

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO.: HAC 41 OF 2013**

STATE

-v-

NIZAR MUNIR SAMUT

**Counsels** : Mr. S. Kiran for the State  
The Accused in person  
**Date of Trial** : 23 July 2014 to 24 July 2014  
**Date of Summing Up** : 25 July 2014

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

**SUMMING UP**

Madam Assessors and Gentlemen 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 accused made submissions to you about the facts of this case. That is their duty as the Prosecution Counsel and the accused. 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 offence with which the accused-person is charged, in a short while.

14. The charge against the accused is a charge of rape under Section 207(1) (2) (b) and (3) of the Crimes Decree No. 44 of 2009. The particulars of the offence, as alleged by the prosecution, are:

**COUNT**

***Statement of Offence***

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

***Particulars of Offence***

**NIZAR MUNIR SAMUT**, on the 12<sup>th</sup> day of January 2013, at Lautoka in the Western Division, inserted his finger into the vagina of **SAS**, a 3 year old.

15. I will now deal with the elements of the offence. 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.

16. If a person penetrates vulva or vagina of another person to any extent with part of that person's body that is rape under Section 207 (2) (b) of the Crimes Decree.

17. 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 3 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.
18. So, the elements of the offence in this case are that the accused inserted his finger in to the vagina of victim to some extent which means that the insertion of a finger fully into vagina is not necessary.
19. Evidence that the accused has been identified by a witness as doing something must, when disputed by the accused, be approached with special caution because experience has demonstrated, even honest witnesses have given identification which have been proved to be unreliable. I give you this warning not because I have formed any view of the evidence, but the law requires that in every case where identification evidence is involved, that the warning be given.
20. In assessing the identification evidence, you must take following matters into account:
  - (i) Whether the witness has known the accused earlier?
  - (ii) For how long did the witness have the accused under observation and from what distance?
  - (iii) Did the witness have any special reason to remember?
  - (iv) In what light was the observation made?
  - (v) Whether there was any obstacle to obstruct the view?
21. 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 victim was witness who offered direct evidence, if you believe her as to what she saw, heard and felt.
22. 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.
23. Expert evidence is also important to borne in mind. Usually, witnesses are not allowed to express opinions. They are allowed to give evidence on what they have seen, heard or felt by physical senses only, as described earlier. The only exception to this rule is the opinions of experts. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their opinions express on a

particular fact to aid court and you to decide the issues/s before court on the basis of their learning, skill and experience.

24. 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 her conclusion or opinion based on 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 her 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.
25. 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 created 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. You must see whether a witness is shown to have given a different version elsewhere. If so, what the witness has told court contradicts with his/her earlier version.

You must consider whether such contradiction is material and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter. If it is shown to you that a witness has made a different statement or given a different version on some point, you must then consider whether such variation was due to loss of memory, faulty observation or due to some incapacitation of noticing such points given the mental

status of the witness at a particular point of time or whether such variation has been created by the involvement of some another for example by a police officer in recording the statement where the witness is alleged to have given that version.

You must remember that merely because there is a difference, a variation or a contradiction or an omission in the evidence on a particular point or points that would not make witness a liar. You must consider overall evidence of the witness, the demeanor, the way he/she faced the questions etc. in deciding on a witness's credibility.

You must also consider the issue of omission to mention something that was adverted to in evidence on a previous occasion on the same lines. You must consider whether such omission is material to affect credibility and weight of the evidence. If the omission is so grave, you may even consider that to be a contradiction so as to affect the credibility or weight of the evidence or both.

In dealing with consistency you must see whether there is consistency *per se* and *inter se* that is whether the story is consistent within a witness himself or herself and whether the story is consistent between or among witnesses. In deciding that, you must bear in mind that the evidence comes from human beings. They cannot have photographic or videographic memory. All inherent weaknesses that you and I suffer, insofar as our memory is concerned, the memory of a witness also can be subject to same inherent weaknesses.

Please remember that there is no rule in law that credibility is indivisible. Therefore, you are free to accept one part of a witness's evidence, if you are convinced beyond doubt and reject the rest as being unacceptable.

26. You need to consider all those 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.
27. I will now deal with the summary of evidence in this case.
28. Prosecution called complainant as the first witness. She was 3 years old at the time of the incident. She stated that when he went down the house to collect eggs uncle Niz came there and put his hand on her mouth. When she went to spare room he took off her clothes, put her on the bed. He put his finger in his mouth and used the same finger on her private part. It was painful. She told this to mom. After that she had shower and she was taken to a doctor. She felt pain inside the private part. She identified the accused in Court. She also showed the picture of the accused from a group of photographs before that. She was examined by a doctor.
29. Under cross examination she stated that she was wearing a top and pants that day. That was the only question asked in the cross examination.

30. You watched her giving evidence in court. What was her demeanor 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 the victim beyond reasonable doubt then you have to decide whether that evidence is sufficient to establish all elements of the charge.
31. The second witness for the prosecution was the complainant's mother. The accused was her father-in-law's brother's son. He mother-in-law asked the accused to repair the windows damage due to hurricane. He stayed at the house for three days. On 12.1.2013 when she took her daughter for a shower, her face was really scared. She asked her not to put water or soap to her private parts. Then she stated that uncle put his finger into her private part. She also said that little blood came out. He held her hard and did not let her go to mom. She had told her mother-in-law and accused's father. Accused's father wanted the matter to be reported to police. Before she went police called her home as accused's father had called the police. Police came to her house that night. She was asked to come to police station next morning. When she went to station her report was taken. They were asked to go to Lautoka hospital next day. When she went to hospital daughter was taken for medical check.
32. Under cross examination she stated that she went to police station on 14.1.2013. She could not go earlier as they had some visitors from New Zealand and her small daughter was sick, therefore her husband requested police for them to come following day. When she was asked why the victim was not medically examined till 1.2.2013 her answer was police went to get an appointment and she was asked to come when police rang her. Police did not ask for the child's clothes and daughter told her that the accused took off the pants. She did not hear any screaming or crying that day.
33. In assessing her evidence you have to keep in mind that she is the mother of the complainant. If you believe her evidence beyond reasonable doubt then there is evidence of recent complaint. You have to decide whether her evidence confirms the evidence of the victim.
34. The third witness for the prosecution was DC Asenaca. She is an officer with 9 years experience. On 12.1.2013 she was attached to the CID specialized branch, sexual offences unit at the Lautoka police station. On that day she received a report of sexual assault from Tuvu. Stand by unit had gone to the house of the complainant. As the victim was 3 years old Indo Fijian girl they were asked to come to the station following day. The complainant brought the victim on 14.1.2014. Their statements were recorded and arrangements were made for the medical examination of the victim. She had obtained the birth certificate of the victim. She identified and tendered the birth certificate marked P1. The victim was examined by the doctor on 1.2.2013. The suspect was arrested on 25.2.2013. She caution

interviewed the suspect. He was charged same day. She had got a photo board prepared at scene of crime office by Cpl. Josateki. The victim and the mother were called to the station. Photo board was shown to the victim. She identified the accused. She identified the accused in Court.

35. Under cross examination she stated that no physical evidence was obtained from the scene on 12.1.2013. Medical examination could not be done on 18.1.2013 as the complainant had some visitors and her younger daughter was not well. She called and asked for another date. The victim could not be examined on 14.1.2013 as there was an emergency accident case. She denied pointing the accused to the victim and said she only showed the photo board with 10 pictures.
36. The next witness for the prosecution was Doctor. She had examined the victim on 1<sup>st</sup> February 2013. In short history she had stated that 'Chachu inserted his fingers into her private part. It was painful and bleeding. He wiped the blood away. The patient was mostly quiet and took long intervals between answers. She seemed shy. Medical findings were that there were no bruises or lacerations in private area. There was discontinuation of hymen at 8 o'clock position. Some people are born with it. However, this cleft was unusual and commonly associated with trauma. This was more than two weeks old. Her professional opinion is that the physical examination is consistent with the history. She tendered the medical report marked P2.
37. Under cross examination she admitted that the early examination is needed for rape victims. However, she had to give attention to other emergencies at the intensive care unit.
38. The Doctor is an independent witness. She had examined the victim after some time. You have to decide whether that evidence is confirming the evidence of the victim or creating any reasonable doubt in the prosecution case.
39. The next witness for the prosecution was PC Josateki. He is a police photographer attached to forensic services unit at Lautoka police station. He had prepared the photo board on instructions given. It contained 10 photographs including the accused's photograph. He had taken a color print out and given that to the investigating officer of this case. He identified and tendered the same marked P3.
40. Under cross examination he admitted that this was done in April. He was not present when photo identification was done.
41. After the prosecution case was closed you heard me explaining the accused his rights in defence. He remained silent. That is his right. No adverse inference should be drawn from the fact that he did not give evidence. Prosecution still has to prove the case against the accused beyond reasonable doubt.



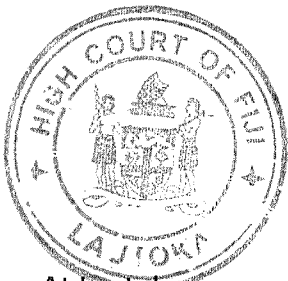
42. I have summarized all the evidence before you. But, still I might have missed some. That is not because they are unimportant. You heard every item of evidence and you should be reminded yourselves of all that evidence and form your opinions on facts. What I did was only to draw your attention to the salient items of evidence and help you in reminding yourselves of the evidence.
43. 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.
44. 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.
45. 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 the charge you must find him guilty for the charge. 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 accused's guilt, you must find him not guilty for the charge.
46. Your possible opinions are as follows:

Charge of Rape

Accused Guilty or Not Guilty

47. 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.

48. Any re-directions?



At Lautoka  
25<sup>th</sup> July 2014

  
Sudharshana De Silva  
JUDGE

Solicitors: Office of the Director of Public Prosecution  
The Accused in person