

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 140 of 2019

STATE

V

SN

Counsel : Ms. Sadaf Shameem for the State
Mr. Amrit Chand with Ms. Ashnilta Shankar for the Accused

Dates of Trial : 15-19 June 2020

Summing Up : 23 June 2020

The name of the accused and the complainant are suppressed. Accordingly, the accused will be referred to as "SN" and the complainant will be referred to as "PD".

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 witnesses said from the witness box, the document tendered as a prosecution exhibit and the admissions made by the parties by way of agreed 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 put 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 submissions made by the State Counsel and closing submissions made by both Defence Counsel and State 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 primary concern to you is the determination of the credibility of witnesses, basically the truthfulness and 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 correctly recalls the facts about which he or 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 how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their 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] The experience of the Courts is that those who have been victims of a sexual offence react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others may not. The reason for this is that every victim has her own way of coping. Conversely, it does not follow that signs of distress by the witness confirms the truth and accuracy of the evidence given. In other words, demeanour in Court alone is not necessarily a clue to the truth of the witness's account. It all depends on the character and personality of the individual concerned.
- [15] You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular 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 perceive (or know) in any other way 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.

- [16] You heard in this case the evidence of Krishneel Kartik Kumar, a cousin brother of the complainant, who is a police officer. The witness said that around 6.45 in the morning, on 24 March 2019, the complainant had called him. As he answered the phone, he said the complainant was crying over the phone asking for help. He had asked her what had happened. The complainant had just kept on crying asking for help to take her out of the house she was in. When asked exactly what the complainant had said (in the Hindi dialect) the witness said "Come brother take me out of here because these boys are doing something to me".
- [17] The complainant need not specifically disclose all of the ingredients of the offence and describe every detail of the incident, but the complaint should contain sufficient information with regard to the alleged conduct of the accused. Accordingly, if you are satisfied that the complainant made a prompt and a proper complaint, then you may consider that her credibility is strengthened in view of that recent complaint.
- [18] It must be borne in mind that the complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.
- [19] In assessing the credibility of a particular 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 could be in relation to the testimony of the witness given in Court or in comparison to any previous statement made by that witness.
- [20] A statement made to the Police by a witness can only be used during cross-examination to highlight inconsistencies or omissions. That is, to show that the relevant witness on a previous occasion had said something different to what he or she said in Court (which would be an inconsistency) or to show that what the witness said in Court was not stated previously in the statement made to the Police (which would be an omission). You have to bear in mind that a statement made by a witness out of Court is not evidence. However, if a witness admits that a certain portion in the statement made to the Police is true, then that portion of the statement becomes part of the evidence.
- [21] This is 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. 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 or omission, you may conclude that the underlying reliability of the account is unaffected.

- [22] 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 inconsistency or omission 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 his or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider the witness to be reliable.
- [23] 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 witnesses are truthful and reliable.
- [24] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses 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.
- [25] 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 to 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.
- [26] 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.
- [27] 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.
- [28] 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. This is also referred to as circumstantial 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.

- [29] 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 of this Court room. 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 fact and the inferences that could be drawn from them.
- [30] I must emphasize, it does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.
- [31] 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.
- [32] 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. The fact that the accused has given evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence.
- [33] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or degree of proof, as expected by law?
- [34] 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.
- [35] 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.
- [36] You must not let any external factor influence your judgment. You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the complainant in this

case 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 also not speculate about what evidence there might have been. You must adopt a fair, careful and reasoned approach in forming your opinions.

[37] I must also explain to you as to the reason for permitting a closed court proceedings when the complainant gave evidence in this case. It was a normal precautionary procedure adopted by Courts in the interests of a vulnerable witness. It is believed that when it is a closed court proceedings, the complainant is relieved of any mental pressure to describe the often unpleasant incidents which she alleged took place. However, please bear in mind that you must not infer that such a protection to the witness was warranted due to the accused's behaviour and you should not draw any adverse inference against him on that account.

[38] Let us now look at the charge contained in the Information:

[39] There is one charge preferred by the Director of Public Prosecutions (DPP), against the accused:

COUNT ONE

Statement of Offence

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

Particulars of Offence

SN, on the 24th day of March 2019, at Nasinu, in the Central Division, penetrated the vagina of **PD**, with his penis, without the consent of the said **PD**.

[40] As you would observe the accused has been charged with one Count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act No. 44 of 2009 (Crimes Act).

[41] Let me now explain to you the elements of the charge.

[42] Section 207(1) of the Crimes Act reads as follows:

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

[43] Section 207 (2) (a) of the Crimes Act is reproduced below.

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent; or

[44] Therefore, when Section 207 (1) is read with Section 207 (2) (a) it would read as follows:

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

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent.

[45] In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207 (2)(a), means having penile sexual intercourse with that other person or having sexual intercourse with the use of the penis.

[46] Therefore, in order for the prosecution to prove the Count of Rape, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this case the 24 March 2019);
- (iii) At Nasinu, in the Central Division;
- (iv) Penetrated the complainant's vagina, with his penis;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[47] Let me now elaborate on these elements in respect of the said Count.

[48] 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.

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

[50] The fourth element involves the penetration of the complainant's vagina; with the accused's penis. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration or ejaculation. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of the complainant with his penis to any extent.

- [51] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's vagina, with his penis, without her consent.
- [52] You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:
- (a) by force; or
 - (b) by threat or intimidation; or
 - (c) by fear of bodily harm; or
 - (d) by exercise of authority; or
 - (e) by false and fraudulent representations about the nature or purpose of the act; or
 - (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.
- [53] Apart from proving that the complainant did not consent for the accused to penetrate her vagina with his penis, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who you believe, whilst bearing in mind that it is the prosecution who must prove the charge beyond any reasonable doubt.
- [54] A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 22 years at the time of the incident, and therefore, she had the mental capacity to consent.
- [55] It must also be noted that in our law, no corroboration is needed to prove an allegation of a Sexual Offence; Rape is obviously considered as a Sexual Offence. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.
- [56] If you are satisfied beyond any reasonable doubt that the accused, on 24 March 2019, penetrated the complainant's vagina with his penis, without her consent, and the accused knew or believed that the complainant was not consenting, or the accused was

reckless as to whether or not she was consenting, then you must find him guilty of the Count of Rape.

[57] If you find that the prosecution has failed to establish any of these elements in relation to the charge, then you must find the accused not guilty of the charge of Rape.

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

[59] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as "*Agreed Facts*" without placing necessary evidence to prove them:

1. The Accused is SN, 26 years old of Sakoca Settlement, Nasinu.
2. On the morning of 24th March 2019, a male Fijian of Indian descent came to SN's house, and stated that he was a Police Officer.
3. SN was interviewed under caution and charged at the Valelevu Police Station.

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

Case for the Prosecution

[61] The prosecution, in support of their case, called the complainant (PD), her cousin brother Krishneel Kartik Kumar, and Medical Officer, Dr. Sokini Vakadraua. The prosecution also tendered the following document as prosecution exhibits:

Prosecution Exhibit **PE1**- Medical Examination Report of the complainant.

[62] Evidence of the complainant PD

- (i) *The complainant testified that she is originally from Wailevu, Labasa. Currently she resides in Labasa with her mother, father and younger brother.*
- (ii) *She is a student at the University of the South Pacific (USP), pursuing a Bachelor's Degree in Education. It is a 4 year course.*
- (iii) *She testified that her date of birth is 1 September 1996. Therefore, she is currently 23 years of age.*
- (iv) *Last year (in 2019), she was staying at Fletcher Road in Vatuwaqa. She was sharing with a roommate. The purpose of moving to Fletcher Road in 2019 was to study at the USP Laucala Campus. In 2019, she was in the third year of her Degree Programme.*
- (v) *The complainant testified that she recalls the 23 March 2019. That night she said she was at home. It was the USP Social Night. Her friends Zainal and Feroz*

- asked her if she wishes to go with them to the night club. The complainant agreed. The complainant said that she agreed because she had so many assignments to do and she just wanted to take a break.
- (vi) The witness said that Zainal and Feroz are her secondary school friends from Labasa Muslim College. They were in the same class and she knows them since she was in Form 3. Zainal and Feroz were both working in Suva.
 - (vii) Her friends Zainal and Feroz had picked her up from her house in Vatuwaqa in a taxi. Thereafter they had gone to the Desi Haze Night Club. They had drunk about 2 to 3 jugs of rum and cola. The witness demonstrated as to how big the jugs were. Two of her other friends had also come and joined them. She knows one of the friends as Shaan.
 - (viii) While drinking she had gone to dance with her friends. Shelvin Chand, who was her ex-boyfriend, tried to talk to her but she had denied talking to him. After that Shelvin had tried to talk to her again at the door of the night club (outside). At this point she had spoken to him.
 - (ix) She testified that Shelvin was apologizing to her because he had cheated on her. Shelvin had been talking to her for several minutes apologizing again and again and asking for a second chance. The witness said that she had agreed to forgive him.
 - (x) Later on Shelvin had asked her to go home to his house. When asked why Shelvin had asked her to go to his house she said: "I don't know why specifically, but maybe he wanted to talk to me after I gave him a second chance."
 - (xi) The complainant said that Shelvin and she had dated for 4-5 months. In those 4-5 months she had never been to his house before. Shelvin is also originally from Labasa.
 - (xii) Thereafter, the complainant had left her friends Zainal and Feroz at the club and gone with Shelvin. He had said that his house was in Sakoca. The witness said: "I went to Shelvin's house by taxi. Shelvin and other friends were in the taxi – two other friends. I later came to know one of their names as SN." So there was herself, Shelvin, SN and another friend (whose name she didn't know). The time was after 4.00 a.m., on 24 March 2019.
 - (xiii) They had reached the house, which Shelvin had said was his house. She had been tired as she had been doing her assignments late nights, because she was taking four full units. So she had gone to bed and slept.
 - (xiv) As you enter the house, first it is the sitting room, just beside the sitting room is the bedroom where she was sleeping. Shelvin had guided her to the bedroom. When she went to the bed to sleep she was alone. She didn't know about the others. After going into the bedroom the door was kept open. She had just gone off to sleep. When asked the time, the witness said that when they left the club it was after 4.00 a.m. Another half an hour later, she went to bed.
 - (xv) The following questions were then asked from the witness and she answered as follows:

- Q. *After going to bed, did you wake up?*
A. *Yes, I woke up in the morning after 6.00 a.m.*
- Q. *Can you describe how did you wake up?*
A. *When I wake up, I saw a boy on top of me. He was facing towards me – so definitely on top of me and he was naked. He was fully naked. I was also fully naked.*
- Q. *Where were you facing?*
A. *I was facing on top towards the ceiling.*
- Q. *Then what happened?*
A. *I was shocked to see a stranger on top of me and I could feel his penis inside my vagina.*
- Q. *Had you seen this boy any time prior to that day?*
A. *No, it was the first time.*
- Q. *Had you seen that boy any time after you had left the night club and before reaching that house in Sakoca?*
A. *No.*
- Q. *Earlier in your evidence you had stated that you, Shelvin and two others went in a taxi to that house?*
A. *Yes.*
- Q. *Do you know who the other two were?*
A. *Later on I got to know. Later on I got to know it was two of those boys who were in the taxi. The same boys who were in the taxi. I did not recognize their face in the taxi. When I went to Shelvin's house then I got to know their faces and one of their names.*
- Q. *How did you get to know the name and the face?*
A. *I came to know afterwards after the incident happened.*
- Q. *What did you get to know after the incident happened?*
A. *The boys' face and one of their names.*
- Q. *And whose name did you come to know?*
A. *SN. I came to know his name through Shahil.*
- Q. *Now back to the incident?*

- A. *It was daylight. It was after 6.00 a.m. and I could see that boy's face and I tried to push him – because I did not like what he was doing. Because I did not give my consent to sleep with me or to come to my room where I was sleeping.*
- Q. *How did you try to push him?*
- A. *Push him on his shoulders – I used my hand. I used my hands to push his shoulder.*
- Q. *Were you able to push his shoulder?*
- A. *No.*
- Q. *Did you say anything to him?*
- A. *No. I did not say anything. But he was saying what happened, what happened twice.*
- Q. *Did you respond?*
- A. *No. He tried to continue having sex with me.*
- Q. *What do you mean?*
- A. *Because I was pushing him telling him to go away, but still he tried to continue.*
- Q. *And what happened after that?*
- A. *Then he went away.*
- Q. *What made him go away?*
- A. *Because I chased him.*
- Q. *How did you chase him?*
- A. *I said go away.*
- Q. *You said you could feel his penis inside your vagina?*
- A. *Yes.*
- Q. *How did this make you feel?*
- A. *He was inserting his penis inside my vagina. So I could feel it.*
- Q. *What was your reaction when he was inserting his penis into your vagina?*
- A. *Because I did not give him my permission.*

Q. How did this make you feel? How was your emotional reaction?
A. I was really crying out loud. I was so embarrassed as to what he was doing and I even wanted to take my life.

Q. When you say you were crying out loud, what were you saying?
A. I was calling out Shelvin and Shahil's names. But they did not respond.

Q. You said the person was naked and you were shocked to see that person on top of you.
A. Yes.

Q. Did you see the face of the person whose penis was inside your vagina?
A. Yes.

Q. How were you able to see his face?
A. It was daylight and nothing was blocking me from seeing his face.

Q. For how long did you see his face that morning?
A. About a couple of minutes.

Q. Do you recall any features that you saw?
A. He was fair, tall and I think he had a beard.

Q. You said you chased this person saying go away – what happened after that?

A. He went away and another boy came in. I don't know his name but he was dark in complexion. Before he came closer to me, I told him not to come closer to me as I will report to my brother who is a police officer. And then he just went away.

Later the witness said that after she chased the second boy away, Shelvin came in and started to ask what happened. She had continued crying and did not say anything.

(xvi) The complainant then testified that she had then got up from bed, and tried to look for her clothes and handbag so as to locate her phone and call her brother. She could not locate her clothes at the time. She had searched for it on the bed. Then she went to the sitting room where she saw her handbag lying beside the TV and she had got her phone. She had picked up her phone and called her cousin brother.

(xvii) When the incident was happening, the witness said that Shelvin was sitting inside the sitting room. She had heard them whispering in the sitting room.

(xviii) When she went to get her phone, all of the boys were in the sitting room drinking beer. She said it was Shelvin, SN and the unknown boy. She didn't say anything to them.

- (xix) The witness said that she calls her brother as Rahul. His real name is Krishneel Kumar. Rahul is her first cousin and he's a police officer.
- (xx) The witness had called her brother. She was crying and so embarrassed to tell him what happened because of the relationship they had. She had told him to get her out of there. When her brother had asked what happened, the witness had said "I told him these boys are not been good to me." Later the complainant said: "I told him that these boys are doing something wrong with me".
- (xxi) The witness said that her brother Rahuī had heard Shelvin and the other boys talking.
- (xxii) The complainant explained as to why she called out for Shahil, although Shahil had not come to the house along with her that morning. She said: "Shahil told me that these boys called him in the morning", and that Shahil had come to the house before she woke up.
- (xxiii) When asked whether she found her clothes that morning, the witness replied as follows: "When I called my brother he asked for my location. But I clearly did not know the exact location. So I tried looking for someone who knew the exact location of the house. Then I saw Shahil coming to the house from the shop holding a Fanta can. Then he told me it is Sakoca. I told my brother it is Sakoca. So he told me to come to the main road so he can come and get me. I went back again to the room looking for my clothes. Where I saw my skirt and top lying on the floor. My skirt was dirty and my undergarment was on the bed. I just wore my clothes and went to the main road with Shahil, where my brother was there within minutes."
- (xxiv) The witness confirmed that at the time she called her brother from the sitting room, she didn't have any clothes on. Shelvin and the other boys had been in the sitting room at the time she had called her brother and was talking to him.
- (xxv) Thereafter the witness explained how her brother had arrived in his vehicle. She and Shahil had got into the vehicle and gone back to the house. Her brother had asked her and Shahil to stay in the vehicle and he went inside the house. She doesn't know what he had asked them. Then her brother had called her inside the house to recognize who the person was who did something to her. She had pointed at SN. Then her brother had asked her to get back into the vehicle.
- (xxvi) Thereafter, they had gone to the Valelevu Police Station and reported the matter. Her statement had been recorded. Thereafter, she had been taken to the CWM Hospital where she was examined by a Doctor.
- (xxvii) The witness said that at the time the person inserted his penis into her vagina, she did not know his name as SN. She had later come to know the name of the person when Shahil had told her the name at the Police Station.
- (xxviii) The complainant identified SN as the person in the dock.
- (xxix) The complainant clearly stated that she did not agree or consent to the accused inserting his penis into her vagina and that the accused knew that she was not agreeing or consenting.

(xxx) The witness further testified that she did not know how her clothes were removed that morning as she was asleep.

(xxxi) The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant.

(xxxii) The defence highlighted certain inconsistencies and omissions in the testimony given in Court by the witness vis a vis her statement made to the Police:

- i. In her testimony in Court, the witness said that she had gone to the club 2-3 times with her friends since coming to Suva in February 2019.

However, in her statement made to the Police, it is recorded as follows:

"I had gone clubbing with my friends for about five to six times this year in Suva."

- ii. Although in her evidence the complainant said that there was a USP Social on the night of 23 March 2019, in her statement to the police she has not mentioned this fact.
- iii. Although in her evidence the complainant said that she had assignments to do and that she wanted a night out because she was tired, in her statement to the police she has not mentioned this fact.
- iv. Although in her evidence the complainant referred to a person by the name of Shaan joining her group of friends to drink at the night club, in her statement to the police she has not mentioned this fact.
- v. Although in her evidence the complainant said that Shaan and the other boy bought their own drinks as well at the night club, in her statement to the police she has not mentioned this fact.
- vi. Although in her evidence the complainant said that at the time they went to Shelvin's house in the taxi, Shelvin's two friends had also accompanied them, and one of them was SN, in her statement to the police she has not mentioned this fact.
- vii. Although in her evidence the complainant said that the person who was on top of her and inserting his penis into her vagina also had a beard, in her statement to the police she has made no mention of the fact that the person had a beard. In her statement

to the police, she has only stated that the person was fair in complexion and tall.

viii. Although in her evidence the complainant said that after the incident happened in the morning, at the time she gave her police statement in the afternoon she had already got to know SN's name through Shahil, in her statement to the police she has not mentioned this fact.

(xxxiii) It was suggested to the complainant that the accused did not penetrate her vagina with his penis on the morning of 24 March 2019. It was further suggested that the complainant herself is not aware as to who was on top of her and was trying to insert his penis into her vagina that morning.

(xxxiv) In re-examination, the State Counsel clarified from the witness the answers given by her in cross examination. The complainant explained as to the reasons why the matters highlighted as omissions were not found in her statement.

[63] Evidence of Krishneel Kartik Kumar

- (i) The witness testified that he is a Police Officer currently based at the Nasinu Police Station in the Traffic Department. It is a temporary posting.*
- (ii) The witness had joined the Fiji Police Force on 30 November 2018. He was based at Police Headquarters at Centre Point until this year. On 3 February 2020, he was transferred to the Valelevu Police Station.*
- (iii) He is known by his nickname Rahul to his family.*
- (iv) The witness testified that the complainant PD, is his first cousin from his dad's side. He has known her from childhood/from birth. He said "she is like a daughter to me".*
- (v) Currently he is residing at Lakha Singh Road in Sakoca. He has been staying there for the past 7 years and has a fair idea of the area.*
- (vi) The witness said that he recalled the events of 24 March 2019. Around 6.45 a.m. he had been still sleeping at his home in Sakoca, when he received a telephone call from the complainant. As he answered the phone, the complainant was crying over the phone asking for help. He had asked her what had happened. The complainant had just kept on crying asking for help to take her out of the house she was in.*
- (vii) When asked exactly what the complainant had said (in the Hindi dialect) the witness said "Come brother take me out of here because these boys are doing something to me".*
- (viii) Thereafter the witness had asked the complainant of her location/her whereabouts. She was not aware of her environment. She had only said that she's somewhere in Khalsa Road. The witness said that he knows where Khalsa*

Road is since Lakha Singh Road is a street attached/off Khalsa Road. The house the complainant was in was probably one kilometer away from his house.

- (ix) The witness further testified that while the complainant was talking to him, she was asking one of the boys named Shelvin for her clothes and stuff. He said he could clearly hear what the complainant was asking. The complainant was crying and was scared. She just wanted to get out of that place.
- (x) When asked as to what exactly he heard the complainant say, the witness said: "She was asking Shelvin for her clothes. She kept asking why did you guys take off my clothes and where did you guys left my clothes. She kept repeating this. At the same time she was asking help from me." The witness said that he felt really upset on hearing the complainant.
- (xi) The witness had told the complainant to just wear her clothes and make herself to the main road where he could see her. The complainant agreed and hung up.
- (xii) The witness had left home immediately in his private vehicle. As he left home he had called the complainant again and she had confirmed that she was somewhere in Sakaca. As he was coming along Lakha Singh Road, he had seen the complainant standing in a feeder road with one of her friends (a male). He had asked both of them to get into the vehicle.
- (xiii) When asked what the complainant's demeanor was like, the witness said: "She was scared, she was holding herself, she was crying." The witness described how the complainant was holding herself.
- (xiv) After the complainant had got into the vehicle with her friend, he had asked her what had actually happened. The witness said she could not relate what happened because she was scared and crying, and because of the relationship he had with her.
- (xv) Thereafter, he had asked the complainant's friend to lead him to the house they were in. The friend had guided him to that house.
- (xvi) Upon reaching the house, he had got off the vehicle and approached the boys who were inside the house. He had told the complainant and her friend to remain inside the vehicle.
- (xvii) As the witness entered the terrace of the house, one of the Indian boys came and locked the grilled door from inside. He had asked them to open the door but they had refused. He had then introduced himself as a police officer and then showed them his police identity. Then the same person who locked the door opened the door and let him in.
- (xviii) As he entered the house, he saw this Indian guy tall, fair complexion with big hair and a big/little big beard (like 2 weeks not shaven), walked out of the room wearing shorts only. A second person was sitting on the sofa with a beer bottle and a glass of beer half-filled between his legs-on the floor.
- (xix) He had asked the three boys as to what happened there. The witness said: "And they were looking at me as though nothing had happened". He had then asked

- them several times if they knew the complainant (referring to her name). However, they denied knowing the complainant.
- (xx) Thereafter, the witness had asked the complainant to come into the house, whilst her friend remained in the vehicle. As the complainant entered the house she directly pointed at the guy who came out of the room wearing shorts only. That's the time she had told him that his name was SN. She had said he was the one who did something to her.
- (xxi) Thereafter, the witness had called the complainant's friend to come into the house. At the time he got to know that his name was Shahil. After Shahil came to the house, he had asked him if Shahil knows the boys and if the boys know him and the complainant. Shahil had said that they all knew each other very well.
- (xxii) At this point in time SN had come begging to him. He had gone down on his feet and asked the witness to say nothing had happened to the complainant.
- (xxiii) He had asked for their IDs. None of them had IDs. Then he had taken down Shelvin's and SN's names. Thereafter, he had taken the complainant and Shahil to the Valelevu Police Station and lodged a complaint.
- (xxiv) The witness identified the accused as the person to whom the complainant had pointed out on 24 March 2019, as the person who did something to her.
- (xxv) This witness was also cross examined at length by the defence. The defence also put several suggestions to the complainant.
- (xxvi) Although in his evidence the witness said that the Indian guy who walked out of the room wearing shorts only was tall, fair complexion with big hair and a big/little big beard (like 2 weeks not shaven), in his statement to the police he has made no mention of the fact that the person had a beard. This was highlighted by the defence as an omission.

[64] Evidence of Dr. Sokini Vakadraua

- (i) The doctor testified that he is currently working at the CWM Hospital attached to the Obstetrics and Gynaecology Department (O&G Department).
- (ii) He has been practising as a Medical Officer for 4 years, after having graduated from the Fiji National University, with a MBBS Degree, in 2015.
- (iii) The witness testified that he conducted a medical examination on the complainant, on 24 March 2019, at 7.30 p.m. at the CWM Hospital. The Medical Examination Report was tendered to Court as Prosecution Exhibit PE1.
- (iv) The Doctor testified that the initial impression of the complainant was that she was calm and co-operative.
- (v) As to the specific medical findings as found in column D12, the Doctor has noted a linear bruising on the complainant's neck – right side of the neck, 3 cm long and 1 cm in width. The Doctor said this was a fresh bruising.

- (vi) *The Doctor has also noted laceration (small tear on the skin) at the posterior fourchette. This is the lowest part of the vaginal canal. It is the base of the vagina before entering the vaginal canal. There was no bleeding noted. However it was a fresh laceration.*
- (vii) *The Doctor testified that bruising or lacerations are usually caused by blunt traumas. When asked to explain as to what kind of trauma could have caused the laceration on the posterior fourchette, the Doctor said it could be by penetration or any blunt trauma from fingers or tongue or penis.*
- (viii) *When asked to explain as to what kind of trauma could have caused the linear bruise on the neck, the Doctor said it could be due to any form of blunt trauma.*
- (ix) *The Doctor said by fresh the injury should be less than six hours old. However, he later clarified that the injury could have been sustained even within the last 12 hours.*

[65] That was the case for the prosecution. At the end of the prosecution case, this Court decided to call for the defence. You then heard me explain several options to the accused. I explained to him that he could give sworn evidence from the witness box and/or call witnesses on his behalf. He could also address Court by himself or his counsel. 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. In this case, the accused opted to offer evidence under oath and also called a further witness in support of his case.

Case for the Defence

[66] The accused gave evidence and also called a witness Shelvin Chand in support of his case.

[67] Evidence of SN

- (i) *The accused testified that he currently resides at Sakoca Settlement. He's originally from Nabouwalu in Bua. It is in Vanua Levu. He has been in Suva for the past 7 years. After completing his Form 7 studies, he came to Suva to do his Tertiary education. He is a Draftsman by occupation.*
- (ii) *The witness testified that he recalls the events that took place since the evening of 23 March 2019. He had been at home that evening. Around 6.30 in the evening, he had called one of his friends named Shelvin Chand and told him to go to a soccer party since he was invited there. However Shelvin had refused. He had said he already had made plans with his cousin so he said let's go to his cousin's place and the witness had agreed.*

- (iii) Shelvin's cousin's home was located at Salala Street in Valelevu. The witness had left home around 6.45 p.m. by cab. He had picked up Shelvin from Khalsa Road and proceeded to Shelvin's cousin's place at Salala Street. Shelvin's cousin's name is Shivnesh.
- (iv) At Shivnesh's house there were other people as well. Shivnesh's wife, Shahil and Shivnesh's brother-in-law (he doesn't know his name). They had remained at Shivnesh's house for 5-6 hours and had been drinking beer. They had drunk approximately 8 bottles of beer. All had been drinking except Shahil and Shivnesh's wife. They had finished drinking around 12.30 in the morning.
- (v) Thereafter, Shelvin and he decided to go clubbing. Shahil had also wanted to join them. So the three of them had left by cab. On the way they had picked Shelvin's friend Ajit from Sports City. They had then proceeded to the Desi Haze Night Club. They had reached around 1.00 a.m.
- (vi) The witness testified that the night club was crowded since it was a Saturday night. He said that he, Shelvin and Ajit had shared 4 jugs of beer between themselves. Shahil was also with them but he doesn't drink.
- (vii) After a while he, Shelvin and Ajit had gone to the dance floor and started dancing. Shahil had been left behind to watch the drinks.
- (viii) While on the dance floor he recalls seeing a girl come and join Shelvin. Thereafter, Shelvin and the girl started to dance together. He noticed that they were holding each other and dancing romantically. He did not know who the girl was.
- (ix) Thereafter, they had all gone back to the table they were seated on. The girl also had joined them there. He had never been introduced to the girl and had not had any conversation with her.
- (x) While they continued to drink, he had seen Shelvin and the girl leave the group. So Ajit and he had continued to drink. Shahil had also been there.
- (xi) A few minutes later Shelvin had re-joined the group and continued to drink with them. Shelvin had then informed him that he wanted to go to the witness's house. The witness had said the key to the house is in the usual place. Shelvin had then left. It was around 4.00–4.15 in the morning. He had not accompanied Shelvin, neither did he see anyone else accompanying Shelvin.
- (xii) Thereafter, Shahil, Ajit and he remained in the Club. After a few minutes, Shahil had said that he was going to his place with Ajit and left. The time was around 4.30 a.m. The witness had remained in the night club with his other friends who came later into the night club. About 5 to 7 others had been at the club.
- (xiii) The witness had remained at the club until 5.30 in the morning. One of his friends had suggested that they go to the house where the soccer party had been held since there was left over drinks and dinner.

- (xiv) Thereafter, they had proceeded to the place where the soccer party was held at Flagstaff in two cabs. They had reached there within 5 minutes.
- (xv) As soon as the witness entered the house, he had eaten since he was hungry. His other friends had continued having the drinks that were left over. The witness had fallen asleep on the floor. He had been woken up by the ringing of his alarm which was 7.15 in the morning. His friends were also sleeping beside him.
- (xvi) Thereafter, he had left the house in Flagstaff and had got to Sakoca within 5 minutes. He said it was about 7.20 or 7.30 in the morning.
- (xvii) He had entered his house. Ajit was standing at the door of the sitting room. He had then seen Shelvin coming out of the wash room. Ajit and Shelvin had been drinking beer in the sitting room.
- (xviii) As he entered the sitting room, the witness went directly to his bedroom to change. After changing, he had been only wearing shorts and nothing on the top.
- (xix) Thereafter, he had gone to the sitting room and joined Shelvin and Ajit and had one glass of beer. He had told them that he was very tired and that he's going to rest, and for them to continue with the drinks.
- (xx) Thereafter, when inside the room he had closed the door half way and just lied down on bed. He was still awake. Then he could hear a girl's voice calling for Shelvin. This voice was coming just beside his room (from the adjoining room).
- (xxi) The witness had not said anything. He thought Shelvin had brought someone so he didn't want to interfere or say anything. From his room, he could hear the girl asking Shelvin for her ATM Card, her phone, her purse and her clothes.
- (xxii) He had told Shelvin from his room, to just go and drop the girl from where he had brought her.
- (xxiii) After a few minutes the girl had gone out. He had not seen with whom she had gone out. Shelvin had said that Shahil had taken the girl to drop her off at the main road. Thereafter, Shelvin had locked the grilled door and continued to drink.
- (xxiv) About 5 to 7 minutes later, Shelvin had called out to him and said that someone had come to the house. So he had got out from the bed and gone out to the porch and saw a boy saying to open the door. However, he didn't open the door.
- (xxv) The person was saying whose house is this and who brought the girl. The witness had asked which girl? Then that person had referred to the complainant's name. He had said he's a police officer and showed his ID. His tone had been harsh. So the witness had opened the door and let him come in. The witness said he hadn't seen this person before.
- (xxvi) The person had then questioned them. He had asked whose house that was. The witness had said it was his house. Again the person had asked whether

the witness knew the complainant and the witness had said "I don't know any PD – ask these boys." Shelvin and Ajit didn't say anything.

(xxvii) Then the man had started asking for their IDs and Shelvin had replied that they don't carry IDs. The witness said: "He was saying in a harsh way what you guys doing in this house? Why you not carrying your IDs? And then he said write your names and contacts plus your parents name and give it to me. Then all three of us gave the details – myself, Shelvin and Ajit."

(xxviii) The witness said that none of them refused to give the details. The witness said that he had taken A4 sheet of paper and written his name and phone contact, and then gave the paper to Shelvin and Ajit to write their details.

(xxix) The police officer had said: "You guys wait and see what I'm going to do to you people" and left the house.

(xxx) The witness said he didn't have an idea of what the man was trying to say. So when he left, he closed the door. Then Shelvin and Ajit had left the house.

(xxxi) As soon as Shelvin and Ajit left the house, the witness had gone to his bedroom to rest. He says he had woken up around 1.00 p.m. He said he saw his flat mate in the house. At that time some officers from the Valelevu Police Station had come to the house and informed the witness to accompany them to the Valelevu Police Station. Even his flat mate (Shelvin Singh) had been asked to come to the police station.

(xxxii) The witness denied that the complainant had come to the sitting room in front of the police officer (Prosecution Witness Krishneel Kumar) and pointed out to him. He also denies that he went up to Krishneel Kumar and begged that nothing had happened or that he went down on his feet to beg from Krishneel Kumar to say that nothing had happened.

(xxxiii) The witness also denied that he accompanied Shelvin and the complainant, together with another friend, at the time they left the Desi Haze Night Club in a taxi to go to his place.

(xxxiv) The witness totally denies the allegations of rape made against him by the complainant.

(xxxvii) The witness was cross examined at length by the State Counsel. The prosecution also put several suggestions to the witness.

(xxxviii) The prosecution highlighted the following omission in the testimony given in Court by the witness vis a vis his statement made to the Police (his Caution Interview Statement): in his testimony in Court the witness said that upon leaving the night club, he went to the house where the soccer party was held. However, in his statement to the police, no mention is made of that fact.

(xxxv) The prosecution also highlighted the following inconsistency in the testimony given in Court by the witness vis a vis his statement made to the Police (his Caution Interview Statement). In his testimony in court the witness said that upon arriving home, Shelvin and Ajit were already at home. However, in his statement made to the police, it is stated that when he returned home, "No one was there."

[68] Evidence of Shelvin Chand

- (i) *The witness testified that he is originally from Vunivau, Bua. This is in Vanua Levu, Labasa. Currently he's residing at Khalsa Road, Valelevu, Nasinu, with his brother, wife and son.*
- (ii) *He's a second year student at the Fiji National University, Samabula. He's a Mechanical Engineering student.*
- (iii) *The witness testified that on 23 March 2019, around 6.00 p.m, he was at home. The accused SN, had called him and asked if they could go to the soccer party. This was around 6.30 p.m. The witness had refused and said that his cousin Shivnesh had called him for drinks at his place. Then the accused agreed to have drinks at Shivnesh's place. The accused also knows Shivnesh.*
- (iv) *Thereafter, he and the accused had gone to Shivnesh's place. They had reached there around 7.15 p.m. and started drinking beer. Shivnesh's brother in law had also been drinking with them. They had consumed about 8 bottles of beer. They had been drinking until 12.30 a.m.*
- (v) *Then he and the accused planned to go to a club. So they left Shivnesh's place around 12.30 and went to the Desi Haze Night Club. Shahil had also joined them to go to the club. On the way they had picked up Ajit from Sports City. They had reached the night club around 1.00 – 1.15 a.m.*
- (vi) *On reaching the Club, they had started drinking beer. The accused had bought 4 jugs of beer. While drinking the beer they had also gone to dance on the dance floor.*
- (vii) *While they were dancing, the complainant came up to him. He knows the complainant as she was his ex-girlfriend. Then he and the complainant started dancing together. His friends were also dancing nearby.*
- (viii) *After a while they had gone back to their table and continued to drink. The complainant had also joined them at their table and started drinking beer with them.*
- (ix) *Thereafter, PD said something to him. He couldn't hear her because of the noise. Then the witness had spoken to the complainant and said that they go outside and talk since it is noisy inside. So he and the complainant went outside, whilst his friends were inside the club.*
- (x) *When outside the club, the complainant had told him to forgive her for cheating on him. Thereafter, she had said as follows: "PD said to me that from today I won't go to the club and I won't go out with boys, and let's go to the house party."*
- (xi) *The witness had told the complainant that he does not have money. Then the complainant had agreed to pay for the drinks and for the taxi fare to go for the house party.*
- (xii) *Thereafter, the witness testified as to how he had asked the accused for his house keys. The accused had given him the house keys and the witness*

- together with the complainant had stopped a taxi and got in. The time was around 4.30 a.m.
- (xiii) From there they had proceeded to the Rewa Street BSP ATM machine. The complainant had given him her ATM card and pin number, and he had withdrawn money for the taxi fare. Thereafter, they had proceeded to the accused's house in Sakoca. The witness said he had told the complainant that it is one of his friend's house. There was no one else in the house at the time.
- (xiv) After going inside the house they had begun to talk. The complainant had asked for forgiveness and said that she won't be cheating again and that she will focus on her school studies. They had been talking for around 40 – 45 minutes. After that they had kissed each other and had a romantic night, in a room where the witness says no one stays in. The witness explained that he always goes to the accused's place and he knows which room belongs to whom and in which room there is no one.
- (xv) When asked to what he meant by romantic night, the witness said that they were kissing each other and were in bed together in a romantic way. Later he said that he had sex with the complainant with her consent. The witness said the time was around 5.15 – 5.30 a.m.
- (xvi) Thereafter, the complainant asked him where Shahil was. The witness had said that Shahil was in the club. The complainant had told the witness to call Shahil. Since the witness did not have credit on his phone the complainant had given him her phone to call Shahil. The witness had then called Shahil from the bed. The time was around 5.30 a.m. At this point the witness came to know that Shahil is already at his home.
- (xvii) The witness had told Shahil that the complainant wants to talk to him and had given the phone to the complainant. The complainant had then told the witness to go and pick Shahil. The witness said that the complainant and Shahil are friends.
- (xviii) Thereafter, the witness had gone in a private car to pick Shahil. The time was around 6.15 – 6.30 a.m. When he picked up Shahil it was daylight. When he went to Shahil's house Ajit was also there. So the three of them came back together – the witness, Shahil and Ajit.
- (xix) On the way the witness had withdrawn further money using the complainant's ATM Card and bought 4 bottles of Fiji Gold beer. After buying the beer they had returned to the accused's house in Sakoca where the complainant was. At the time they reached it was around 7.00 – 7.30 a.m.
- (xx) Upon reaching home the witness had gone to the room the complainant was in to check on her. The complainant had been sleeping with the blanket covered from head to toe.
- (xxi) Thereafter, the witness had told Ajit to serve the beer and gone to the washroom. As soon as he came back from the washroom to the sitting

- room, he had seen the accused taking off his shoes. This was about 5 minutes after he returned to the house.
- (xxii) The witness had invited the accused too to join them in drinking. The accused had said that he would change and come; and had gone to his room. Thereafter, the accused had come and joined Ajit and him. He had one glass of beer to drink. The accused had then said that he's going to his room and once they finished drinking to let him know. He had also told them not to make a lot of noise, because the neighbors are there. At this time the complainant was in her room.
- (xxiii) Thereafter, the accused had gone to his room.
- (xxiv) About 15 minutes thereafter, the complainant had called the witness to her room. She had told him to give her her handbag and ATM Card because she wanted to go home. When asked as to how the complainant appeared at the time, the witness said that she was fine.
- (xxv) When the witness went to bring the complainant's handbag from the sitting room, he had seen Shahil coming from the shop. Then he had told Shahil that the complainant wants to go home; whether he could please take her to the main road. Shahil had agreed to do so.
- (xxvi) On hearing the girl's voice, the accused had enquired from his room as to who the girl was and said to go and drop her.
- (xxvii) Thereafter, Shahil went to drop the complainant. The accused remained in his room, while the witness and Ajit were drinking beer (in the sitting room).
- (xxviii) The witness then testified that about 10 minutes later a male person had come and knocked on the door. The witness had called the accused to come and see who it was. The accused had then come out of his room to check on the person.
- (xxix) The witness then testified as to how this person, who had identified himself as a police officer (Prosecution Witness Krishneel Kumar) had questioned them and got their personal details and left. The witness did not know who this person was.
- (xxx) The witness said that apart from this male person, no one else came into the sitting room of the house.
- (xxxi) After this person left, the witness and Ajit had continued drinking till about 8.30 – 9.00 a.m. Thereafter, the two of them had told the accused that they are leaving and left the house, since they had to attend a Holi celebration. The accused had remained at home at the time the witness and Ajit left.
- (xxxii) This witness was cross-examined in detail by the Counsel for the State.
- (xxxiii) The prosecution highlighted certain inconsistencies and omissions in the testimony given in Court by the witness vis a vis his statement made to the Police:

1. Although in his evidence the witness said that after arriving at the accused's house in the morning of 24 March 2019, he and the

complainant had talked, and that they had talked for 40 – 45 minutes. And also that the complainant had asked him forgiveness and said that she will not cheat on him and she will focus on her school/studies, in his statement to the police he has not mentioned any of these matters.

- ii. *Based on the above omissions, the prosecution also highlighted the following as an inconsistency.*

“When we reached there, PD told me that she was feeling sleepy. So I told her that she can sleep in one of the bedrooms. So she went to sleep.”

- iii. *Although in his evidence the witness said that he and the complainant had kissed each other and were in bed together and had a romantic night together and also that they had sex together, in his statement to the police he has not mentioned any of these matters.*

- iv. *In his testimony in Court, the witness said that the complainant had requested him to call Shahil.*

However, in his statement made to the Police, it is recorded as follows: “After that I called Shahil and asked where he was.”

- v. *In his testimony in Court, the witness said that after he had spoken to Shahil, he went to pick Shahil and when he came back, that he had opened the door and entered the accused’s house.*

However, in his statement made to the Police, it is recorded as follows: “Upon reaching home I saw that the grill door was locked from inside as when I left home I had only locked the front door and not the grill door. So I knew that SN was back home.”

(xxxiv) In cross examination the witness said that he too had been arrested by the police for this case. He said he had been arrested at 5.00 in the evening of 24 March and kept overnight at the Police Station. The next morning around 9.00 a.m. he had been interviewed by the police. The witness said, “I told them all whatever I told in Court today and they assaulted me. I can demonstrate the way they assaulted me. I told him whatever I told in Court today. But the Officer assaulted me and said this is not right and this is right.”

Analysis

- [69] The above is a summary of the evidence led at this trial. The prosecution led the evidence of the complainant, PD, her cousin brother Krishneel Kartik Kumar and Medical Officer, Dr. Sokini Vakadraua. The defence relied on the evidence of the accused himself and witness Shelvin Chand.
- [70] You must bear in mind that Shelvin Chand was originally listed as a witness for the prosecution. However, since he was not called by the prosecution to testify, the defence called the said Shelvin Chand as a defence witness.
- [71] In this case, the prosecution is relying on the evidence of Dr. Sokini Vakadraua, who had conducted the medical examination of the complainant. This kind of evidence is given to help you with scientific matters by a witness who has expertise. As you may have heard, experts carry out examinations which are relevant to the issues you have to consider. They are permitted to interpret results of the examinations for our benefit, and to express opinions about them, because they are used to doing that within their particular field of expertise.
- [72] You will need to evaluate expert evidence for its strengths and weaknesses, (if any) just as you would with the evidence of any other witness. Remember, that while experts deal with particular parts of the case, you receive all the evidence and it is on all the evidence that you must make your final decision.
- [73] 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.
- [74] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [75] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, you must treat those facts as proved beyond reasonable doubt.
- [76] In this case, it is clear from the evidence that the complainant and prosecution witness Krishneel Kumar, saw or met the accused for the first time on the date of the alleged incident. Thereafter, the complainant and the said witness identified the accused in Court.
- [77] Identifying an accused for the first time in court after the alleged incident, when the accused is inside the accused box is known as 'dock identification'. Dock identification is unreliable in the absence of a prior identification in the investigation stage during an identification parade or photograph identification. Therefore, you should consider the evidence pertaining to identification of the accused with caution. It is because the witness may identify the accused merely because he is sitting in the 'dock'. The witness

may assume that the accused is the person who committed the crime merely because he is sitting in the dock. Therefore, it is for you to decide what weight you should give to the evidence of dock identification.

- [78] When you consider the evidence on the identification of the accused, please bear in mind that an honest and a convincing witness can still be mistaken with regard to identity. Mistaken recognition can occur even of close relatives and friends. Recognition may be more reliable than identification of a stranger; but, even when the witness is claiming to recognise someone whom he or she knows, I wish to remind you that mistakes in recognition of close relatives and friends are sometimes made.
- [79] Therefore, you should closely examine the following circumstances, among others, when you evaluate the evidence given by the complainant and prosecution witness Krishneel Kumar on identification of the accused in relation to the offence;
- a) Duration of observation of the accused person;
 - b) The distance within which the observation was made;
 - c) The lighting condition at the time the observation was made;
 - d) Whether there were any impediments to the observation or was something obstructing the view;
 - e) Whether the complainant and prosecution witness Krishneel Kumar knew or had seen the accused before;
 - f) For how long had the complainant and prosecution witness Krishneel Kumar known or seen the accused before;
 - g) If not known or seen before or only known or seen occasionally, is there any special reason to remember the accused person;
 - h) Duration between original observation and identification; and
 - i) Is there any material discrepancy between description given to the Police by the witnesses when first seeing the accused and his actual appearance?

[80] All these matters go to the quality of the identification evidence. If the quality is good and remains good during the case, the danger of a mistaken identification is lessened. However, the poorer the quality of the identification evidence, greater is the danger of a mistaken identification.

[81] I have already 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 given by the witness for it. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.

- [82] However, if there is no acceptable explanation given by the witness 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 and omission 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 his evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency or omission and consider him or her to be reliable as a witness.
- [83] The accused has testified in Court and totally denies the charge of Rape against him. He totally denies that he was on top of the complainant when she woke up on the morning of 24 March 2019, or that he penetrated the complainant's vagina with his penis as set out in the Information.
- [84] According to the accused he had returned to his home in Sakoca around 7.20 - 7.30 on the morning of Sunday 24 March 2019. This position is further corroborated by the testimony of Defence Witness Shelvin Chand.
- [85] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses, 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 has proved the element of the offence, beyond any reasonable doubt.
- [86] It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on the prosecution evidence, also when you are assessing the evidence led on behalf of the accused. You must consider his evidence and the evidence of Shelvin Chand also for its consistency and also the probability of their version. If you find the evidence of the defence is truthful and reliable, then you must find the accused not guilty of the charge, since the prosecution has failed to prove its case.
- [87] If you neither believe the evidence adduced by the defence nor disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution case. The benefit of such doubt should then accrue in favour of the accused and he should be found not guilty of the charge.
- [88] However, I must caution you that even if you reject the evidence of the defence as not truthful and also unreliable that does not mean the prosecution case is automatically proved. The prosecution have to prove their case independently of the accused and that too on the evidence they presented before you.

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

- i. *If you believe the evidence of the defence, then you must find the accused not guilty of the charge of Rape;*
- ii. *If you neither believe nor disbelieve the evidence of the defence, then again you must find the accused not guilty of the charge of Rape;*
- iii. *If you reject the version of the defence, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution;*
- iv. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charge of Rape;*
- v. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charge of Rape have been established beyond reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*

[90] Any re directions the parties may request?

[91] 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 separately on the charge of Rape 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.

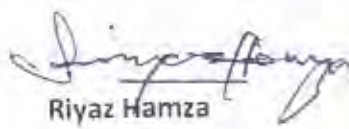
[92] Your possible opinions should be as follows:

Count One

Rape- Guilty or Not Guilty

[93] I thank you for your patient hearing.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 23rd Day of June 2020

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : Amrit Chand Lawyers, Suva.