agreed upon the following facts. Therefore, they need no further proof and you could consider them as proved. Those are;
- i) The complainant in this matter is LNB, a female born on the 9<sup>th</sup> day of March, 2009.
  - ii). Umesh Chand is the accused in this matter.
  - iii). The complainant was aged 9 (8?)last year (2017) and has turned 10 (9?) years on 9<sup>th</sup> of March 2018.
  - iv). The complainant is in year 4 at Vishnu Deo Primary School (in 2018).
  - v). The accused is 48 years old.
  - vi). The accused is the complainant's mother's de facto partner and the complainant's mother's name is Sharon Rukshana Begum.

#### **Summary of evidence**

21. The 1<sup>st</sup> witness for the prosecution or the PW1 is Juvenile LNB. Her evidence is that;
- i) presently she lives in Nanuku with her mom Sharon and dad Aben.
  - ii) Before coming in to Nanuku she lived in Wailea.
  - iii) She knows Umesh (the accused) and used to call him "papa" and he did bad things to her. Once in December 2017, during the night, when her mom was asleep Umesh touched her private parts. When touching her private parts his 3<sup>rd</sup> and 4<sup>th</sup> fingers went little inside her private parts (vagina) and she has felt pain.
  - iv) In the same month (December 2017) during one night in the sitting room, while her mother was asleep Umesh has done the same thing to her.
  - v) Again in 2018, while her mother has gone to the town and she was sleeping in her mother's room, Umesh has come to her and has started taking off her clothes. Thereafter he has sucked her private parts. Umesh sucked her private parts by placing his mouth there and using his tongue.
  - vi) Thereafter, on 13<sup>th</sup> of July, 2018 Umesh has pulled her into the bathroom and poked his fingers inside her private parts. At that time her mother had been away in the shop, sent by Umesh. She has not told it to the mother on anyone else, before because Umesh has threatened her that he will hit her with the knife if she happened to tell anyone.
  - vii) When they left Vatuwaqa and came to Nanuku, she has told her mother and her mother has taken her to the police station.
  - viii) The witness further states that once Umesh was touching her private parts, on the settee, a white thing came out of his private part and he has put it on her private parts.

Thereafter he has wiped them off with a hand towel. On that day, before touching her private parts, Umesh has kissed her in the mouth.

22. This witness has been subjected to cross examination at length by the defence. Answering the cross examination, PW1 says that;
- i) Umesh is not her real father, but she used to call him “papa”.
  - ii) Umesh’s house is a small house, which consists of two bedrooms and the living area and kitchen area is structured as a single open space. One bed room is occupied by Umesh and her mom, Sharon, who is also known as Reena.
  - iii) There is a canteen in front of the Umesh’s house. Close to the canteen there is another house occupied by Rajnesh and Vikashini.
  - iv) When queried about an old man named Jagdishwar, the witness admits him to be her mother’s father (grandfather). The witness admits that her grandfather was there with them throughout their stay at the Umesh’s house and she used to sleep with him while Umesh and her mother slept in the adjoining room.
  - v) Many questions were asked from the witness on the time frames. You should note that almost all of these time frames were proposed by the defence and when accepted by the 9 year old child witness, later tries to contradict them, either through her or through the other witnesses.
  - vi) The defence successfully points out a contradiction in her evidence with her statement to the doctor, regarding the incident on 13<sup>th</sup> of July 2018, to wit; whether she happened to remove her clothes at the time of the incident inside the bathroom.
23. In re-examination the witness said, though her grandfather was there at Umesh’s house, he was not there throughout. After being there for few days he went back.
24. The PW2 was Sharon Rukshana Begum. Her evidence was that;
- i) She is also known by the name Reena and currently resides at Nanuku settlement in Vatuwaqa.
  - ii) She is residing there for 6 months and before that she was at the Umesh’s house together with her only daughter LNB and Umesh, her de facto partner.
  - iii) Though the witness inaccurately states that she move into Umesh’s house for the first time in May, 2016, later admits that she moved in February 2017 and she has been chased away by Umesh after 9 months, in or around October 2017. Thereafter she has got married to one Aben Prasad on the 3<sup>rd</sup> of November 2017 and after being with him for a month, has moved back to Umesh’s house with her daughter in or around the end of November 2017.
  - iv) After been at Umesh’s house for 8 months, she has moved out of it on the 14<sup>th</sup> of July 2018, together with her daughter due to a family problem. On that day itself, LNB, her daughter has told her of the incidents and she has taken the child to the police station, immediately. However, no complaint was recorded from them and was asked to come on Monday. However, the matter was referred to the child abuse unit and a statement

was recorded from the child and the child has been examined by the doctor on the 18<sup>th</sup> of July 2018, thereafter.

25. Facing the cross-examination, the witness has said;
- i) After being chased out by Umesh, in October 2017 she developed a relationship with Aben Prasad and got married to him on the 3<sup>rd</sup> of November 2017.
  - ii) When proposed that she, together with her daughter LNB, stayed with Aben Prasad till mid-January 2018, the witness denied it and re-affirms that they stayed with Aben for only a month, before returning to the Umesh's house in December 2017.
  - iii) When queried of the incidents that took place on the 13<sup>th</sup> of July 2018, and proposed that she took her daughter with her when she went to the canteen, the witness denied that and confirms that she went there alone while her daughter stayed home with Umesh.
  - iv) When proposed that this is framed against the accused because he did not want them back, the witness denied such.
26. The next witness PW3 was the doctor who examined the child on the 18<sup>th</sup> of July 2018. Her evidence was;
- i) She is a MBBS qualified medical practitioner with over 30 years of working experience. She was attached to the MSP clinic. On the 18<sup>th</sup> of July 2018, she has examined the child LNB and prepared the report marked and produced as PE1. At the time of the examination, the mother of the child had been present with the child.
  - ii) When she examined the child, LNB, her vaginal examination revealed that she had injuries in her Labia Minora area and they should be less than 7 days old at the time of the examination.
  - iii) In answering to cross examination, the witness states that it is highly unlikely that those injuries being self-inflicted.
27. With the leading of the above evidence and marking and producing PE1, the prosecution closed their case and the Court being satisfied that the prosecution has adduced sufficient evidence covering the elements of the alleged offences, decided to call for a defense, acting under the virtue of section 231(2), of the Criminal Procedure Decree, explaining and giving his due rights to the accused.
28. The accused having understood his rights elected to give evidence and to call few witnesses on his behalf. His evidence is that;
- i) He was married previously and his wife died on the 13<sup>th</sup> of June 2016. He has had her 6 month funeral ritual on the 13<sup>th</sup> and the 14<sup>th</sup> of January 2017.
  - ii) Soon thereafter, he has had a heart attack and was admitted to the hospital. As he was discharged, Sharon/Reena and her daughter LNB have come with him to his house.
  - iii) Thereafter Reena and LNB has left him and gone in October 2017, and Reena has got married to Aben Prasad. Since that marriage did not work out, Reena, together with her



daughter have come back to him in January 2018. When asked about the date they returned, the witness affirms that he was not sure of the date but they returned one week before the schools commenced for 2018.

- iv) The witness further states that he works 6 days a week Monday to Saturday and leaves for work at 6 O'clock in the morning and returns home by about 7.30 in the night. It should be noted that on the instructions of the accused the learned defence counsel has proposed to the PW1 in cross examination that accused leaves home for work at 6.30 am.
  - v) Speaking of the alleged incidents the witness denies them. He further alleges that since he chased them out of his house, Reena and her daughter are jealous of him and therefore has framed him.
  - vi) On Friday the 13<sup>th</sup> of July 2018, he has returned from work at about 7.00 pm. He has brought home some fish. He has given \$150.00 to Reena to settle the canteen bill and while Reena and LNB went to the canteen, has started to clean the fish. When cleaning the fish, his sister and her husband (Popo and Papu) has come. By producing this evidence the accused intends to elicit that there were many at his house on that particular evening and therefore he could not have dragged or pulled the LNB to the bathroom, without being noticed.
  - vii) Testifying further, the witness states that Reena and LNB returned back in January, a week before the school commenced. However, when queried by the Court, the witness states that they came back while the school term was in progress.
29. The next witness for the defence or DW2 was Mr. Ramniwas. His affirmation was that;
- i) He is the owner of the canteen in front of Umesh's house.
  - ii) Reena and her daughter used to come to his canteen to buy things.
  - iii) On the request of Umesh, he opened a credit account for them and they used to buy things on credit and settle all dues on every Friday.
  - iv) On Friday the 13<sup>th</sup> of July, after 7 O'clock, Reena came with her daughter and settled their dues. The witness further states he did not peruse his earlier records of credit in order to give evidence.
30. The next witness for the defence / DW3 was Vikashini. Her evidence was that;
- i) She knows the accused as they are from the same village as well as he is her brother-in-law. She also knew Reena and her daughter since they came to live in Umesh's house.
  - ii) When queried whether Reena or her daughter came to her house, her initial response was that they have come once, but immediately she follows that that they used to come sometimes. However, her next answer was that LNB comes alone to her house but Reena was never used to come.
  - iii) Her ultimate assertion was that LNB was never left alone at Umesh's house.
31. The final witness for the defence was Saraswathi. She states that;
- i) The accused is a brother of hers and she is also known as Popo.

- ii) She lives in the same settlement where the accused lives, but two blocks away (about 100 meters away) from his house.
  - iii) She knows Reena as the partner of her brother and Reena came to stay with him at the end of February 2017.
  - iv) Thereafter Reena, together with her daughter has left Umesh's house in October 2017 and returned back in January 2018, one week before the school term began on the 15<sup>th</sup> of January 2018.
  - v) On the 13<sup>th</sup> of July 2018, at around 7.30pm the witness has gone (with her husband) to Umesh's house. At that time, only Umesh has been there and he was cleaning the fish. Reena and her daughter had been at the canteen.
  - vi) When Reena and her daughter came back from the canteen, there had been many people in the living room of the Umesh's house including the father of Reena's. \
32. That is a summary of the evidence given by the witnesses. Please remember that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I did not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit. As I have already explained, which evidence you would accept and which evidence you would not accept is a matter for you and you alone to decide.
33. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proven and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offence have been proven beyond reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements
34. The Accused has indicated his stance through his own evidence, defence witnesses and cross-examination done from the prosecution witnesses; It is that he did not do those acts, but this case was framed against him due to the fact that he has chased them. With the submission of the accused's stance, one of the three situations given below would arise;
- (i) You may accept his stance and, if so, your opinion must be that the accused is 'not guilty'.
  - (ii) Without necessarily accepting his stance you may think, 'well what he suggests might be true'. If that is so, it means that there is a reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
  - (iii) The third possibility is that you reject his stance. But, that itself does not make the accused guilty. The situation would then be that you should still consider whether the prosecution has proved all the elements beyond reasonable doubt.
35. Any re-directions?

36. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the accused. You have copies of the document tendered as the exhibit "PE 1". When you have reached your separate opinion, you will come back to court and you will be asked to state your opinion.
37. Your opinion should be whether the accused is guilty or not guilty.



***Solicitors for the State*** : ***Office of the Director of Public Prosecutions, Suva***  
***Solicitors for the Accused*** : ***Jiten Reddy Lawyers***