

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

CRIMINAL CASE NO: HAC 286 of 2016

STATE

V

VINEETA DEVI

ASHISH PRASAD

Counsel : Mr. Yogesh Prasad with Mr. Setefano Komaibaba and Ms. Sheenal Swastika for the State
Mr. Mohammed Yunus for the Accused

Dates of Trial : 17-19 June 2019

Summing Up : 20 June 2019

[The First Accused, Vineeta Devi, had pleaded guilty to Count One in the Consolidated Information and was sentenced by this Court on 7 August 2018. Therefore, whatever reference is made in this case to an accused would be a reference to the Second Accused, Ashish Prasad, who is charged with Count Two in the Consolidated Information].

SUMMING UP

Madam Assessors and Gentleman Assessor,

[1] It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The

Counsel for the State and the accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.

- [2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.
- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in 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 evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinion. You must take all evidence into consideration, before you proceed to form your opinion. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charge against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charge against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witness, Payal Pritika Devi, said from the witness box, the two documents tendered as prosecution and defence exhibits and the admissions made by the parties by way of admitted facts.

- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony before you since this trial began. Ensure that no external influence plays any part in your deliberations.
- [10] A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening submission made by the State Counsel and closing submissions made by both State Counsel and Defence Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.
- [11] As I already indicated to you, a matter which will be of concern to you is the determination of the credibility of the witness, basically the truthfulness and reliability of her evidence. It is for you to decide whether you accept the whole of what the 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 the witness is telling the truth and correctly recalls the facts about which she has testified.
- [12] Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13] You have seen the demeanour of the witness in the witness box when answering questions. How was she when she was being examined in chief and then being cross-examined? Was she forthright in her answers, or was she evasive? How did she conduct herself in Court? In general what was her demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may find Court environment stressful and distracting.
- [14] You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of the witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.
- [15] In assessing the credibility of the witness, it may be relevant to consider whether there are inconsistencies in their evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency

is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it 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. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.

- [16] However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by the witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of her evidence is inaccurate. In the alternative, you may accept the reason she provided for the inconsistency and consider her to be reliable as a witness.
- [17] Madam Assessors and Gentleman Assessor, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witness is truthful and reliable.
- [18] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witness before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [19] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not guilty of the charge. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.
- [20] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence charged.
- [21] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did

something, may have told you about that from the witness box. Those facts are called primary facts.

- [22] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [23] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you will understand the relationship between primary facts and the inferences that could be drawn from them.
- [24] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [25] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offence charged. It is not his task to prove his innocence.
- [26] I have said that it is the prosecution who must prove the allegations. Then what is the standard of proof or degree of proof, as expected by law?
- [27] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond any reasonable doubt every element that goes to make up the offence charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason. The doubt must only be based on the evidence presented before this Court.
- [28] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.

[29] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the complainant or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinions.

[30] Let us now look at the charges contained in the Consolidated Information.

[31] There are two charges preferred by the Director Public Prosecutions (DPP), against Vineeta Devi and the accused:

COUNT ONE

Statement of Offence

ABORTION: Contrary to Section 234 (1) and (4) (a) (b) of the Crimes Act 2009.

Particulars of Offence

VINEETA DEVI, between the 20th day of July 2016 to the 23rd day of July 2016, at Nausori in the Eastern Division, unlawfully performed an abortion on **PAYAL PRITIKA DEVI.**

COUNT TWO

Statement of Offence

ABORTION: Contrary to Section 234 (1) and (4) (b) of the Crimes Act 2009.

Particulars of Offence

ASHISH PRASAD, between the 20th day of July 2016 to the 23rd day of July 2016, at Nausori in the Central Division, committed certain acts with intent to procure the abortion of **PAYAL PRITIKA DEVI.**

[32] As I have already indicated the First Accused, Vineeta Devi, had pleaded guilty to Count One in the Consolidated Information and was sentenced by this Court on 7 August 2018. This case only proceeds against the Second Accused, Ashish Prasad.

[33] As per the Consolidated Information, the accused is charged with Abortion, contrary to Section 234 (1) and (4) (b) Crimes Act No. 44 of 2009 (Crimes Act).

[34] In terms of Section 234 (1) of the Crimes Act, “A person commits an indictable offence if he or she unlawfully performs an abortion”.

[35] For ease of reference Sections 234 (2), (3) and (4) are re-produced below:

(2) The performance of an abortion by a medical practitioner is not unlawful for the purposes of this section if —

(a) the abortion is performed by a medical practitioner in good faith and with reasonable care and skill; and

(b) the pregnancy is the result of sexual intercourse between—

(i) a parent and child; or

(ii) a brother and sister (whether of the whole blood or half-blood); or

(iii) a grandparent and grandchild; or

(c) the pregnancy is the result of sexual intercourse that constitutes the offence of rape under this Decree.

(3) In this section—

"medical practitioner" means any person lawfully registered under a law of Fiji to practice as a medical practitioner.

(4) A reference in this section to performing an abortion includes a reference to—

(a) attempting to perform an abortion; and

(b) doing any act with intent to procure an abortion, whether or not the woman concerned is pregnant.

[Emphasis is mine].

[36] Therefore, in order to prove the offence of Abortion against the accused, the prosecution must establish beyond any reasonable doubt that;

(i) The accused;

(ii) During the specified time period (in this case between the 20 July 2016 to the 23 July 2016);

(iii) At Nausori, in the Central Division;

- (iv) Committed certain acts;
- (v) With the intention to procure the abortion of the complainant, Payal Pritika Devi.

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

[38] The second element relates to the specific time period during which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[39] The fourth element relates to the physical element of the offence. The prosecution should prove beyond any reasonable doubt that the accused committed certain acts in furtherance of the abortion.

[40] With regard to the final element, the prosecution should prove beyond any reasonable doubt that the acts committed in furtherance of the abortion was committed by the accused with the intention to procure the abortion. The law provides that a person is said to have intention with respect to conduct if he or she means to engage in that conduct.

[41] The term 'procure' has not been specifically defined in the law. However, the English Dictionary meaning for the term procure can mean to obtain (something), especially with care or effort. It can also mean to persuade or cause (someone) to do something.

[42] I must also explain to you another legal provision. Section 182 (3) of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act") provides that:

"(3) Variance between the charge and the evidence produced in support of it with respect to —

(a) the date or time at which the alleged offence was committed; or

(b) the description, value or ownership of any property or thing the subject of the charge —

is not material and the charge need not be amended for such variation."

[43] This is a provision that is directly applicable to proceedings in the Magistrate's Courts. However, in the absence of any similar provisions for proceedings in the High Court, this provision maybe used for proceedings before the High Court as well.

[44] If you are satisfied beyond any reasonable doubt that the accused, between 20 July 2016 and the 23 July 2016, at Nausori, committed certain acts, with the intention to

procure the abortion of the complainant, Payal Pritika Devi, then you must find him guilty of the second count of Abortion.

[45] If you find that the prosecution has failed to establish any of these elements in relation to the second count of Abortion, then you must find him not guilty of Abortion.

[46] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

[47] In terms of the provisions of Section 135 of the Criminal Procedure Act, the prosecution and the defence have consented to treat the following facts as "*Admitted Facts For Ashish Prasad*" without placing necessary evidence to prove them:

1. Ashish Prasad is a businessman from Nalele, Taveuni.
2. The complainant in this case is Payal Pritika Devi.
3. The complainant was in a de-facto relationship with Ashish Prasad in the year of 2015.
4. Ashish Prasad was interviewed at Nausori Police Station on 3 August 2016.

[48] Since the prosecution and the defence have consented to treat the above facts as "*Admitted Facts*" without placing necessary evidence to prove them you must therefore, treat the above facts as proved beyond reasonable doubt.

Case for the Prosecution

[49] The prosecution, in support of their case, called the complainant, Payal Pritika Devi. The prosecution also tendered the following document as a prosecution exhibit:

Prosecution Exhibit **PE1** - A statement made by the complainant, on 28 August 2016.

[50] Evidence of the complainant Payal Pritika Devi

- (i) *The complainant said that she is currently residing at Malaqereqere in Sigatoka.*
- (ii) *In October 2015, she was residing in Taveuni with her parents. She was working at a spare parts shop belonging to Ashish Prasad, the accused, at Naqara Town in Taveuni.*

- (iii) *She said that the accused is a businessman. He was a married person. He had left his first wife and was staying with his second wife. The second wife was also working at the spare parts shop.*
- (iv) *The complainant testified that in October 2015, the accused took her to stay with him on rent in town. She said the relationship between the accused and herself at the time was just like husband and wife. She further testified "Sometimes we used to fight, sometimes it was good. Sometimes he also used to chase me out of the house."*
- (v) *The complainant said she met the accused when she was working at Naidu Shop and Save and the accused came and told her that there is a space (vacancy) in his shop and if she wishes to she was welcome to come and work with him. This was in 2014. Sometime in January 2015, she started working with the accused. The relationship with the accused had started sometime in October 2015.*
- (vi) *The witness testified that in June 2016, she was staying with the accused at his place, since his second wife had left him and went away with another man. The accused took her out of the rented house and kept her with him at his house.*
- (vii) *The complainant stated that in June 2016, she found out that she was pregnant, with the accused's baby. Because she was vomiting she went to the hospital and a scan was done. She was told that she was 2 months and 4 days pregnant. The accused had accompanied her to the hospital.*
- (viii) *When asked what the accused reaction was to her pregnancy, the witness said "He was not that happy because he already has a small son."*
- (ix) *After finding out that the complainant was pregnant, the accused had told his wife (second wife) about her pregnancy. Then the accused had given her some type of Fijian medicine made from some leaves and asked her to take the medicine saying her vomiting will stop. The witness had drunk the medicine. However, nothing had happened and she continued vomiting.*
- (x) *The accused had not been very happy. He had called his wife and told her that the complainant had drunk the medicine (but that nothing had happened).*
- (xi) *Thereafter, the complainant went to the hospital and got an injection to stop the vomiting.*
- (xii) *The witness testified that on 19 July 2016, she and the accused came to Suva. They had gone to Nausori as the accused had a case.*

(xiii) *The accused (had then) taken the complainant to his brother, Ajit Singh's place at Naduru. She testified that they had stayed at Ajit's place for 3 to 4 days.*

(xiv) *The witness was asked the following questions in examination in chief:*

Q. *What did you do during these 3 to 4 days?*

A. *The first day when we went there, that same night they took me to Vineeta Devi's place.*

Q. *Who took you to Vineeta Devi's place?*

A. *Ajit Singh and his wife.*

Q. *Is Ajit Singh, Ashish Prasad's own brother?*

A. *I don't know. Ashish Prasad calls him brother. It was my first time to go his place.*

Q. *When his brother and wife took you to Vineeta Devi's place, where was Ashish Prasad?*

A. *He was at home – at Ajit's place in Naduru.*

Q. *Did you know why you were taken to Vineeta Devi by Ajit and his wife?*

A. *They say to just go and visit.*

Q. *When you reached Vineeta Devi's place, what happened?*

A. *We went, we had tea, then we were sitting. After a while, she asked me to go to a room.*

Q. *Do you know this person, Vineeta Devi from before?*

A. *No. I have never seen her before and we have never talked.*

(xv) *The witness then testified as to how Vineeta Devi asked her to lie down and massaged her stomach. She had told the complainant to remove her undergarments. While massaging her stomach and pushing her baby bag downwards, Vineeta Devi had been putting cassava sticks into her private part so that her baby bag got damaged. It had been very painful. The witness explained the length and the thickness of the cassava sticks that were used.*

(xvi) *In addition, the complainant testified that Vineeta had stepped on her back with her feet so that her baby dies. All this had gone on for about an hour.*

(xvii) *Thereafter, the complainant testified to what transpired the next day (20 July 2016). The witness said she recalled that date. She said that on this day, Vineeta Devi had come to Ajit's place at Naduru. Ajit, his wife, their two children, Ashish Prasad and the witness had been present at the time.*

The complainant said "That's the day Ashish Prasad gave \$200 to the lady for the massage." The witness said she had seen four \$50 notes been given to Vineeta Devi by the accused.

- (xviii) The complainant said this money transaction had taken place between 10.30 a.m and 12.00 noon on that day.*
- (xix) The witness said on this day, Vineeta Devi had repeated all that (she had done the day before). She had massaged her stomach, poked the sticks into her private part and stepped on her back.*
- (xx) The witness said that she clearly saw Ashish Prasad give Vineeta Devi the money. "I was there and I saw." She testified as to where exactly she was at the time she saw the accused give the money to Vineeta. Later, the witness drew a rough sketch of the house so as to depict where the transaction took place.*
- (xxi) A statement made by the witness, on 28 August 2016, was tendered to Court as Prosecution Exhibit **PE 1**. The witness stated that the accused had forced and threatened her to write the statement. The accused had made her write this letter while they were travelling on a boat. The first copy he had written himself on a paper. Then the accused had asked the witness to copy and write the letter again. The first paper the accused had written he had thrown it into the sea.*
- (xxii) Later, the witness testified that she had signed the letter at home. Thereafter, the accused had taken the document and got it stamped before a JP and paid the JP \$10.00.*
- (xxiii) The witness was cross examined at length by Counsel for the Defence.*
- (xxiv) The witness confirmed that her first clinic at the Taveuni Hospital was on 21 June 2016 and the second clinic was on 12 July 2016. She also said that the accused had accompanied her on both her visits to hospital. The Defence tendered as Defence Exhibit **DE 1** the Antenatal Case Record pertaining to the complainant.*
- (xxv) In cross examination, the witness said that she and the accused had boarded the boat to Suva at 3.00 p.m. on 19 July 2016 from Taveuni. She had arrived at the Suva jetty around 7.00 in the morning on 20 July 2016.*
- (xxvi) After reaching Suva, the accused had attended his family case at the Nausori Court. The accused had made her sit at a tailoring shop while he attended court. At the time the accused had also given her some money to do some shopping in Nausori town.*
- (xxvii) The accused's court case had finished around mid-day and she and the accused had stayed in Nausori town for one and half hours. Thereafter, they returned to Ajit's place at Naduru.*

(xxviii) *The witness said that around 7.30 p.m. that day she had been taken to Vineeta Devi's house. The accused had remained at Ajit's place.*

(xxix) *The following further questions were put to the witness in cross examination:*

Q. *So you agree with me, the first incident happened on 19 July 2016?*

A. *Yes.*

Q. *And the following day, 20 July 2016, is when Vineeta came to Ajit's house to massage your stomach?*

A. *Yes.*

Q. *I put it to you that you are lying in this Court, because on 20 July 2016, Ashish Prasad was attending Nausori Court and was not at Ajit's house between 10.30 a.m. and 12.00 noon?*

A. *No.*

Q. *I put it to you that on 20 July 2016, between 10.30 a.m. and 12.00 noon, you were waiting for Ashish Prasad at Nausori town?*

A. *I was in town the day we came to Suva when Ashish Prasad went to attend his Court. And on the same evening, I was taken to that lady's place for the stomach massage. On the next day, the lady came and she was given the money and Ashish Prasad told her that he was going to attend Court and they have planned to return to Taveuni. Ashish Prasad's wife came to meet her at Ajit's place that she is returning with Ashish to Taveuni. And then I was shouting and crying and I was taken to Vineeta Devi's place.*

(xxx) *The accused denies that he had given any money to Vineeta Devi to perform the abortion on the complainant. It was suggested by the Defence that it was complainant who gave Vineeta \$200.00 to do the abortion on her.*

(xxxi) *The accused also denies that he had threatened the complainant to write the Statement PE1. The Defence position is that the complainant wrote the Statement voluntarily.*

[51] That was the case for the prosecution. At the end of the prosecution case Court decided to call for the defence. You then heard me explain several options to the accused. I explained to him that he could address Court by himself or through his counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He

could even remain silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[52] In this case, the accused opted to remain silent. I must emphasize that you must not draw any adverse inference against the accused due to Court calling for his defence or of his choice to remain silent. The defence tendered as Defence Exhibit **DE 1** the Antenatal Case Record pertaining to the complainant.

Analysis

[53] The above is a brief summary of the evidence led at this trial. The prosecution led the evidence of the complainant, Payal Pritika Devi, to prove its case.

[54] As I have informed you earlier, the burden of proving each ingredient of the charge rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.

[55] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.

[56] In this case it has been agreed by the prosecution and the defence to treat certain facts as admitted facts without placing necessary evidence to prove them. Therefore, you must treat those facts as proved beyond reasonable doubt.

[57] However, I wish to remind you once again about another matter. During the testimony of the complainant she referred to certain uncharged acts against the accused. During the course of the trial, I directed you to disregard such evidence. I wish to reiterate once again that you should disregard all such evidence pertaining to uncharged acts against the accused. Please focus your mind only on the second count, which is the relevant charge against the accused. Do not let your minds be prejudiced by anything the complainant said regarding uncharged acts.

[58] The accused is totally denying that he gave any money to Vineeta Devi to procure the abortion on the complainant. It has been suggested by the Defence that it is the complainant herself who had wanted the abortion done on her and that she had given the \$200.00 to Vineeta Devi for that purpose. The Defence is also taking up the position that the complainant is not a reliable witness and her evidence cannot be believed as she has contradicted the dates on which the alleged incidents took place.

[59] I have explained to you how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. However, if there is no acceptable explanation for the inconsistency or omission which

you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies or omissions in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency or omission that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of her evidence is inaccurate. In the alternative, you may accept the reason she provided for the inconsistency or omission and consider her to be reliable as a witness.

[60] It is for you as judges of fact to consider the totality of the evidence and come to a finding on all of the above matters.

[61] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witness, is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the charge, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved the elements of the charge, beyond any reasonable doubt.

[62] In summary, and before I conclude my summing up let me repeat some important points in following form:

- i. If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charge;*
- ii. If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charge have been established beyond any reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*

[63] Any re directions the parties may request?

[64] Madam Assessors and Gentleman Assessor, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions on the charge against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[65] Your possible opinions should be as follows:

Count Two

Abortion contrary to Section 234 (1) and (4) (b) Crimes Act - Guilty or Not Guilty

[66] I thank you for your patient hearing.



A handwritten signature in black ink, which appears to read "Riyaz Hamza".

Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT SUVA

Dated this 20th Day of June 2019

Solicitors for the State : **Office of the Director of Public Prosecutions, Nausori.**
Solicitors for the Accused : **Messrs M. Y. Law, Barristers & Solicitors, Ba.**