

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 75 of 2016

STATE

V

AFZAL KHAN

Counsel : Ms. L. Latu for the State.
: Mr. D. S. Naidu for the Accused.

Dates of Hearing : 20, 21, 24, 25 June, 2019
Closing Speeches : 26 June, 2019
Date of Summing Up : 26 June, 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.
7. During the closing speeches, the defence counsel asked the following questions, such as where was the medical report of the complainant from Nadi Hospital when she had gone to the hospital on the day of the alleged incident, where was the $\frac{3}{4}$ pants of the complainant and the bed sheet, why was Azad not called as a witness, there was no re-construction, why were statements not taken from the brother and nephew of the complainant and

so on. I direct you to disregard any suggestion made by counsel that invites you to speculate or assume the answers.

8. You are to only concentrate on the evidence adduced and nothing else, furthermore, it is not for the defence or anything to tell the prosecution how they are to put their case before the court whether they call a witness or not is their prerogative and you are to disregard from your minds why a witness was not called or a statement not taken.

BURDEN OF PROOF AND STANDARD OF PROOF

9. 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.
10. 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.
11. 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.
12. 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.
13. 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

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

Statement of Offence

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

Particulars of Offence

AFZAL KHAN, on the 26th day of March, 2016 at Nadi in the Western Division penetrated the vagina of **NAZIMUN NISHA KHIRL** with his penis without her consent.

15. To prove the above count the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
- (a) The accused;
 - (b) Penetrated the vagina of the complainant Nazimun Nisha Khirl 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.
16. In this trial the accused has denied committing the offence of rape. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of the complainant with his penis without her consent.

17. The slightest of penetration of the complainant's vagina by the penis is sufficient to satisfy the act of penetration.
18. The first element of the offence is concerned with the identity of the person who allegedly committed the offence.
19. The second element is the act of penetration of the complainant's vagina by the penis.
20. 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.
21. 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.
22. 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.
23. 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 vagina without her consent then you must find the accused guilty as charged.

24. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of rape, then you must find the accused not guilty of the offence he is charged with.
25. 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.
26. You must be satisfied that the prosecution has proved all the elements of the offence beyond reasonable doubt in order for you to find the accused guilty of the offence of rape. If on the other hand, you have a reasonable doubt with regard to any of those elements concerning the offence, then you must find the accused not guilty.

ADMITTED FACTS

27. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as final amended admitted facts.
28. From the admitted facts you will have no problems in accepting those facts as proven beyond reasonable doubt and you can rely on it. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
29. 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

30. The prosecution called three (3) witnesses to prove the charge against the accused.
31. The complainant Nazimun Nisha Khirul informed the court, on 26th March, 2016 at about 3.30pm while she was alone at her home at Mulomulo, Nadi the accused also known as Munna her brother in law came and knocked on the door and asked her to open it.
32. The complainant refused saying he was not allowed into her house or her compound, upon hearing this, the accused started to forcefully kick the door. The accused told the complainant if she did not open the door he will break it as the accused continued kicking, the tower bolt nuts came out and the door opened.
33. The accused went inside the house grabbed the complainant's right hand and pressed her neck with his hand and asked her why she did not open the door. The complainant was unable to talk properly because the accused was pressing her neck tightly as a result she urinated in her pants. The complainant was also unable to breathe properly she was dragged inside her bedroom and pushed onto her bed.
34. The complainant was struggling with the accused in the hope that he would leave her. The accused pulled her left hand to the side and then slapped her on her right cheek he then forcefully pulled down her pants together with her panty and forcefully inserted his penis into her vagina and had sexual intercourse with her. By this time she was half unconscious with saliva coming out from her mouth.

35. The accused then ejaculated inside the complainant's vagina she was struggling when the accused was forcefully having sexual intercourse with her. The complainant was not able to free herself she was helpless by this time, feeling weak, saliva was coming out of her mouth, and she thought she was dead. The accused kept on saying that he will kill her.
36. After this the accused pulled his trousers up, and commented that she was not satisfied with sexual intercourse that is the reason why she was going overseas. She was unable to talk properly but she begged the accused not to kill her she did not do anything since she was scared. The accused left her bedroom and went into the passage of the house at this time the complainant called her former husband Azad Khan for help.
37. The complainant was still on her bed when she started to vomit blood, a little later the accused came into her bedroom and told her not to worry a car was coming and he will take her with him. The accused then started to repair the door which he had broken when he saw Azad coming he ran out of the house.
38. The complainant came out of the bedroom into the passage of the house, from here she called out to her daughter Zaina after a while she was taken to the Mulomulo Police Post. Upon seeing her condition Police Constable Atish told the complainant's brother to take the complainant to the hospital immediately.
39. On the way to the Nadi Hospital the complainant told her daughter Zaina despite having difficulties in talking that "Chachu" meaning her uncle the accused had strangled her neck, tried to kill her and had forcefully raped her. The complainant was not medically examined the same day at the hospital.

40. According to the complainant the accused had also punched the side of her head. The complainant identified the accused in court.
41. In cross examination the complainant stated when the accused strangled her neck he had used his right hand and at this time she was near the wash tub inside her house. The layout of the complainant's house was marked and tendered as defence exhibit no. 1.
42. The complainant disagreed the accused was in a sexual relationship with her, she also denied calling the accused into her house that afternoon, she maintained the accused had come into her house by kicking the front door and after raping her left the house. The accused was told not to enter her compound or her house by her former husband Azad and by her as well.
43. The complainant denied Azad had seen the accused leaving his house so he got angry and started to assault her. When it was suggested that the neighbours heard her call for help since Azad had dragged her outside into the compound the complainant stated this was a lie. When the accused was raping her she had screamed for help but no one came to save her. The complainant also stated since her neck was pressed tightly by the accused her voice was not that loud.
44. The complainant also explained, when the accused had pushed her on the bed he was still holding her neck with one hand so she turned onto her side to save herself because she was suffocating. To make her rest on her back the accused used his other hand to twist and pull her hand so that she was face up on the bed looking at the ceiling. The complainant was struggling with the accused and she also tried to pull the hand of the accused away from her neck since she could not breathe properly.
45. At this time, she was moving her legs, she felt the accused insert his penis into her vagina and her whole body was struggling with the accused that is

her legs and arms. The accused after pulling down her pants and panty to her knees was on top of her, she maintained that whatever she told the court had happened. When Azad came home the complainant was feeling weak she was vomiting Azad then ran to get the police.

46. Before going to the Mulomulo Police Post her daughter Zaina had changed her clothes, at the Mulomulo Police Post upon the advice of a police officer the complainant was taken to the Nadi Hospital. At the Nadi hospital she was checked by a doctor.

47. The police statement of the complainant dated 29th March, 2016 was marked and tendered as defence exhibit no. 2. The complainant was referred to line 10 of her police statement which was read as follows:

“He then carried me inside my room, and I was struggling inside the room on top of my bed.”

48. When the complainant was questioned by defence counsel that she had told the police that she was carried inside her room the complainant told the court she had informed the police officer writing her police statement that the accused had pressed her neck as a result her head was facing upwards and she was dragged inside her bedroom.

49. The complainant agreed she had told the court that from where the wash tub was she was pushed into her bedroom and she had urinated in her ³/₄ pants because the accused was pressing her neck tightly. The complainant also agreed it was not mentioned in her police statement that she had urinated.

50. According to the complainant, the police officer did not mention that she had urinated in her pants in the police statement because she was told by the police officer to tell this in court. The complainant also agreed her police statement does not mention anything about her vomiting, however,

she had told this to the police officer who had told her it was in her medical report. The complainant maintained that she had told the police officer writing her police statement that she had vomited, urinated and the accused had pushed her into her bedroom that day and that the incident as she had narrated in court had happened.

51. In re-examination the complainant clarified that she was inside her house near the wash tub when her daughter and her brother came to take her to the hospital. Her police statement was recorded by a police officer she had told the officer that the accused had held her neck, pushed her inside the bedroom and that she had also told the officer she had urinated and vomited when the alleged incident had happened. At that time, she was in shock but whatever was in her best of knowledge she told the police officer.
52. The complainant further stated that Azad had not assaulted her she had called him for help.

Ladies and Gentleman Assessors

53. You will note on Tuesday 25th June, the complainant Nazimun Nisha Khirul was recalled by the court to clarify an issue for the court. The complainant informed the court that she was unable to recall whether she had lodged a report at the Mulomulo Police Post in respect of her complaint in the evening of 26th March, 2016 or the next morning. The complainant also stated she was told to go to the Nadi Police Station to lodge her report.
54. In cross examination by the defence counsel the complainant stated that she did not go to the Mulomulo Police Post on 26th March at around 8pm to lodge her complaint and that she did not lodge her report to Police Constable Poasa. The complainant also denied telling Constable Poasa the accused had tried to rape her on 26th March, 2016. Upon questioning by

the State Counsel the complainant told the court that she did not lodge any report at Mulomulo Police Post.

55. The second prosecution witness was Zaina Nisha the daughter of the complainant who informed the court on the 26th March, 2016 at about 3.00pm she was at her mother's house for a visit with her in laws. When she arrived, she saw her mother sitting under a tree after a while she saw the accused quickly walk out of her mother's house from the side door.
56. At about 3.30pm they went to her grandfather's house next door, about 10 meters away, from there she was able to see the accused go towards her mother's house again. After sometime, they went to her aunt's house, here she came to know that her mother was in some problem. The witness and her uncle left for her mother's house at the gate of her mother's house she met Azad who was rushing to the police station.
57. When the witness entered the house she saw her mother lying on the floor in the passage inside the house and was vomiting blood, her mother's clothes were wet and smelt of urine her mother was unconscious like about to die. The witness observed the complainant was not able to talk, and was breathing slowly she helped her mother in changing her clothes, and with the help of her uncle and cousin brother they lifted her mother into the car and took her to the Mulomulo Police Post.
58. At the police post the police officers told them to immediately take her mother to Nadi Hospital. In the car the complainant was lying on the lap of the witness at the back seat on their way to the Hospital from Mulomulo Police Post the complainant started to talk a bit, she told the witness that her uncle the accused had beaten and raped her. As soon as they reached the Hospital the witness made her mother sit on a wheel chair and took her to the doctor.

Ladies and Gentleman Assessors

59. 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.
60. 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 told her daughter Zaina when she was taken to the Nadi Hospital from the Mulomulo Police Post that her uncle the accused had assaulted and raped her.
61. This is commonly known as recent complaint evidence. The evidence given by Zaina Nisha is not evidence of what actually happened between the complainant and the accused since Zaina was not present and did not see what had happened between the complainant and the accused.
62. 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 told her daughter Zaina a short while after what the accused had done to her and therefore she is more likely to be truthful. On the other hand, defence says the complainant and her daughter had made up a story against the accused. Defence further says when the complainant when went to the Mulomulo Police Post in the evening of the alleged incident to lodge her complaint against the accused she did not mention anything about being raped by the accused so she should not be believed.

63. 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 complainant was consistent and credible in her conduct and in her explanation of it.
64. In cross examination the witness stated that from Nadi Hospital they were told by police officers who had come to visit her mother to go to Nadi Police Station and from there they went home.
65. When the witness was referred to her police statement dated 30th March, 2016 the witness agreed that she had told the police that her mother was vomiting which was mentioned in her police statement.
66. When the witness was again referred to her police statement the witness agreed it was not mentioned that she had met Azad at the gate before entering her mother's house.
67. The witness explained that she did inform the police officer writing her police statement but he did not write it. The witness also agreed she had told the police officer that she had changed her mother's clothes which were wet with urine before taking her to the hospital.
68. The witness agreed this was not written in her police statement but when the police officer had written her statement it was there. The witness stated that she could not write English but was able to read little bit of English.
69. The police statement of Zaina Nisha dated 30th March, 2016 was marked and tendered as defence exhibit no. 3.

Ladies and Gentleman Assessors

70. The learned counsel for the accused in this regard was cross examining the complainant and this witness about some inconsistency in the statement they gave to the police immediately after the incident when 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 two witnesses with their evidence given in court. You are allowed to take into consideration the inconsistencies 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.
71. 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.
72. If there is any inconsistency, 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 is so fundamental, then it is for you to decide as to what extent that influences your judgment about the reliability of the witness.
73. When further suggested by the defence that the complainant was not in the condition the witness had described in court such as difficulty in breathing, had urinated in her clothes and was barely conscious the witness maintained 90% of what she had told in court was her mother's condition.
74. The witness denied she told the court what her mother had told her to say.

75. In re-examination the witness stated that her police statement was recorded by a police officer who was speaking to her in Hindi and she was also giving her story in Hindi and the officer had read the same to her in English.
76. The witness also clarified when she had said 90% of what she had described in court was her mother's condition she meant her mother was lying down, could not breathe properly, her eyes were closed and she could not walk or stand up.
77. The final prosecution was Dr. Vincent Wong Kitmung. The witness graduated in the year 2014 from the University of Fiji with an MBBS degree. He completed his internship at the Lautoka Hospital.
78. On 29th March, 2016 the doctor had examined the complainant at Nadi Hospital. The Fiji Police Medical Examination Form of the complainant dated 29th March, 2016 was marked and tendered as prosecution exhibit No. 1.
79. The specific medical findings by the doctor upon the physical examination of the complainant were as follows:
- (a) Laceration was noted on the right inner lip about 1cm long, another laceration was about 0.5cm long on the tip of the complainant's tongue. According to the doctor laceration meant cut on the skin;
 - (b) Two scratch marks were seen on the neck with bruise noted about 3cm long from the chin; and
 - (c) Tenderness of the occipital region that is pain at the back of the head.
80. According to the doctor, his conclusion was that he was unable to determine if sexual penetration had occurred since there were no obvious

signs noted except for vaginal discharge. However, the doctor could not rule this out since it was a delayed examination.

81. In cross examination the doctor stated that the injuries seen were a couple of days old when he examined the patient. He stated that very vigorous sexual intercourse may result in some bruising or laceration.

Ladies and Gentleman Assessors

82. You have heard the evidence of Dr. Kitmung who had been 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.
83. 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.
84. 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.
85. This was the prosecution case.

DEFENCE CASE

Ladies and Gentleman Assessors

86. 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 guilty beyond reasonable doubt remains on the prosecution at all times. The accused gave evidence and called three witnesses. You must consider their evidence and give such weight as you think fit.
87. The accused informed the court that the complainant was his sister-in-law who used to stay about 10 meters away from his house. He denied the allegation raised against him by the complainant.
88. On 26th March, 2016 the complainant had called the accused into her house since he had told her to remove the black electricity wire which was going over his house. The accused was not welcome at the house of the complainant since Azad his brother had reported against him.
89. The accused denied he had forced himself into the house of the complainant by breaking the front door of the house. He also denied stealing the mobile phone from the complainant's house. According to the accused it was his mobile which he had gifted the complainant and after their relationship had broken she had asked him to take it from her house. When he went to get his mobile the complainant was sitting outside the house.
90. When the accused went inside the complainant's house for the second time, Azad the accused's brother saw him so he ran out of the house. The accused saw Azad go inside the house, drag the complainant outside into the compound and started assaulting her by

holding her neck. The accused did not do anything because his brother Azad was really angry by this time the complainant was close to the gate but inside her compound. At this time the accused saw a white car come into the compound he did not see who was in the car.

91. The complainant lived in a house which had two other flats with tenants. The tenants were in their flats at the time and there were other houses nearby. The accused was very angry with the complainant because he knew his relationship with the complainant had ended because she was now married in Australia the complainant was his first love and he would not hurt her because she had supported him.
92. The accused denied raping or assaulting the complainant. He does not know the reason why the complainant had made this allegation against him.
93. In cross examination the accused agreed when the complainant was living at Mulomulo, she took care of his parents as well as him. He further stated that he had told the police he saw his brother going into his house and assaulting his wife who was screaming for help. The accused denied forcefully entering the complainant's house, holding her neck, strangling her and dragging her into the bedroom. The accused also denied forcefully pulling down the complainant's $\frac{3}{4}$ pants and panty. He maintained he did not assault the complainant as alleged.
94. When it was suggested to the accused that he had forcefully penetrated the vagina of the complainant with his penis, the accused stated that he was not aware of this incident.
95. The second defence witness Vadivell Mudaliar informed the court that he knows both the complainant and the accused very well since their houses were about 10 meters away from his house. The witness helps the accused as a labourer since the accused was a carpenter. There were other houses around the complainant's house.

96. On the 26th of March, 2016 at about 3.30pm the accused came from town and told the witness to sit and wait for him at his house and he will be back after meeting the complainant. The witness waited for about 10 minutes after a while, the witness heard the complainant shouting for help saying 'save me Azad is hitting me'. The witness saw this since he was standing in the compound.
97. After Azad had assaulted the complainant, the complainant sat beside the gate in her compound. Azad had dragged the complainant from her house to the gate. After assaulting the complainant Azad walked towards the Mulomulo Police Post. The witness did not see the accused at this time. Shortly after, a car came and the complainant's brother took the complainant in his car, the witness then left for his house.
98. In cross examination the witness agreed that sometimes he drank yaqona with the accused and he did not give a statement to police in 2016 and at no point in time he had told the police his side of the story until the accused called him and reminded him of what had happened in 2016. The only reason why he came to court was to help the accused but not to save him from prison. According to the witness Azad had held the complainant's hand, dragged her and was slapping her.
99. In re-examination the witness stated that he had told the court whatever he had seen that day. He had discussed with the accused about 3 to 4 days ago and he had agreed to tell the court whatever he had seen that day. The police had not asked him about the incident.
100. The third defence witness Edward Bibi informed the court on 29th March, 2016 he had recorded the statement of the complainant Nazimun Nisha Khirul. The witness confirmed it was defence exhibit no. 2 and he recorded what the complainant had told him at the time he was writing the police statement.

101. The final defence witness Police Constable Poasa Lagickakarawa informed the court that he was doing afternoon shift at Mulomulo Community Post on 26th March, 2016. In the evening of the 26th the witness recalled taking a report from the complainant which he had recorded in the station diary. The complainant had told him the accused had threatened her, opened her house door without her permission and tried to rape her. The four highlighted diary entries of the Mulomulo Police Post dated 26th March, 2016 was marked and tendered as defence exhibit no. 4. This witness also told the court that the complainant had refused to give her police statement at the time.
102. The complainant had come to lodge her report at the police post with her daughter.
103. In cross examination by the State Counsel the witness stated that he had started his shift at 6pm that day and that he was not aware of any earlier report by the complainant before the start of his shift.
104. In re-examination the witness stated there was no earlier report by the complainant as per the Mulomulo Police Post Station diary.
105. This was the defence case.

ANALYSIS

106. The prosecution alleges on 26th March, 2016 at about 3.30pm the complainant was alone at her home at Mulomulo, Nadi after the complainant did not open the door the accused forcefully entered her house.
107. When inside the house the accused grabbed the complainant's right hand and pressed her neck with his hand and asked her why she did not open the door. The complainant was unable to talk properly because the accused was pressing her neck tightly as a result she urinated in her

pants. The complainant was also unable to breathe properly she was dragged inside her bedroom and pushed onto her bed.

108. On the bed the accused after forcefully pulling down the complainant's pants and panty forcefully inserted her penis into her vagina and had sexual intercourse with her. By this time she was half unconscious and saliva was coming out from her mouth.
109. The complainant was struggling when the accused was forcefully having sexual intercourse with her. The complainant was not able to free herself she was helpless by this time, feeling weak she thought she was dead.
110. On the way to the Nadi Hospital the complainant told her daughter Zaina that the accused had strangled her neck, tried to kill her and forcefully raped her.
111. Zaina informed the court that when she was at her aunt's house she came to know that her mother was in some problem. Zaina and her uncle left for her mother's house.
112. When Zaina entered her mother's house she saw her mother lying on the floor in the passage inside the house and was vomiting blood, her mother's clothes were wet and smelt of urine her mother was unconscious like about to die. The witness observed the complainant was not able to talk, and was breathing slowly she helped her mother in changing her clothes, and with the help of her uncle and cousin brother they lifted her mother into the car.
113. In the car the complainant was lying on the lap of the witness at the back seat on their way to the Nadi Hospital from Mulomulo Police Post the complainant started to talk a bit, she told Zaina that the accused had assaulted and raped her.
114. The accused on the other hand denies all the allegation of the complainant he says the allegation is a made up story against him by the complainant

and her daughter. He did not rape the complainant or assault her. He was in love with the complainant which he described as first love. He admits he went into the house of the complainant at her request but did not do anything as alleged.

115. The defence further says Vadivell Mudaliar saw how the complainant was assaulted and dragged by Azad. In the evening when the complainant went to the Mulomulo Police Post she did not tell Police Constable Poasa who was recording her complaint that the accused had raped her.

Ladies and Gentleman Assessors

116. 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 give 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.
117. 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.


118. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge 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 his or her previous statement 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.
119. 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.
120. 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.
121. The accused is not required to prove his innocence or prove anything at all. He is presumed innocent until proven guilty.
122. Your possible opinions are:-


1. Count One: **RAPE**: GUILTY OR NOT GUILTY.

Ladies and Gentleman Assessors

123. 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.

124. 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

26 June, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs. Pillai, Naidu and Associates, Nadi for the Accused.