

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 73 of 2017

STATE

V

MUNESHWAR REDDY

Counsel : Ms. P. Lata and Mr. A. Singh for the State.
: Ms. J. Singh [LAC] for the Accused.

Dates of Hearing : 1, 2, 3, 4, 5 April, 2018
Closing Speeches : 8 April, 2019
Date of Summing Up : 8 April, 2019

SUMMING UP

Ladies and Gentleman Assessors

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

ROLE OF JUDGE AND ASSESSORS

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused is guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
6. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

BURDEN OF PROOF AND STANDARD OF PROOF

7. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.
8. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused person's guilt, before you can express an opinion that he is guilty.

If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.

9. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this court room.
10. You must decide the facts without prejudice or sympathy to either the accused or the complainant. Your duty is to find the facts based on the evidence without fear, favour or ill will.
11. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

INFORMATION

12. The accused is charged with the following offences: (a copy of the information is with you).

FIRST COUNT

Statement of Offence

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

Particulars of Offence

MUNESHWAR REDDY, on the 3rd March, 2017 at Nadi in the Western Division, penetrated the vagina of **ANGEL NARAYAN SCHMEKEL**, with his penis, without her consent.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

MUNESHWAR REDDY, on the 3rd March, 2017 at Nadi in the Western Division, penetrated the mouth of **ANGEL NARAYAN SCHMEKEL**, with his penis, without her consent.

13. To prove counts one and two the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
 - (a) The accused;
 - (b) Penetrated the mouth and vagina of the complainant with his penis;
 - (c) Without her consent;
 - (d) The accused knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.
14. In this trial the accused has denied committing the offences of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the mouth and vagina of the complainant with his penis without her consent.
15. The slightest of penetration of the complainant's mouth and vagina by the accused penis is sufficient to satisfy the act of penetration.
16. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
17. The second element is the act of penetration of the complainant's vagina by the penis.
18. The third element is that of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all.

Furthermore submission without physical resistance by the complainant to an act of another shall not alone constitute consent.

19. If you are satisfied that the accused had penetrated the vagina of the complainant with his penis and she had not consented, you are then required to consider the last element of the offence that is whether the accused knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
20. You will have to look at the conduct of both the complainant and the accused at the time and the surrounding circumstances to decide this issue.
21. If you are satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that the accused had inserted his penis into the complainant's mouth and vagina without her consent then you must find the accused guilty as charged.
22. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offences of rape, then you must find the accused not guilty of the offence he is charged with.
23. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means if you are satisfied with the evidence given by the complainant and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by the complainant.
24. In this case, the accused is charged with two offences, you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.

25. You must be satisfied that the prosecution has proved all the elements of all the offences beyond reasonable doubt in order for you to find the accused guilty of either or all the counts. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning either or all the offences, then you must find the accused not guilty.

ADMITTED FACTS

26. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as amended final admitted facts.
27. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
28. I will now remind you of the prosecution and defence cases. In doing so it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is not important. You should consider and evaluate all the evidence in coming to your opinion in this case.

PROSECUTION CASE

29. The prosecution called four witnesses to prove its case against the accused.
30. The complainant Angel Narayan Schmekel informed the court that even though she was born in Fiji she left Fiji when she was about 15 years of age.
31. In August 2015 the complainant came to Fiji with a view to starting up a business in Fiji in the tourism sector, it was during this visit the

complainant met the accused. The accused and the complainant discussed ways of starting the business in which the complainant invested F\$55,000.00 in buying a boat since she was a foreigner she could not register a business under her name.

32. As days went by, a boyfriend and girlfriend relationship developed according to the complainant they were a couple, she was getting to know him since the relationship was a recent one she had not introduced him to her family. The relationship lasted for about 4 months till December, 2015.
33. In December, 2015 her tourist visa expired so she left Fiji leaving her boat in the care of the accused. The complainant came in January, 2016 to Fiji but she did not meet the accused after two weeks she left. On 28th December, 2016 the complainant came to Fiji and met the accused, the boyfriend and girlfriend relationship had ended but she supported him.
34. When she came to know the accused was doing the business under his name she was very disturbed the accused did not take this well he then sought time to pay back the money invested. Moreover, the accused informed the complainant that she can go and report the matter to the police but no one will help her since he has friends in the Police Department.
35. By this time the relationship had ended, there were arguments between the two the accused did not take this break up well, he wanted to meet her and had started threatening her.
36. On 3rd March 2017 the accused made numerous phone calls asking her to meet him she refused. The accused told her that he was coming to her home and that he will kill her. The complainant did not take the threat seriously so she did not report him to the police.

37. At around 1pm the accused came to her house in a car, the complainant was alone since her mother was at work and her father was attending a funeral. The nearest neighbour was about 80 meters away from her house. The accused came and started tooting the car horn.
38. In order to avoid any dramas in front of her house she went out and told the accused that she did not want to talk to him and he had better leave since her father would come home anytime. Upon hearing this, the accused started to swear at her loudly as a result she was embarrassed.
39. He asked her to sit inside the car and talk like adults and for her not to break up the relationship and to make a decision fast otherwise he will not leave and when her dad comes either he dies or her dad dies. When the complainant left her house she did not wear any shoes, close the house door or take her mobile phone with her.
40. As the complainant sat in the car she saw a dagger near the hand brake of the car, at this time the accused punched her face reversed the car very fast and was taking her somewhere. The accused was angry with her he had punched her on the right side of her face and said that she will not be able to see her parents again. The complainant was scared begging him to let her go and to stop the car.
41. On the way she tried to open the car door but he pulled the door and continuously punched her. The punches were directed to her face, head, arms, back, stomach and ribs he also slapped her many times. The accused told her he will teach her a lesson by killing her then chop her body into pieces put it in a sack and dump it in the ocean. The accused stopped the car at his house at Nadovi, Sonaisali Road which was about 30 minutes away from her home.

42. In the car the complainant cried for help but he wouldn't stop the car. The complainant received injuries on her lips, face, arms and both sides of the head. She was shouting and crying for help she received bruises on both sides of her head, arms, a cut on her lower lip and her front tooth got cracked.
43. The complainant was dragged out of the car and taken into the living room of the house. At this time he again started punching and swearing with all those beatings she was feeling weak. The accused pushed her on the bed in the living room he tied her feet together with some cotton material then started removing her clothes and taking photos of her in her undergarments and when she was fully naked. The accused was laughing and saying that he will circulate her pictures in the social media, send it to his friends and to her father.
44. The complainant begged him with her hands together to let her go but he did not listen and continued laughing. After removing his clothes the accused put his penis into her mouth. The complainant did not consent to what the accused had done, he asked her to suck his penis but she refused and did not cooperate.
45. Thereafter the complainant saw urine dripping from his penis he said it was dirty but she deserved a dirty penis, he then inserted his penis into her vagina, she felt helpless every time she screamed for help the accused tried to suffocate her with a cushion. The accused had penetrated her for about 3 to 4 minutes. The complainant reminded the accused that he has 2 sisters and a mother if someone did this to them the accused replied that he did not care but that day was her turn to be raped.
46. After this he wore his clothes sat in a corner and started crying, he said he shouldn't have done this to her and that he will go to jail so it was better for him to kill her so there is no evidence. The complainant was scared she

begged him not to kill her and assured him that she was not going to report him or tell anyone about what he had done to her but will just leave the country. She was saying this to make him believe her since she wanted to get out of that house alive.

47. There was no one in the house so to get the attention of the neighbours she was screaming and every time she screamed he suffocated her. After much persuasion the accused believed her that she will not report the matter to the police, since the complainant was injured she asked to be taken to the doctor.
48. The accused took her to Dr. Fong's clinic in Nadi Town, the accused told the complainant to sit in the waiting area not to talk to anyone and wait for him. The complainant got out as the car was driven away she ran and told the receptionist that she immediately wanted to see the doctor since her life was in danger and if a guy comes not to let him see the doctor.
49. As soon as she entered the doctor's room she tried to lock the door but could not since there were no keys in the door. The complainant was with the doctor for about 2 minutes she was scared all she told the doctor was that her life was in danger and for him to do her medical straight away.
50. Dr. Fong replied that the complainant had to first report the matter to the police and then go to the Government Hospital for her medical to be done. At this time the accused came into the room. Dr Fong told the accused to leave but he refused saying that the complainant was his partner.
51. Dr. Fong then asked the accused to take her to Nadi Hospital upon hearing this the accused grabbed her arm and took her away from the doctor's clinic. Once out of the doctor's clinic she came across 2 people who were having lunch outside the Restaurant, she cried and begged for their help,

but no one came to help her. The accused was assaulting her in front of these people and they were just watching.

52. The complainant was taken to Wailoaloa Beach throughout the journey the complainant was assaulted and sworn at, he also said that at the beach he will kill her and throw her in the water. At the Wailoaloa Beach the complainant was further assaulted there were people walking past the car she cried for help but nobody seemed to care.
53. The accused threatened her even if she reported him to the police nothing would happen to him and that he will kill her and her family. From here she was taken to a Pharmacy in Namaka from where he purchased pain killers and told her not to see a doctor but to just leave the Country and if she reports he will know about it and he will come after her and the family.
54. The accused called her mum telling her that the complainant was not feeling well and after taking her to the doctor's he will drop her near the Prince Charles Park. When her mother saw her she started asking her lots of questions. The complainant in her reply said let's just go home and that she wanted to leave the Country as soon as possible.
55. The accused informed her mother that the complainant had a headache and had fallen down. The complainant's mother then asked the accused whether he had assaulted her daughter, he denied.
56. The complainant did not tell her mother or report the matter to the police since no one had helped her despite her repeated requests for help and she believed she will not get justice so to save her family she just thought of leaving the Country.

57. After the incidents the accused continued to call her and send her text messages apologizing for what he had done he also sent her pictures he had taken of her on the 3rd asking for forgiveness for what he had done.
58. The complainant took photographs of her injuries and screenshots of the messages and pictures sent to her by the accused. These photographs, pictures and messages were marked and tendered as prosecution exhibit no. 1. The individual photos were explained by the complainant and marked 1 to 5 in the exhibit.
59. On the night of 13th March, the accused started to call her explaining about what he had done he said if she did not meet him he will be coming to her house on the 14th. The complainant told her mother everything the accused had done to her on 3rd March and for her not to go to work on the 14th. On 14th at around 7am the accused started to call the complainant, her mum picked up the phone the accused threatened her mother that he will come and kill both of them.
60. The complainant told her mother to report the matter to the police. The accused came home around 7.30am the gate was locked so the accused could not come inside. The complainant's mother and the accused were talking near the gate after a while the accused left without saying or doing anything.
61. At about 9am the police came the complainant gave her statement and was medically examined. The complainant identified the accused in court.
62. In cross examination the complainant stated that after the accused capsized her boat, she did not want to do anything with him and from this time he started threatening her. Her mother did not know about her boyfriend/girlfriend relationship with the accused all she knew was that

there was a business relationship between the complainant and the accused.

63. The complainant denied she had called the accused home on 3rd March because her father was not at home. Furthermore, the complainant stated that she told the Police Officer writing her statement that the accused had started to honk the car but maybe it was not written down. The complainant was referred to her Police Statement dated 14th March, 2017 to the 4th paragraph:

“Beginning on March, 2017 after an argument on phone when I refused to talk to him, he came over to my house, forcefully took me to his place, beating me along the way.”

64. When it was suggested that she did not tell the police each and everything that she told the court in her evidence the complainant explained that she told the officer everything that had happened. She had spent two hours giving her statement and that she was disturbed at the time and worried about her family so she did not read word by word that was written. When she read the statement the important points such as beatings, rape, Dr. Fong and so on were there so she signed it.
65. The complainant stated that when she was taken by the accused in his car from her home it was a very painful experience. She agreed she did not tell her mother what the accused had done to her when she met her near Prince Charles Park. When her mother asked her what had happened to her she had replied it was a headache and that she fell. She did not say anything else because she was scared.
66. When her mother questioned her about the injuries, the complainant told her mother that she did not want to talk about it but wanted to leave the

Country. Her mother had also asked the accused what had happened to the complainant and did he assault her.

67. The complainant did not tell her mother anything till the night of 13th March. Before meeting her mother near Prince Charles Park, she went to the Pharmacy with the accused and had met the Sales Assistant, she did not run away or yell or seek assistance because the accused had threatened her and she was scared.
68. The complainant denied on 3rd March she had called the accused to come home and pick her and also she did not climb over the fence to go with accused. The complainant maintained the accused had put his penis into her mouth and had penetrated her vagina and that she was not making up a story.
69. The complainant agreed the accused had his business under the name of Utopian Water Sports. She agreed after 3rd March, she had the opportunity to lodge her police complaint the next day but she did not. Although she had gone to Dr. Gani a few days later she did not tell this doctor anything about being raped because she was threatened by the accused.
70. The complainant disagreed that she had fabricated a story against the accused since he had capsized her \$55,000.00 worth of boat. She maintained that she had been raped and assaulted on 3rd March, 2017. The pictures in particular picture no. 3 with the message was sent to her by the accused on line messenger and the other pictures were of her injuries taken by her on her mobile phone. The complainant denied having the password to the Facebook account of Utopian Water Sports.
71. The second witness was the mother of the complainant Sarojini Devi. On 3rd March, 2017, the witness was at work after 1.00 pm she received a call

from her husband saying that the door of the house was open and the complainant was nowhere to be seen in the house.

72. The witness then called the complainant's mobile phone which was unanswered. The witness then called the accused since he was doing business with the complainant, when the accused answered the phone he told the witness the complainant was sick and he was taking her to Dr. Fong. The witness with her husband went to Dr. Fong's Clinic but the complainant was not there so she called the accused again. The accused answered the call and at this time she heard the complainant's voice "Maa" meaning mother, after that the phone was switched off.
73. The witness got scared by this time it was 4.30 pm on a Friday afternoon. She called from her husband's mobile, the accused answered the phone. The witness told the accused to park the car wherever he was and she was coming over. The witness saw the accused had parked his car near Prince Charles Park.
74. The complainant slowly came out of the car as if she was afraid but the accused came to her car first. The witness saw the complainant wearing the clothes she wore at home, was not wearing any footwear and her hair was messed up.
75. When the complainant came near the witness, she saw marks on one side of the complainant's face. At this time the witness asked the accused whether he had assaulted the complainant, the accused denied and said she had fallen.
76. At home the witness noticed the complainant had marks on both sides of her face. The witness told the complainant if she had fallen marks would have been on one side of the face not on her hands or all over her body.

The complainant replied that she was having a headache while applying vicks and balm she saw blue marks on the complainant's hands and arms.

77. At home the behaviour of the complainant was not normal she was quiet, not replying, appeared scared and not eating properly. On 13th March during night time the accused called the complainant but she did not want to talk to him so she gave the phone to the witness.
78. The witness told the accused that the complainant was sick and she did not wish to speak with him. The accused told her to be quiet and that he was coming over to her house. At this time the witness switched off the phone.
79. After this the witness asked the complainant why the accused was behaving like this. At this time the complainant told the witness that she did not fall, the accused had assaulted her, she showed her some photos of her injuries on her phone of what the accused had done to her, she also told the witness that the accused had raped her.
80. When questioned by the witness why she had not informed the police, the complainant replied the accused had threatened her if she reported to the police he will kill her and the whole family and since the Police Officers were his friends they will not do anything to him.

Ladies and Gentleman Assessors

81. Victims of sexual offences may react in different ways to what they may have gone through. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full as to what had happened could be due to shame or shyness or cultural taboo when talking about matters of sexual nature.

82. A late complaint does not necessarily signify a false complaint and on the other hand an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to determine what weight you would give to the fact that the complainant in this case did not tell Dr. Fong in the afternoon of the alleged incident that she had been raped by the accused or to the Sales Assistant at the Pharmacy or to her mother at Prince Charles Park on the day of the alleged incident or to Dr. Gani who she had visited a few days after the alleged incident. She only told her mother on 13th March, 2017 in the night after about 10 days when her mother got suspicious of the accused behaviour towards the complainant and started questioning her.
83. This is commonly known as recent complaint evidence. The evidence given by Sarojini Devi is not evidence of what actually happened between the complainant and the accused since Sarojini was not present and she did not see what had happened between the complainant and the accused.
84. You are, however, entitled to consider the evidence of recent complaint in order to decide whether the complainant is a credible witness. The prosecution says the complainant did not tell Dr. Fong or the Sales Assistant at the Pharmacy or to her mother in the afternoon of the alleged incident that she had been raped by the accused was because she was traumatized and threatened by the accused who was present at all these instances. The prosecution also wants you to consider the fact that when the complainant went to Dr. Fong she had told him *“my life is in danger please help me, please do my medical straight away”*.
85. Moreover, the accused had threatened to kill her and her family so she did not even complain to her parents when she met them at Prince Charles Park. The prosecution also wants you to consider when she was leaving Dr. Fong’s clinic and was at the Wailoaloa Beach when she cried for help

no one came to her rescue. In respect of not telling Dr. Gani the prosecution says the complainant was scared if she told anyone the accused will kill her. The prosecution says considering the circumstances of the complainant she is more likely to be truthful.

86. On the other hand, defence says the complainant was a 34 year old adult a foreign National who did not complain about being raped to Dr. Fong when she was with him for 2 minutes or to the Sales Assistant at the Pharmacy or to her parents immediately after the alleged incidents or to Dr. Gani a few days after the alleged incidents since she was not raped. It took her about 10 days to tell her mother that she had been raped by the accused only after her mother questioned her therefore she should not be believed.
87. It is for you to decide whether the evidence of recent complaint helps you to reach a decision. The question of consistency or inconsistency in the complainant's conduct goes to her credibility and reliability as a witness. This is a matter for you to decide whether you accept the complainant as reliable and credible. The real question is whether the witness was consistent and credible in her conduct and in her explanation of it.
88. The complainant then asked the witness not to go to work since she was scared to stay home alone. Next morning on the 14th the accused called to say that he was coming over to her house, when he reached the house gate the witness went to the gate. The accused was yelling and running here and there saying "open the gate I want to talk". The witness said I won't open the gate. He then reversed the car nearly damaging the fence saying he will bring 4 to 5 iTaukei men and break her house.
89. In cross-examination, the witness stated that she did not know the complainant and the accused were in a relationship all she knew was they were business partners.

90. The witness agreed she did not tell the police in her Police Statement of 15th March, 2017 that the accused had raped the complainant since the police did not question her about this issue. The police had questioned her about the phone calls made by the accused and the incident at the gate of her house on 14th March.
91. Furthermore, the police had not asked her about the injuries on the complainant so she did not tell them. The witness also stated that she was there when the complainant was telling the police about what the accused had done to her.

Ladies and Gentleman Assessors

92. The learned counsel for the accused in this regard was cross examining the complainant and Sarojini Devi about some inconsistencies and omissions in the statement they gave to the police after the incident when the facts were fresh in their minds with their evidence in court. I will now explain to you the purpose of considering the previously made statement of the complainant and Sarojini with their evidence given in court. You are allowed to take into consideration the inconsistencies or omissions in such a statement when you consider whether the witnesses are believable and credible. However, the police statement itself is not evidence of the truth of its contents.
93. It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
94. If there is any inconsistency or omission, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If

there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency or omission is so fundamental, then it is for you to decide as to what extent that influences your judgment in respect of the reliability of the witness you are considering.

95. The witness agreed she loved her daughter and whilst she was protective of her she will say the right thing.
96. The third witness was Dr. Shalvin Chand. Dr. Chand graduated with an MBBS Degree from the University of Fiji in the year 2013. He recalled examining the complainant on 15th March, 2017. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no. 2.
97. The doctor's medical findings were:
 1. Right lower leg slight bruising still visible ;
 2. Left lower leg bruising slightly visible;
 3. Vagina examination - no vaginal wall laceration.
- no discharge.
- no marks or bruises.
98. The doctor also saw the complainant had a tattoo on the left side of her stomach. In the professional opinion of the doctor, there were light bruises which were visible highly likely due to assault but due to late presentation at the hospital it had become light over time.
99. When prosecution exhibit 1 was shown to the doctor in respect of picture 2, he said that there were bruises on the legs below the knee which was what he had noted on the day of the medical examination and had made a note on page 5 of the Medical Examination Form (prosecution exhibit no. 2).

100. In respect of injuries seen in the pictures, the doctor said the injuries were a result of blunt force trauma, such as punching and tight grabbing. In respect of picture 3, the doctor said when he had examined the complainant, he saw a tattoo on the front part of the stomach as seen in the picture.
101. In cross examination, the doctor agreed the bruises noted in the medical report could be caused by falling on a hard surface and any bruise can be caused by a blunt trauma like a fall.

Ladies and Gentleman Assessors

102. You have heard the evidence of Dr. Chand who was called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective. The medical report of the complainant is before you and what the doctor said in his evidence as a whole is to assist you.
103. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the doctor.
104. You should remember that this evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your decisions, you must reach your decision having considered the whole of the evidence.

105. The final prosecution witness Dr. Raymond Fong a Medical Practitioner, informed the court that in the afternoon of 3rd March, 2017 the complainant came into his clinic looking very upset and distressed. When the witness asked her about the problem, the complainant replied that she was assaulted by her boyfriend and she wanted police help. The witness observed that the complainant had her hair covering her face and that she was looking back indicating that she was scared of something.
106. The witness had a conversation with the patient for about two minutes so he was unable to make any assessment of her face in such a short time her hair was down which covered most of her face. At this time the boyfriend came, the witness told him to go outside while he examined the patient. The boyfriend was very arrogant, he did not wish to leave saying he had the right to stay.
107. The patient refused to talk and the boyfriend refused to leave since the patient needed medical attention the witness suggested they go to the Nadi Hospital. The patient was sitting on a chair the boyfriend took her hand and pulled her. According to the doctor he was very aggressive.
108. In cross examination, the witness agreed the patient had said her boyfriend had assaulted her and she wanted to report the matter to the police.
109. This was the prosecution case.

DEFENCE CASE

Ladies and Gentleman Assessors

110. At the end of the prosecution case you heard me explain options to the accused. He has those options because he does not have to prove

anything. The burden of proving the accused guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to give evidence and called two witnesses so you must take into account what the defence adduced in evidence through the accused and defence witnesses when considering the issues of fact which you are determining.

111. I now draw your attention to the evidence adduced by the defence during the course of the hearing.
112. The accused informed the court that on 29th June, 2015 he met the complainant at Bamboo Travellers. On 3rd March, 2017 the accused was at his home preparing for his boat trip with his customers since he was a boat captain. On this day he also had a date with the complainant at 10.30am, however, he went to pick the complainant late at around 12 noon before leaving for her home both had phone conversation. According to the accused the complainant was very angry with him.
113. He had also purchased another boat that day since the complainant's boat had sunk which was the cause of the problems in their relationship. At the complainant's house he tooted the horn of the car, she came out of the house but wasn't dressed as she used to and was also without any make up. When the complainant came to the gate he asked her whether they were going or not upon seeing the complainant in that dressing the accused started getting angry.
114. The complainant started yelling saying that everything was about the boat and his business nothing about her, the accused was embarrassed he then asked her to come in the car because he did not want to waste his time. Since the gate was locked and she did not have the key the complainant climbed over the fence.

115. In the car the complainant said lets go the accused started driving towards town but the complainant wanted to go to his house. On the way to his house the complainant started getting physical, there were heated arguments between the two. The complainant started throwing her hands and scratching his face all of a sudden she pushed his face. The complainant wasn't wearing the seat belt so when he retaliated by pushing her, she got hit on the side of her forehead by the seat belt buckle.
116. At home the accused took out cold fizzy drink since he did not have any ice in the fridge when he placed the bottle on the injury the complainant reacted alleging that the accused wanted to spoil her face, wanted to kill her and destroy her face. After this the complainant went to the washroom when she came back the side of her forehead was getting swollen.
117. After coming out of the washroom the complainant became aggressive alleging that he was having an affair since she saw a girl's hair in the washroom she wanted to have sex with the accused but he refused saying that she was hurt and to just take it easy.
118. After a while the complainant took off her top she was wearing her sports bra then her pajamas. The accused tried to calm the complainant down but she threatened him *"if you leave me I will destroy you and I know how to destroy you."*
119. At this time he took a photo of the complainant she covered her face. The accused denied penetrating the mouth and the vagina of the complainant with his penis that day.
120. After a while the complainant's mother called, the accused said they were going to town. To cover up for the injuries caused to the complainant the accused took the complainant to Dr. Fong when the accused went into the doctor's room the doctor asked him to leave but the accused refused saying

that he was the partner of the patient and therefore he had the right to be present.

121. The doctor told the accused to take the complainant to a lady doctor or to the Nadi Hospital. Upon hearing this, the accused became really angry according to the accused he asked the doctor why there was any need to take the complainant to another doctor. He then held the complainant's hand and left.
122. From there they went to Wailoaloa Beach as a short cut to the Pharmacy at Martintar he did not assault the complainant at Wailoaloa. After buying the medicine at the Pharmacy the accused and the complainant went to town.
123. At this time, he received a call from his friend Louis Ting a barman at Sonaisali Hilton who wanted the payment of his commission for a sale he had referred to the accused. The accused then drove to the Nadi Bus Stand and picked Louis at this time the complainant's mother called to say that he is to stop the car where he was so the accused parked the car opposite Prince Charles Park.
124. There was a Restaurant nearby so he went and brought tea for the complainant. The parents of the complainant came after about 20 minutes. Louis was sitting on the passenger's seat and the complainant was at the back seat. When her parents came he told the complainant's mother the complainant got hurt in her house her mother said "right" and they went away with the complainant.
125. In cross examination the accused stated the boat Blue Wave belonged to the complainant which the accused was using for his business because the complainant trusted him.

126. The accused denied the complainant had broken up with him although they had arguments. On 3rd March, 2017 the accused denied having a sharp knife in his car but agreed he had asked the complainant to sit in his car.
127. The accused denied assaulting, threatening or raping the complainant as alleged. In respect of the injury received by the complainant the accused agreed he had pushed her. He denied tying the complainant's legs but agreed he took pictures of the complainant when she was in her sports bra and panty.
128. The accused also agreed the complainant had a tattoo on the left side of the stomach. The accused agreed he saw injuries on the complainant's body which was caused after he had pushed the complainant and another two injuries on her knees.
129. The accused did not take the complainant to the hospital as requested by Dr. Fong because the complainant was not wearing shoes and she didn't want to go to the hospital but he was taking her to a lady doctor in Martintar. The accused used to send messages to the complainant from Utopian Water Sports account.
128. The second defence witness was Michael Louis Ting, on 3rd March, 2017 he was at the Prince Charles Park waiting for the accused at around 3.30pm to 4.30pm when he met the accused with his "so called business partner."
129. The witness approached them by getting into the back seat of the car. According to the witness the complainant was physically okay. The complainant had a conversation with him in the car she had asked him how long he had been selling the business trips and then the accused went and brought some tea from the nearby Restaurant. After a while her parents came and she left.

130. In cross examination the witness stated that the accused did not pick him from the Nadi Bus Stand and he had walked to Prince Charles Park. The complainant was fully dressed to go to town. The witness knows the accused for two to three years now, being normal friends and on that day he went to collect his commission from the accused. The witness confirmed he had sat at the back seat of the car while the accused and the complainant sat in front.
131. The final defence witness Roneel Vishal informed the court that he graduated with a Diploma in Information Systems Management and Software. He has known the accused since 2011 they are friends and also he did some freelance work for the accused.
132. At the request of the accused the witness had created a Facebook page in the name of Utopian Water Sports, on the first day it was the accused and him who had excess to the account but on the following day he gave access to the complainant since he had an argument with her regarding the use of that page. He gave her password to the Facebook account on which the page was created.
133. In cross examination the witness stated that apart from professional acquaintance they would hang out once a week or once in two weeks.
134. In respect of picture 3 (prosecution exhibit no. 1) the witness stated that the screen shot of the photograph was a messaging option of the Utopian Water Sports. The witness could not say which account was used but it was from Utopian Water Sports a private message between a sender and a receiver. The witness could not confirm if the message was sent from the Facebook page because when he created the page for Utopian Water Sports it only had "contact us" information there was no message option.

135. The witness could not confirm who had sent the message in picture 3 and he also could not confirm if the message was from the Facebook he had created. The accused could not have sent the message from the Facebook page since the page was only for viewing.
136. The message could have been sent from either a messenger or link app since both apps had the same layout of messaging.
137. This was the defence case.

ANALYSIS

138. The prosecution alleges in August 2015 the complainant came to Fiji and met the accused. As days went by a boyfriend and girlfriend relationship developed between the two which lasted for about 4 months till December, 2015.
139. When the complainant came to know the accused was doing business under his name using her boat she was very disturbed the accused did not take this well he then sought time to pay back the money invested.
140. By this time the relationship had ended, there were arguments between the two the accused did not take this break up well, he wanted to meet her and had started threatening her.
141. On 3rd March 2017 the accused made numerous phone calls asking her to meet him she refused. The accused told her that he was coming to her home and that he will kill her.
142. At around 1pm the accused came to the house of the complainant in a car, she was alone. He asked her to sit inside the car and talk like adults and for her not to break up and to make a decision fast otherwise he will not

leave and when her dad comes either he dies or her dad dies. As the complainant sat in the car she saw a dagger near the hand brake of the car, at this time the accused punched her face reversed the car very fast and was taking her somewhere. The accused was angry with her he had punched her on the right side of her face and said that she will not be able to see her parents again. The complainant was scared begging him to let her go and to stop the car.

143. When they arrived at the accused's house the complainant was dragged out of the car and taken into the living room of the house. At this time he again started punching and swearing with all those beatings she was feeling weak. The accused pushed her on the bed in the living room he tied her feet together with some cotton material then started removing her clothes and taking photos of her in her undergarments and when she was fully naked.
144. After removing his clothes the accused forcefully put his penis into her mouth. The complainant did not consent to what the accused had done. Thereafter the complainant saw urine dripping from his penis he said it was dirty but she deserved a dirty penis, he then forcefully inserted his penis into her vagina, she felt helpless every time she screamed for help the accused tried to suffocate her with a cushion. The accused had penetrated her for about 3 to 4 minutes. The complainant did not consent to this act of the accused as well.
145. After the incidents the accused continued to call her and send her text messages apologizing for what he had done he also sent her pictures he had taken of her on the 3rd asking for forgiveness for what he had done.
146. On the night of 13th March, the complainant told her mother about what the accused had done to her and for her not to go to work on the 14th.

147. The matter was subsequently reported to the police and the complainant was medically examined.
148. The defence on the other hand denies all the allegations the accused takes the position that the complainant had made up a story against him since the boat she had given to the accused had sunk and she was alleging that the accused had deliberately done so. The complainant was not happy with the accused about this. The boyfriend and girlfriend relationship between the two had turned sour.
149. The accused did not on the 3rd March insert his penis into the mouth or vagina of the complainant as alleged. In respect of the message sent to the complainant under the accused's business name was not sent by him the complainant also had the password to the Facebook account.

Ladies and Gentleman Assessors

150. You have seen the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
151. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.
152. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a

witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.

153. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.
154. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
155. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
156. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
157. In this case the accused is charged with two (2) counts of rape you should bear in mind that you are to consider each count separately from the other.

You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.

158. Your possible opinions are:-

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

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

Ladies and Gentlemen Assessors

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

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



Sunil Sharma
Judge

At Lautoka

8 April, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.