

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 276 of 2016

STATE

vs.

KITIONE VAKADRANU

Counsel: Ms. U. Tamanikaiyaroi with Ms. B. Khantaria for the State
Ms. L. David for Accused

Date of Hearing: 5th, 6th and 7th March 2019

Date of Summing Up: 11th March 2019

SUMMING UP

1. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. As I explained you before the commencement of the hearing, we have different functions. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
2. Your function is to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

3. I may comment on the facts if I think it will assist you when considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard any comment I make about the facts of this case, unless it coincides with your own independent opinion.
4. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box and the documents tendered as exhibits. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The purposes of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. Therefore, the opening address of the prosecution is not evidence. The closing addresses of the counsel of the prosecution and the defence are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
5. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. As judges of facts you are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I make my judgment.
6. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts solely

upon the whole of the evidence. It is your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

Burden and Standard of Proof

7. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused is guilty for the offence.
8. The burden of proof of the charge against the accused is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.
9. The standard of proof in criminal trial is “proof beyond reasonable doubt”. It means that you must be satisfied in your mind that you are sure of the accused’s guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you find any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

Information and elements of the offences

10. The accused is charged with one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act and one count of Criminal Trespass, contrary to Section 387 (1) (a) of the Crimes Act.
11. The main elements of the offence of Rape as charged are that:
 1. The accused,
 2. Penetrated into the vagina of the complainant with his penis,

3. The complainant did not consent to the accused to penetrate into her vagina with his penis,
 4. The accused knew or believed or reckless that the complainant was not consenting for him to insert his penis in that manner.
12. The main elements of the criminal trespass as charged in the second count are that:
- i) The accused,
 - ii) Entered into the house of the complainant,
 - iii) With the intention to commit an offence.

Agreed Facts

13. I now request you to draw your attention to the agreed facts, which are before you. They are the facts that the prosecution and defence have agreed without dispute. Hence, you are allowed to consider them as proven fact by the prosecution beyond reasonable doubt.

Separate Consideration

14. The accused is charged with one count of Rape and one count of Criminal Trespass. It is your duty to consider each of these two counts separately. If you find the accused guilty to the first count that does not automatically make the accused guilty to the second count. Likewise, if you find the accused not guilty to the first count that does not automatically make the accused not guilty to the second count.

The Accused

15. It is the onus of the Prosecution to prove that it was the accused who has committed this crime on the complainant. As I explained above, at no point of time the onus shift on the accused to prove that it was not him who has committed this crime.

Penetration

16. I will now explain you the element of penetration. Evidence of slightest penetration of the penis of the accused into the vagina of the complainant is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

Consent

17. Let me now draw your attention to the issue of consent. It is your duty to decide whether the prosecution has proven beyond reasonable doubt that the complainant did not give her consent to the accused to insert his penis into her vagina.
18. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of rape, the complainant consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. A consent obtained through fear, by threat, by exercise of authority, by use of force or by intimidation could not be considered as a consent given freely and voluntarily. A submission without physical resistance by the complainant to an act of another person shall not alone constitute consent.
19. If you are satisfied, that the accused had inserted his penis into the vagina of the complainant and she had not given her consent, you are then required to consider the last element of the offence, that is whether the accused honestly believed or knew or reckless that the complainant was freely consenting for this alleged sexual intercourse. I must advice you that belief in consent is not the same thing as a hope or expectation that the complainant was consenting. You must consider whether the accused knew either that the complainant was not in a condition or a position to make a choice freely and voluntarily, or the complainant had made no choice to agree to sexual intercourse. If you conclude that the accused believed or knew that the complainant was consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that were prevailed at the time of the alleged incident.

Corroboration

20. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. It means that if you are satisfied with the evidence given by the complainant and accept it as reliable, credible and truthful; you are not required to look for any other evidence to support the account given by the complainant.
21. One or more of you may have assumptions as to what constitutes rape, what kind of person may be the victim of rape, what kind of person may be the rapist or what a person who is being or has been raped will do or say. Though such assumptions are natural in ordinary life, it is important that you must leave behind such assumptions as there is no stereotype of circumstances for a rape, a rapist or a victim of rape.
22. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety of ways. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgment strictly on the evidence that you have heard from the witnesses during the course of the hearing.
23. You must be mindful that not to bring in to the assessment of the evidence any preconceived views as to how a victim of rape in a trial such as this should react to the experience that the victim had gone through. Every person has his or her own way of coping with such incident. Some may display obvious signs of distress and others may not. Demeanours of the victim in the court while giving evidence is not necessarily a clue to the truth of the victim's account.

Evidence of the Prosecution

24. Let me now remind you briefly the summary of the evidence presented by the prosecution and the defence during the course of the hearing. I trust that you can properly and correctly recall all of the evidence adduced during the hearing.

25. The complainant said that she had been living at Cunningham for few months in 2016 with one Rahul at her house. Rahul was her de-facto partner at that time. The accused used to visit her place and have grog sessions with Rahul. He usually comes on Fridays and spends the time at her place till about 10.00 p.m. There were few i-taukei boys such as Peta, Jerry, Aseri, in the area, who used to come to her place and drink kava with Rahul. The accused had come to her place on three Fridays in the month. He had done that over the period of three months. Beside of those Fridays, the accused had come to her place on few Saturdays as well. The accused had come on those Saturdays to help the complainant and Rahul in renovating their house. There were plenty boys who came and helped them in renovating the house and the accused was one of them. During those visits, the complainant had met the accused and they have greeted each others. During those visits, the complainant had overheard their conversations. When she usually comes home after the work, Rahul and the boys, including the accused had already started the drinking sessions. She cooked and then went to sleep. Rahul had left her in the month of July 2016 and the accused never came to her place thereafter. He then only came to her house on the day that the incident took place.
26. The complainant could recall that she went to sleep around 8.00 o'clock on the 19th of July 2016. However, she had fallen into sleep around 10.00 p.m. She was sleeping on the floor of the bedroom. Her house was 20 x 10 meters house. There is a living room and beside it, you find the kitchen. Beside the kitchen you find the bedroom. The bedroom is covered with a masonite board. The board goes from the floor to the ceiling of the house. The bedroom door is an open door and facing the center to the back door. She had kept the battery light on the kitchen table when she went to sleep. It was a small battery light, and she had turned the light into dim mode. The complainant said though it was in dim mode, still the light from the battery light came into the bedroom. The kitchen table was seven to ten meters away from the bedroom. She could not see the battery light from the place where she was sleeping. The light came to her on the side of her face. Apart from the battery light, there was light coming from the neighbouring house through the two window louvers. The windows had curtains. Those curtains were made in old saree. The curtains

were very thin, therefore, the light was still coming through the windows. The complainant further said that it was a full moon night.

27. After the midnight, she woke up and found that the accused was sitting beside her. He had a knife holding in his left hand and placed it on her throat. He has threatened her not to scream, if so, he will kill her. The complainant said that she recognised the person as the accused. His face was close to her face, about two to three meters. She had been observing the person throughout this ordeal, that lasted for about 1/2 hour. According to her, she clearly saw that it was the accused that came into her room with a knife in that night. He had a beard covering his face and his skin was light dark. He had curly short hair.
28. When the accused threatened her, he was sitting on her knee length. While holding the knife in one hand, the accused had lifted her skirt up and put her undergarment to a side. He had then pulled his trousers down and used his legs to remove it. He had then inserted his penis into her vagina and had sexual intercourse. Once he done, he laid on her for a while. The complainant said that she did not do anything while the accused had sexual intercourse with her as she was scared and he was still holding the knife. The accused had then threatened her that he will kill her if she is going to tell others about this matter. The complainant had thought that he will actually going to kill her. Therefore, she had told the accused that don't kill her and he can come and have sexual intercourse with her whenever he wants. The accused had then left her house through the back door. While he was walking to the backdoor, she has clearly seen his face again with the light came from the battery light and also from the moon light.
29. Once the accused left, the complainant has tried to call her son, but he has not answered to her call. She had then tried to her daughter, but the result was the same. She then called her son-in-law Amit Kumar and told him that an i-taukei person had entered into her house. The son-in-law and her daughter Sumitra Naidu had then came to her house in the early hours of the 19th of July 2016. The complainant had then told her daughter that an i-taukei boy had raped her. She had not known his name at that time, though she knew him as the accused used to visit her house. After that she had gone to the Valelevu Police Station and

reported the matter. Afterward, she had been taken to the CWM hospital for the medical examination.

30. You have heard the evidence of Amit Kumar and Sumitra Naidu. Amit Kumar was married to Sumitra Naidu, who is the daughter of the complainant. They said in their evidence that the complainant called and told Amit in the early hours of the 19th July 2016 that an i-taukei man had entered into her house and raped her. They have gone to the complainant's house immediately after receiving that call. When they entered into the house the complainant got hold of her daughter and started to cry. The complainant had told Sumitra that an i-taukei boy, who used to come to her place and known to her, though she does not know his name, had entered into the house and placed a knife on to her neck. He had then raped her and left the house.
31. Doctor Nitik Ram, in his evidence explained about the medical findings that he found in the complainant during the medical examination that was conducted on the 19th of July 2016. Doctor Ram has found a superficial laceration on the neck of the complainant and also a bite mark on the left arm of the complainant. Moreover, he has found minor vaginal laceration in the vaginal area of the complainant. According to his professional view, these injuries were afresh and might have occurred few hours before the medical examination.

Evidence of the Defence

32. At the conclusion of the prosecution case, the accused was explained about his rights in defence. The accused opted to give evidence on oath and also called two witnesses for his defence.
33. The accused denies this allegation. According to his evidence, he was sleeping at his home at the time material to this matter. He had been drinking with his brother and some relatives since 10.00 and then went to the city at around 7.00 p.m on the 18th of July 2016. They had gone to a night club and stayed there until 10.00 p.m. The accused, his brother, and two of his brother's friends then returned home. Upon returning home, they all had dinner. Thereafter, the two friends left. The brother of the accused also went with the

friend in order to drop them at the junction. After they left, the accused went outside of the house to smoke a cigarette. The brother has returned in a while and had gone to sleep. Having smoked his cigarette, the accused had gone into the veranda of the house and lied down beside his brother. The father of the accused had returned home from a church meeting while he was still smoking his cigarette. He had then fallen into sleep and woke up in the following morning when the police came to his house, looking for him.

34. Accused denies the fact that he was a good friend of Rahul. During the evidence in chief, the accused said that he had gone to the complainant's house only once or twice. One time he had gone to the complainant's house in order to help them to build the toilet of the house. Then he had gone there to drink grog with few other boys. They were Peta, Jerry, Aseri, and Loata. When he went to drink grog at the complainant's house, Rahul was alone at home. He had met the complainant when he went to help them in building the toilet. He had greeted her saying Bula in Fijian and then the complainant had replied him in Hindi which he did not understand. You may recall that the accused then said during the cross examination, that he greeted the complainant in Hindi.
35. You have heard that the accused used the words "usually" "sometimes" and "normally" when he explained about his visits to the complainant's house. During his cross examination the accused agreed with the learned counsel for the prosecution that he had visited the house of the complainant more than twice. The accused said that he met the complainant during the day time. When he spoke to her, he was very close to her.
36. The accused denies that he went into the house of the complainant and forcefully had sexual intercourse with her in the early hours of the morning of 19th of July 2016. The accused further explained that he had usually gone to the complainant's house twice a day when he went there to build the toilet. He was there in the morning and then went back home for lunch. After the lunch he had gone to complainant's place and returned home around 4.30 p.m. He then said that he went there only once in order to help them in building the toilet.

37. You have heard evidence of Aporosa Narara, who is the father of the accused. According to his evidence, he had gone to drink grog at one of his friend's place in Makoi in the evening of 18th of July 2016. He had returned home around 11.00 p.m. When he returned home, he had found the accused, his elder brother and two of his friends were having dinner at home. After the dinner, the brother of the accused went out with his two friends in order to drop them at the junction. The accused also went out of the house to smoke a cigarette. In a while the brother of the accused came and they all then followed each other's into the house. The brother of the accused then went to sleep and the accused was also lying down beside his brother when Mr. Aporosa had his dinner. After that he too went to sleep. According to Mr. Aporosa, he had slept with the accused and his brother in the living room. He woke up in the morning when the police came in looking for the accused. Mr. Aporosa said that he did not know what happened to the accused and his brother while he was sleeping from 12.30 a.m until he woke up in the morning.
38. Mr. Jone Rupeni, who is the elder brother of the accused, said that he had his dinner with his two friends and the accused upon returning from the night club. He had then gone to drop his friends. When he returned home, he had gone to the veranda, which is an extension of the house and lie down. He was dozing off to sleep, when his father returned home from a family function at Makoi. He heard the father had a few chat with the accused. He had woken up around 12.00 to stretch himself and found that the accused was sleeping beside him. He had woken up again at 2.00 a.m. and found the accused was sleeping beside him. He then woke up in the morning when the police came in looking for the accused. Mr. Rupeni said that while he was sleeping between 12.00 midnight to 2.00 a.m. he did not know whether the accused left home. He slept in the veranda with his brother. Moreover, he said that the sitting room and the veranda is not a same place. Having recognized the copy of the statement which he made to the police during the investigation, Mr. Rupeni said that few lines of the statement are missing in that copy. According to the said copy of the statement, Mr. Rupeni had not informed the police that he had woken up at 12.00 midnight on the 19th of July 2016.

39. I have summarized the evidence presented during the course of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence and recall yourselves on all of them. What I did only was to draw your attention to the main items of evidence and help you in recalling yourselves of the evidence.

Analysis and Directions

40. You heard the evidence presented by the prosecution and the defence. The prosecution alleges that the accused break into the house of the complainant while she was sleeping in the early hours of the morning of 19th of July 2016, with a knife. He had then threatened her that he would kill her if she shouted. Thereafter he forcefully had sexual intercourse with her without her consent. Afterwards, he had threatened her that he would kill her as she would tell others about this incident. The complainant had then told him that not to kill her and he could come and have sexual intercourse with her anytime he wishes. The accused in his defence adduced evidence saying that he was sleeping at home with his family, mainly with his elder brother and father during the time material to this incident. According to the evidence presented by the defence, the accused denies the charges.

Evaluation of Evidence

41. It is your duty now, to determine whether the prosecution has established beyond reasonable doubt that the accused had trespassed in to the house of the complainant and then had sexual intercourse with the complainant without her consent as alleged in the first count. In order to do that you have to evaluate the evidence presented by the prosecution and defence and determine the reliability and credibility of evidence given by the witnesses. You must be satisfied that you can rely on the evidence as the true, reliable, and credible evidence. In order to do that, you have to be satisfied that evidence is free from mistakes, errors and inaccuracies. If you find the evidence is free from such mistakes, errors and inaccuracies, you can take the evidence into consideration as reliable evidence.

42. The assessment of credibility of evidence does not concern with unintended inaccuracy, mistakes or errors. It is focused on the lies or inaccurate facts that are intentional and motivated attempts to deceive. The credibility depends on the individual who gives evidence, his motivations, his relationship to and the reaction to the particular situation.
43. Evaluation of the reliability and credibility of evidence will assist you to determine what evidence you may accept and what part of the evidence you may refuse. In doing that, you may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.
44. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking in the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with his or her own evidence but also with other evidence presented in the case.
45. It is your duty to consider the demeanour of the witnesses, how they react to being cross examined and re-examined and were they evasive, in order to decide the credibility of the witness and the evidence.
46. Moreover, you must bear in your mind that a witness may tell the truth about one matter and lie about another; he or she may be accurate in saying one thing and not accurate in another thing.

Inconsistencies

47. You have heard that the learned counsel for the defence cross examined the complainant about the inconsistent nature of her evidence given in the court with the statement she had given to the police.

48. Moreover, the learned counsel for the prosecution cross examined the two defence witnesses regarding the inconsistency nature of their evidence given in the court and the statements that they have made to the police during the investigation. I will explain them in detail in a while. I now only explain you the legal position on such inconsistencies and contradiction, which would undoubtedly assist you in your deliberation.
49. You are allowed to take into consideration about such inconsistencies when you consider the credibility and reliability of the evidence given by the witness. However, the previously made statements are not evidence of the truth of its contents. The evidence is what a witness testified in the court.
50. It is obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. Moreover, as I explained above, the victims of rape react differently to the trauma and the experience they have gone through, especially in revealing those incidents to another person.
51. If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.

Defence of Alibi

52. Let me now take your attention to the defence of the accused, where he claims that he was sleeping at his home with his family at the time material to these counts.

53. The accused are not obliged to prove his innocence and also not required to give evidence. However, in this hearing, the accused not only elected to give evidence on oath but also called witnesses to give evidence for the defence. Therefore, you have to take into consideration the evidence adduced by the accused when you determine the issues of fact of this case.
54. The accused's defence is alibi. The accused says that he was not at the house of the complainant in the early hours of the morning of 19th of July 2016 as he was sleeping at his home with his brother.
55. Even though the accused has put forward the defence of alibi, the burden of the proving the case against accused still remains on the prosecution. The prosecution must prove so that you are sure that the accused was present at the scene of the crime and forcefully had sexual intercourse with the complainant without her consent.
56. The accused gave evidence and called two witnesses to support his assertion that at the time this alleged incident took place, he was sleeping at home with these two witnesses. The accused and the two witnesses were cross-examined about the alibi and you are invited by the prosecution to conclude that they were lying.
57. If you conclude that the accused's alibi is true or may be true, then he cannot have participated in this alleged sexual intercourse with the complainant and you must find him not guilty. If, on the other hand, you are sure, having considered the evidence carefully, that the accused's alibi is false, that is a finding of fact which you are entitled to take into account when judging whether he is guilty. But do not jump to the conclusion that because the alibi put forward is false the accused must be guilty. You should bear in mind that sometimes an alibi is invented because the accused thinks it is easier than telling the truth. The main question for you to answer is: are we sure that these alleged incidents actually took place as claimed by the prosecution.

58. In respect of the defence of alibi, the accused is not required to prove beyond reasonable doubt that he was sleeping at home with the two witnesses of the defence. The burden of the accused to prove the alibi is evidential burden. It means that the accused has to adduce or point to evidence that suggests a reasonable possibility that he was sleeping at home with the two witnesses of the defence at the material time relevant to this matter. Such evidence that could point or suggest that the accused was somewhere else, and not at the scene of the crime, has to be credible and reliable evidence.
59. The prosecution claims the evidence of the accused as well as his two witnesses are not credible on the ground of inconsistency.
60. The accused in his evidence said that he came home with his brother and two friends of his brother around 11.00 p.m. on the 18th of July 2016. They then had dinner together. The two friends then left and his brother also went with them in order to drop them at the junction. The accused had then gone out to smoke a cigarette. When he was smoking his cigarette, his brother returned and went straight to sleep at the veranda. Then his father came and went into the house. He then went to the veranda and slept beside his brother. According to the evidence of his brother, he went to drop his two friends and then came home and straightly went to sleep at around 11.45pm. While he was getting into sleep, his father came home. He had heard the father had a few chat with the accused. The father of the accused in his evidence said that he came home when the accused, his brother and the two friends were having dinner at home. He then saw the accused went out to smoke a cigarette. Then the brother came home after dropping the friends. They all then followed each other's into the home. While the father was having his dinner, the accused and his brother went to sleep. The father said that all of them slept in the sitting room.
61. If you find any inconsistencies or contradictions of the defence witnesses, you can take them into your consideration. Moreover, you may recall that the learned counsel for the prosecution cross examined the two defence witnesses about the inconsistency nature of their respective evidence with the two respective statements made to the police by the two witnesses.

62. You can take into consideration these inconsistencies and the contradictions, between the witnesses and also with the previously made statements to the police, when you determine whether the evidence of alibi is reliable and credible. Then you can decide what weight you would give to this evidence in order to conclude whether it is true or may be true, or false.
63. As I explained before, if you conclude the alibi is false, do not straight away proceed to the conclusion that the accused is guilty. Still you have to examine the evidence of the prosecution to satisfy that the prosecution has established all the essential elements of the offence beyond reasonable doubt.

Evidence of the Prosecution

64. The accused claims that he was not present at home of the complainant and therefore, the complainant may have mistakenly identified the perpetrator as the accused. Therefore, you must determine whether the complainant has clearly and properly have identified the accused as the person who actually came into her house and raped her as she claims. In order to do that you have to determine, whether you can accept the evidence of the complainant as reliable, credible and truthful evidence. If you are satisfied, you must then proceed to determine whether what she said in evidence is probable or improbable according to the circumstances which she was explaining.
65. The main contentions of the defence are that the complainant had mistaken in her identification of the perpetrator. Accordingly, the case against the accused mainly depends on the correctness of the identification of the perpetrator by the complainant. When you are considering the identification evidence given by the complainant, you need to exercise special caution. The reason for this is that experience tells us that honest and impressive witnesses, genuinely convinced of the correctness of their identification, have in the past made mistakes, even a number of witnesses making the same identification. You cannot convict the accused unless you are sure that the complainant's identification was accurate and, in making that judgment, you need to look carefully at the circumstances in which it

was made and at any other evidence in the case which may support it. Specially you have to take into consideration the followings:

- i) How long was the suspect under observation?
- ii) At what distance?
- iii) In what light?
- iv) Was the observation impeded in any and, if so, what way?
- v) Had the witness seen the suspect before (i.e. was this recognition?) and, if so, how often and in what circumstances?
- vi) Was there any material difference between the description given by the witness at the time and the suspect's actual appearance?
- vii) Any other circumstances emerging in the evidence which might have affected the reliability of the identification (e.g. press photographs),

66. Let us consider the circumstances in which the identification took place. The complainant said that she knew the accused before as he used to come to her house. According to the complainant, the accused had visited her house when Rahul was staying with her. Accused had joint with Rahul for 'grog' sessions at her house. Moreover, the accused had come to her house on few Saturdays, in order to help them in building the toilet of the house. The accused had spoken to her during those visits. The accused in his evidence once said that he visited her place only once or twice, but during the cross examination, he said that he had visited her place more than twice. You may recall that the accused said that he went to her house twice on the Saturday. During those visits he had met the complainant at day time.

67. You have heard the evidence of the complainant, explaining the lighting condition of the bedroom during that early hours of the morning of 19th of July 2016. She had dimmed the battery light and placed it on the kitchen table. Even though the light was dimmed, she said that some lights come into the bedroom from the battery light through the bedroom door. Moreover, the lights from the neighbour's house came through the two louvers of the bedroom. The bedroom louvers had curtains made with thin old saree. It was a full moon

night. The light of the battery light, fall on the side of her face, while she was sleeping on the floor of the bedroom.

68. The complainant then said in her evidence that she saw the face of the accused as it was very close to her face. She had seen and observed the face of the accused throughout this ordeal. The complainant further said that she was able to recognize the accused from his voice as well. The complainant had seen the accused clearly when he was going out through the backdoor.
69. When you are making the decision about the evidence of identification, you can take into consideration other evidence that tends to support the evidence of identification. In doing that you can take into consideration about the evidence of the complainant and the accused about the visits made by the accused to the house of the complainant. Is there any evidence to support that the accused had a prior knowledge about the set up inside the house of the complainant. If you find such evidence, you are allowed to take them into your consideration.
70. Finally, on the subject of supporting evidence, I want to say something about the accused's evidence of alibi. Clearly, if you are sure that the evidence of the complainant is reliable, it would follow that the accused's alibi is false. You must, of course, consider the alibi evidence with care before you reach such a conclusion. Putting the evidence of the complainant on one side for a moment, if you are to conclude that the alibi defence is false, that fact is also capable of providing to support for the complainant's identification. But that would be a conclusion about which you should be cautious, because as I explained before a false alibi may be put forward for reasons other than guilt. One example is that accused who thinks it is simpler to put forward a false alibi than to explain what he was really doing; another is that the accused who has a genuine alibi but thinks he may not be believed unless he can find others to support him. Only if you can exclude such possibilities should you regard a false alibi as any support for the prosecution case.

Expert Evidence

71. It is the general rule that witnesses are normally not allowed to give opinion and only allow to give evidence on what they have seen, heard, or felt by their physical sense. However, the exception is that the evidence of expert witnesses. Expert witnesses are those who are learned and experts in a particular subject or field with relevant experience. Such witnesses are allowed to give evidence of their opinion.

72. In this case you have heard the evidence of Dr. Nitik Ram. He is a medical doctor and gave his professional opinion about the injuries that he found during the medical examination of the complainant on the 19th of July 2016. You may recall the evidence given by Dr. Ram about the injuries that he found in the complainant. You can take into consideration the expert evidence given by Dr. Ram with all other evidence adduced during the hearing. It is for you to decide whether the expert opinion given by Dr. Ram is relevant to the matter that you have to determine. If you decide it is relevant, then you have to decide what is the weight you give to this expert evidence. If not you can disregard it.

Evidence of Recent Complaint

73. You have heard that the complainant had told her son-in-law Amit Kumar and the daughter Sumitra Naidu about these incidents few hours after this incident took place on the 19th of July 2016. According to Sumitra's evidence, the complainant had told her that an i-taukei youth came into the room and raped her. The complainant had told Sumitra that she knew the i-taukei boy though she does not know his name as he used to visit her house before.

74. The evidence given by Amit Kumar and Sumitra Naidu are known as evidence of recent complaint. It is not an evidence as to what actually happened between the complainant and the accused. Amit Kumar and Sumitra Naidu were not present and witnessed what happened between the complainant and the accused.

75. You are entitled to consider the evidence of recent complaint in order to decide whether or not the complainant has told the truth and her account is credible and reliable. It is for you to decide whether the evidence of recent complaint helps you to reach a decision, but it is important that you must understand that the evidence of recent complaint is not independent evidence of what happened between the complainant and the victim.

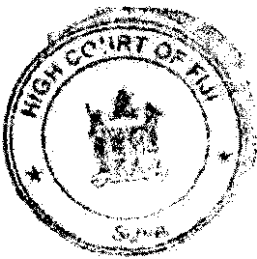
Inconsistency Nature of the Evidence

76. You may recall that the learned counsel for the Defence proposed to you to consider the inconsistency nature of the evidence given by the victim with the statement she made to the police during the investigation.
77. You are allowed to consider these inconsistent natures of the evidence given by the complainant, when you evaluate her evidence in order to determine whether you can satisfy and accept the evidence given by the complainant as credible, reliable and truthful evidence beyond reasonable doubt.

Final Directions

78. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count one, you can find the accused guilty for the said offence of Rape.
79. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count one, you must find the accused not guilty for the said count of Rape.
80. Likewise, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Trespass as charged under count two, you can find the accused guilty for the said offence.

81. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Trespass as charged under count two, you must find the accused not guilty for the said offence.
82. Madam and Gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.



A handwritten signature in black ink, appearing to read "R.D.R.T. Rajasinghe".

R.D.R.T. Rajasinghe
Judge

At Suva

11th March 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.