

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: 152 OF 2010

STATE

-v-

NAVEEN SINGH

Counsels : Mr. S. Babitu for the State
Mr. R. Kumar for the accused

Date of Trial : 03 September -04 September 2013

Date of Summing Up : 05 September 2013

(Name of the victim is suppressed. She is referred to as SW)

SUMMING UP

Madam Assessors and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me – as the Judge who presided over this trial –to sum up the case to you on law and evidence. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.
2. I will direct you on matters of law which you must accept and act upon.

3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. In other words you are the Judges of fact. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The counsel for Prosecution and the counsel for the accused made submissions to you about the facts of this case. That is their duty as the Prosecution Counsel and the Defence Counsel. But it is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions, and your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions, but I will give them the greatest weight when I come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the accused person is innocent until he is proved guilty. The burden of proving his guilt rests on the prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.
9. Your decisions must be solely and exclusively upon the evidence, which you have heard in this court and upon nothing else. You must disregard anything you might have heard or read about this case, outside of this courtroom. Your duty is to apply the law as I explain to you to the evidence you have heard in the course of this trial.
10. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
11. As assessors, you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.

12. In accessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole. In deciding on the credibility of any witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gave evidence. Was he/she evasive? How did he/she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable.

13. I must give each one of you a word of caution. This caution should be borne in mind right throughout until you reach your own opinions. That is – as you could hear from evidence – this case involved an alleged incident of rape. An incident of rape would certainly shock the conscience and feelings of our hearts. It is quite natural given the inherent compassion and sympathy with which human-beings are blessed. You may, perhaps, have your own personal, cultural, spiritual and moral thoughts about such an incident. You may perhaps have your personal experience of such a thing, which undoubtedly would be bitter. You must not, however, be swayed away by such emotions and or emotive thinking. That is because you act as judges of facts in this case not to decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law, to which every one of us is subject to. I will deal with the law as it is applicable to the offences with which the accused-person is charged, in a short while.

14. In this case the prosecution and the defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. They are of course an important part of the case. The agreement of these facts has avoided the calling of number of witnesses and thereby saved a lot of court time.

15. The charges against accused are as follows:

COUNT 1

Statement of Offence

RAPE: Contrary to Section 207 (1), (2) (b) and (3) of the **Crimes Decree, 2009.**

Particulars of Offence

NAVEEN SINGH, on a day between the 1st day of October 2010 and the 31st day of October 2010 at **LAUTOKA** in the **WESTERN DIVISION**, used his finger to penetrate the vagina of **KW**, a 7 year old.

COUNT 2

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1) of the **Crimes Decree, 2009.**

Particulars of Offence

NAVEEN SINGH, on a day between the 1st day of October 2010 and the 31st day of October 2010 at **LAUTOKA** in the **WESTERN DIVISION**, unlawfully and indecently assaulted **KW**, in that **NAVEEN SINGH** licked the vagina of **KW**, a 7 year old.

COUNT 3

Statement of Offence

RAPE: Contrary to Section 207 (1), (2) (b) and (3) of the **Crimes Decree, 2009.**

Particulars of Offence

NAVEEN SINGH, on a day between the 1st day of October 2010 and the 31st day of October 2010, at **LAUTOKA** in the **WESTERN DIVISION**, used his finger to penetrate the vagina of **KW**, a 7 year old.

COUNT 4

Statement of Offence

RAPE: Contrary to Section 207 (1), (2) (a) and (3) of the **Crimes Decree, 2009.**

Particulars of Offence

NAVEEN SINGH, on a day between the 1st day of October 2010 and the 31st day of October 2010, at **LAUTOKA** in the **WESTERN DIVISION**, used his penis to penetrate the vagina of **KW**, a 7 year old.

COUNT 5

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1), of the **Crimes Decree, 2009.**

Particulars of Offence

NAVEEN SINGH, on the 1st day of November 2010 at **LAUTOKA** in the **WESTERN DIVISION**, unlawfully and indecently assaulted **KW**, in that **NAVEEN SINGH** touched the vagina of **KW**, a 7 year old, with his finger.

COUNT 6

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1), of the **Crimes Decree, 2009**.

Particulars of Offence

NAVEEN SINGH, on the 1st day of November 2010 at **LAUTOKA** in the **WESTERN DIVISION**, unlawfully and indecently assaulted **KW**, in that **NAVEEN SINGH** kissed the vagina of **KW**, a 7 year old.

COUNT 7

Statement of Offence

RAPE: Contrary to Section 207 (1), (2) (a) and (3) of the **Crimes Decree, 2009**.

Particulars of Offence

NAVEEN SINGH, on the 1st day of November 2010 at **LAUTOKA** in the **WESTERN DIVISION**, used his penis to penetrate the vagina of **KW**, a 7 year old.

COUNT 8

Statement of Offence

INDECENTLY INSULTING OR ANNOYING THE MODESTY OF A PERSON: Contrary to Section 213 (1), (b) of the **Crimes Decree, 2009**.

Particulars of Offence

NAVEEN SINGH, on the 21st day of November 2011 at **LAUTOKA** in the **WESTERN DIVISION**, intruded upon the privacy of **KW**, by causing the said **KW** to masturbate him.

16. I will now deal with the elements of the offences. The offence of rape is defined under Section 207 of the Crimes Decree. Section 207(1) of the Decree makes the offence of rape an offence triable before this court. Section 207 (2) states as follows:

A person rapes another person if:

- (a) The person has carnal knowledge with or of the other person without other person's consent; or
- (b) The person penetrates the vulva, vagina or anus of other person to any extent with a thing or a part of the person's body that is not a penis without other person's consent; or
- (c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

17. Carnal knowledge is to have sexual intercourse with penetration by the penis of a man of the vagina of a woman to any extent. So, that is rape under Section 207 (2) (a) of the Crimes Decree.

18. If a person penetrates the vagina to any extent with a part of another person's body, which is not the penis of that person, without the consent of the woman, that is rape under Section 207 (2) (b).

19. So, the elements of the offences of Rape in this case are that **the accused either penetrated the vagina of victim to some extent with penis or penetrated the vagina of victim to some extent with finger** which means that the insertion of a penis or finger fully into vagina is not necessary.

20. Other parts of the offence are irrelevant to the facts of this case.

21. Consent as defined by Section 206 of the Crimes Decree, means the consent freely and voluntarily given by a woman with a necessary mental capacity to give such consent. A woman under age of 13 years is considered by law as a person without necessary mental capacity to give consent. The girl in this case was only 7 years of age and, therefore, she did not have the capacity under the law to consent. So, the prosecution does not have to prove the absence of consent on the part of the girl because law says that she, in any event, cannot consent.

22. I will now deal with the elements of the offence of Indecent Assault. The offence of indecent assault is defined under Section 212 of the Crimes Decree:

A person commits indecent assault if:

- (a) Unlawfully and indecently;
- (b) Assaults another person.

23. For the assault to be indecent it must be accompanied by a circumstance of indecency. Conduct is indecent when it is as such that ordinary people would so describe it, in light of prevailing standards of morality and, more specifically, in light of whether the victim has consented to the conduct in question.

24. Apart from the elements of the offence, the identity of the person who alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the accused-person and connect him to the offence that they alleged to have been committed.

25. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a victim who saw, heard and felt the offence being committed. In this case, for example, the alleged victim was witness who offered direct evidence, if you believe her as to what she saw, heard and felt.

26. Documentary evidence is also important in a case. Documentary evidence is the evidence presented in the form of a document. In this case, Medical Report is an example if you believe that such a record was made. Then you can act on such evidence. You can take into account the contents of the document if you believe that contemporaneous recordings were made at the relevant time on the document upon examination of the victim.

27. Expert evidence is also important to borne in mind. Usually, witnesses are not allowed to give opinions. They are allowed to give evidence on what they have seen, heard or felt by their physical senses only, as described earlier. The only exception to this rule is the opinions of experts. Experts are those who have learned in a particular science, subject or a field with experience in the field. Then can come as witnesses and make their opinions express on a particular fact to aid court and you to decide the issue/s before court on the basis of their learning, skill and experience.

28. The doctor in this case, for example, came before court as an expert witness. The doctor, unlike any other witness, gives evidence and tells us his conclusion or opinion based on his

examination of the victim. That evidence is not accepted blindly. You will have to decide the issue of rape before you by yourself and you can make use of doctor's opinion if his reasons are convincing and acceptable to you; and, if such opinion is reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence in the case.

29. In assessing evidence of witnesses you need to consider a series of tests. They are for examples:

Test of means of opportunity: That is whether the witness had opportunity to see, hear or feel what he/she is talking of in his/her evidence. Or whether the witness is talking of something out of pace mechanically crated just out of a case against the other party.

Probability and Improbability: That is whether what the witness was talking about in his or her evidence is probable in the circumstances of the case. Or, whether what the witness talked about in his/her evidence is improbable given the circumstances of the case.

Belatedness: That is whether there is delay in making a prompt complaint to someone or to an authority or to police on the first available opportunity about the incident that was alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation to such delay.

Spontaneity: This is another important factor that you should consider. That is whether a witness has behaved in a natural or rational way in the circumstances that he/she is talking of, whether he/she has shown spontaneous response as a sensible human being and acted accordingly as demanded by the occasion.

Consistency: That is whether a witness telling a story on the same lines without variations and contradictions.

30. You need to consider all these matters in evaluating the evidence of witnesses. You shall, of course, not limit to those alone and you are free to consider any other factors that you may think fit and proper to assess the evidence of a witness. I have given only a few illustrations to help what to look for to evaluate evidence.

31. I will now deal with the summary of evidence in this case.

32. Prosecution called SW as the first witness. She was 7 years old at the time of the incident. She was living in Lovu with her family. Her neighbor Naveen had done bad things to her. She goes to Naveen's house to watch Hindi movies. Naveen had licked her vagina after taking off her clothes. He had also put his finger into her vagina. Naveen had put his 'pepe' into her 'pepe'. 'Pepe' is where the urine is coming out. This was done in store room and in the bath room. Naveen had put his 'pepe' while in a kneeling position. She was standing in front of him. This was done many times. Naveen had told her not to tell her parents.
33. Under cross examination it was put to her that she never told Police that Naveen licked her vagina, inserted his finger into her vagina or Naveen touched her body. Her position was that she told those to Police.
34. You watched her giving evidence in court. What was her demeanour like? How she react to being cross examined and re-examined? Was she evasive? How she conduct herself generally in Court? Given the above, my directions on law, your life experiences and common sense, you should be able to decide whether witness's evidence, or part of a witness's evidence is reliable, and therefore to accept and whether witness's evidence, or part of evidence, is unreliable, and therefore to reject, in your deliberation. If you accept the evidence of SW beyond reasonable doubt then you have to decide whether that evidence is sufficient to establish all elements of the charges.
35. The second witness for the prosecution was the mother of the victim. On 21.11.2010 she was at home. After lunch the victim had asked whether she could go and watch movies at Puspa's house. She had allowed her to go. She was washing dishes. She had told the victim that she will come after that. When she went there, victim was not at the sitting room. Puspa had told her victim had gone home. Victim had come running out from a room. She had questioned the victim. She was quiet and didn't tell anything.
36. At home she had questioned her several times. Then she had beaten the victim with a stick. Victim's father had intervened and got victim to sit down. The father had questioned the victim in her presence. The victim had told that Naveen had taken off his pants and showed the private parts to her. Naveen had made her to touch his private parts. Then Naveen had taken off victim's clothes and had touched victim's private parts. She had identified the accused as Naveen.
37. It was put to this witness in cross examination that the victim made up a story to get away from beating. She said she could not understand that.

38. You saw her giving evidence in Court. She had given prompt answers to questions put to her by the defence counsel. It is up to you to decide whether you could accept her evidence beyond reasonable doubt. If you accept her evidence it corroborates the evidence of the victim regarding the complaint.
39. The third witness for the prosecution was Doctor V. Masi. He had examined the victim on 21st November 2010 at 5.00 p.m. at the Lautoka hospital. Her hymen was perforated. His opinion was that the child was raped. His findings are consistent with the history given by the victim. The medical report was tendered as part of his evidence marked P1.
40. In cross examination he admitted that perforated hymen could be a result of horse riding or actively taking part in sports.
41. The Doctor is an independent witness. It is up to you to decide whether his evidence further corroborated the evidence of the victim regarding penetration into vagina.
42. The next witness for the prosecution was WPC Irene. She had recorded the caution interview of the accused on 22.11.2010. The interview was conducted in English language. The accused was given his rights. The accused had answered the questions put to him voluntarily. She read over the entire interview and produced the interview notes marked as P2. Accused had not made any complaint to her. The witness was 8 months pregnant at this time.
43. When cross examined, she denied assaulting the accused with a ruler three times on the head. She further denied two Fijian Police officers assaulting the accused during interview or same officers pulling down the accused's pants and burning the penis of the accused with a lighter and putting a stick in to accused's back.
44. It is up to you to decide whether the accused made a statement under caution voluntarily to this witness. If you are sure that the caution interview statement was made freely and not as a result of threats, assault or inducements made to the accused by persons in authority then you could consider the facts in the statement as evidence. Then you will have to further decide whether facts in this caution interview statement are truthful. If you are sure that the facts in the caution interview are truthful then you can use those to consider whether the elements of each charge are proved by this statement.

45. Sgt. Mohamed Harif was the next witness for the prosecution. On 23.11.2010 he had recorded the charge statement of the accused. It was done in English. The accused had not made any complaint. He identified the original notes of the charge statement and the accused. In cross examination he denied fabricating the statement or threatening the accused that he will be beaten if it is not signed.
46. It is up to you to decide whether the accused made the charge statement voluntarily to this witness. If you are sure that the charge statement was made freely and not as a result of threats, assault or inducement made to the accused by persons in authority then you could consider the facts in the charge statement as evidence. Then you will have to further decide whether facts in this charge interview are truthful. If you are sure that the facts in the charge statement are truthful then you can use those to consider whether elements of each charge are proved by this statement.
47. The last witness for the prosecution was WPC Asenaca. She is the investigating officer of this case. She had received the report on 21.11.2010. She had recorded the statement of the victim and had taken her for medical examination. Steps were taken to arrest the accused and he was interviewed and charged. There was no complaint from the accused. In cross examination she denied seeing accused being assaulted by Police officers.
48. After the prosecution's case was closed, you heard me explaining the accused his rights in defence.
49. The Accused elected to give evidence. His position was that victim is not known to him. He denied the allegations of Rape and Indecent assault. He could not say the date he was arrested. He was taken to Lautoka Police station. He was put to a room and was assaulted by several officers on his head, chest and ears. He was asked to put his penis on a table and Police officer will assault the penis with an iron rod. Another officer had brought a large scissors and told him that he is going to cut his penis. He grabbed a chair and prevented that. The victim and the mother were in the Police station and they were laughing at him. When he was put into cell the Police officer had told the other prisoners that he had raped someone. He was assaulted by three prisoners in the cell. After assault he could not walk.
50. The following day his caution interview commenced. One Fijian officer had slapped him. WDC Irene had assaulted him with a wooden ruler while interviewing him. Police officers have put a ruler to his back. Another Police officer had burnt his penis with a lighter. The following day his charge statement was recorded by a lady Fijian officer. He was taken to

Natabua prison. He had not complained to the Magistrate about Police assault. He had not made a complaint to anyone.

51. In cross examination he denied the signatures on the caution interview and the charge statement. He further said that he does not know the victim. He is not watching movies at home. He once said that disclosures were not given to him by court. But later said that disclosures were read over to him by his brothers. When it was put to him that Police could not have made up all this? He did not answer that question. Accused stated that he had not gone to a doctor after the Police assault.
52. I must remind you that when an accused person has given evidence he assumes no onus of proof. That remains on the prosecution throughout. His evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
53. You will generally find that an accused gives an innocent explanation and one of the three situations then arises:
- (i) You may believe him and, if you believe him, then your opinion must be Not Guilty. He did not commit the offences.
 - (ii) Alternatively without necessarily believing him you may say 'well that might be true'. If that is so, it means there is reasonable doubt in your minds and so again your opinion must be Not Guilty.
 - (iii) The third possibility is that you reject his evidence as being untrue. That does not mean that he is automatically guilty of the offence. The situation then would be the same as if he had not given any evidence at all. He would not have discredited the evidence of the prosecution witnesses in any way. If prosecution evidence proves that he committed the offences then the proper opinion would be Guilty.
54. You watched the accused giving evidence in court. What was his demeanor like? How he react to being cross examined and re-examined? Was he evasive? How he conduct himself generally in Court? The position taken up by the accused in giving evidence in the court is different from his caution interview statement, charge statement and the position taken up by him at the time of cross examination of prosecution witnesses. In other words his version is inconsistent. It is up to you to decide whether you could accept his version and his version is sufficient to establish a reasonable doubt in the prosecution case. If you accept his version accused should be discharged. Even if you reject his version still the prosecution should prove its case beyond reasonable doubt.

55. I have summarized all the evidence before you. But, still I might have missed some. That is not because they are unimportant. You heard every item of evidence and you should remind yourselves of all that evidence and from your opinions on facts. What I did was only to draw your attention to the salient items of evidence and help you in reminding yourselves of the evidence.
56. Please remember, there is no rule for you to look for corroboration of the victim's story to bring home an opinion of guilty in a rape case. The case can stand or fall on the testimony of the victim depending on how you are going to look at her evidence. You may, however, consider whether there are items of evidence to support the victim's evidence if you think that it is safe to look for such supporting evidence. Corroboration is, therefore, to have some independent evidence to support the victim's story of rape.
57. You have to also bear in mind that according to Section 130 of the Criminal Procedure Decree, "In any case of a sexual nature, no evidence shall be given, and no question shall be put to witness, relating directly or indirectly to-
- (a) The sexual experience of the complainant with any other person other than the accused; or
 - (b) The reputation of the complainant in sexual matters, except by leave of court.
58. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial, and never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt.
59. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of accused's guilt of each charge you must find him guilty for each charge. You have to consider evidence against each charge separately. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.
60. State counsel in his submissions stated that 1st and 3rd charges are identical and therefore you have to give an opinion only in respect of one of those. He further stated that the date

in the 8th charge is wrong and therefore you don't have to give any opinion in respect of the 8th charge.

61. Your possible opinions are as follows:

(i)	First charge Rape	Accused Guilty or Not Guilty
(ii)	Second charge of Indecent assault	Accused Guilty or Not Guilty
(iii)	Fourth charge of Rape	Accused Guilty or Not Guilty
(iv)	Fifth charge of Indecent assault	Accused Guilty or Not Guilty
(v)	Sixth charge of Indecent assault	Accused Guilty or Not Guilty
(vi)	Seventh charge of Rape	Accused Guilty or Not Guilty

62. You may now retire to deliberate on the case, and once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.

63. Any re-directions?

Sudharshana De Silva
JUDGE

On 5th September 2013
At Lautoka

Solicitors for the State:
Solicitors for the Accused:

Office of the Director of Public Prosecution
Legal Aid Commission