

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 417 OF 2016S

STATE

vs

GOVIND SAMI

**Counsels : Ms. L Bogitini for State
Mr. A Reddy for Accused**

Hearing : 19, 20, 21, 22, 23, 26 and 27 February, 2018

Summing Up : 28 February, 2018

SUMMING UP

A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentleman Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.
2. State and Defence Counsels have made submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsels, in this case.

Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

B. THE BURDEN AND STANDARD OF PROOF

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.
5. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means that you must be satisfied, so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt so that you are not sure about his guilt, then you must express an opinion, that he is not guilty.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victim. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

C. THE INFORMATION

7. You have a copy of the information with you, I will now read the same to you:

"...[read from the information]..."

D. THE MAIN ISSUES

8. In this case, as assessors and judges of fact, each of you will have to answer the following questions:
 - (i) On count no. 1, did the accused, between 1 and 31 July 2014, at Navua in the Central Division, rape the complainant (PW1)?

- (ii) On count no. 2, did the accused, on 25 October 2016, at Navua in the Central Division, rape the complainant (PW1)?
- (iii) On count no. 3, did the accused, on 29 October 2016, at Navua in the Central Division, indecently annoy the complainant (PW1) by showing her his penis?

E. THE OFFENCES AND THEIR ELEMENTS

- 9. In count no. 1 and 2, the accused was charged with "rape", contrary to section 207(1) and (2)(a) of the Crime Act 2009. In count no. 3, he was charged with "indecently annoying a person", contrary to section 213 (1)(a) of the Crimes Act 2009.
- 10. For the accused to be found guilty of "rape", the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) The accused's penis penetrated the complainant's vagina;
 - (ii) Without her consent; and
 - (iii) The accused knew she was not consenting to 10 (i) above, at the time.
- 11. The slightest penetration of the complainant's vagina by the accused's penis, is sufficient to satisfy element 10 (i) above, and it's irrelevant whether or not the accused ejaculated.
- 12. "Consent" is to "agree freely and voluntarily and out of her own freewill". If consent was obtained by force, threat, intimidation or by fear of bodily harm to herself or by exercise of authority over her, that "consent" is deemed to be no consent. The consent must be freely and voluntarily given by the complainant.
- 13. It must also be established by the prosecution beyond reasonable doubt that the accused knew the complainant was not consenting to 10(i) above, at the time. You will have to look at the parties' conduct at the time, and the surrounding circumstances, to decide this issue.
- 14. For count no. 3, for the accused to be found guilty of "indecently annoying a person", the prosecution must prove beyond reasonable doubt, the following elements:

- (i) the accused
- (ii) with intent to insult the modesty of the complainant
- (iii) exhibits his penis to the complainant
- (iv) intending her to see it.

15. The physical part of the offence is that the accused must exhibit his penis to the complainant. While doing the above, the accused must intend to insult the modesty of the complainant, that is, insult her in a sexual way. He must also intend her to see his penis.
16. There are 3 counts in the information. You must consider them separately and come to a considered decision on each of them, in the light of the total evidence presented at the trial.

F. THE PROSECUTION'S CASE

17. The prosecution's case were as follows. The accused owned a 97 acres farm in Raiwaqa, Navua. On the farm, he raised various types of animals and maintained a vegetable garden. He hired people to work for him on the farm. On his farm was a farm house. The house had two bedrooms, a bathroom, a kitchen and a warehouse. The accused had hired the complainant's (PW1) husband (PW2), as the caretaker of his farm house. PW2 also works for the accused in his farm. PW2 and his wife (the complainant and PW1) occupy one of the bedrooms. The bigger bedroom was normally occupied by the accused, when he was at the farm. The accused paid for everything in the farm house, and often treated PW2, as if he was one of his sons.
18. According to the prosecution, the accused visited his farm from Suva in July 2014. He always visited his farm to check on his workers and issued instructions on what to be done. The accused came to his farm house and allegedly called out to the complainant (PW1). PW1 came to meet the accused. According to the prosecution, the accused allegedly demanded that PW1 take off her trousers. He allegedly talked to her harshly. According to the prosecution, PW1 was scared, frightened and shaking. According to the prosecution, she allegedly did not want nor consent to sex with the accused. PW1 allegedly took off her trousers and panty in fear. The accused allegedly inserted his penis into her vagina, and had sex with her for about 3 minutes. According to the prosecution, the accused knew she was not consenting to sex at the time (count no. 1)
19. On 25 October 2016, the complainant's husband (PW2) and other workers were out in the farm working. Only the complainant (PW1) and the accused were in the farm house. PW1 had just

finished washing the accused's clothes, and was folding the same. PW1 was taking the accused's clean clothes to his bedroom. According to the prosecution, the accused allegedly confronted PW1 in his bedroom. He allegedly stood in front of her, and demanded she take off her trousers, as he wanted to have sex with her. PW1 allegedly told him, she didn't want to have sex with him. According to the prosecution, the accused allegedly pushed her to the bed in the bedroom, where she fell into the same. The accused then took off her trousers, took off his clothes, and allegedly inserted his penis into her vagina, and had sex with her for 3 minutes, without her consent. According to the prosecution, the accused knew she was not consenting to sex, at the time (count no. 2)

20. On 29 October 2016, PW1 visited an aunty in Raiwaqa, Navua. Her husband (PW2) had come to Suva to attend a funeral. According to the prosecution, PW1 later returned to the accused's farm house to take some of her clothes. At the farm house, PW1 met the accused, and he called her into his bedroom. In his bedroom, according to the prosecution, the accused allegedly told PW1 he wanted to have sex with her. PW1 allegedly told him, she cannot. The accused then allegedly opened his trousers, took his penis out and told PW1 to suck the same. PW1 allegedly refused and cried. The accused allegedly showed his penis to PW1 for about 2 minutes. On seeing PW1 cried, the accused then allegedly stopped what he was doing (count no. 3).
21. The above matters were later reported to police. An investigation was carried out. On 7 November 2016, the accused appeared in the Navua Magistrate Court, charged with two counts of rape and one count of indecently annoying a person. Because of the above, the prosecution is asking you, as assessors and judges of facts, to find the accused guilty as charged, on all counts. That was the case for the prosecution.

G. THE ACCUSED'S CASE

22. On 20 February 2018, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the three counts. In other words, he denied the allegations against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was called upon to make his defence, he choose to remain silent, but called five witnesses. That was his right.
23. Remember, the burden of proof stays on the prosecution throughout the trial and it never shifts to the accused, at any stage of the trial. So, when he chose to remain silent, he is calling, by

conduct, on the prosecution to prove his guilt beyond reasonable doubt. That was his constitutional right. And as such, nothing negative whatsoever should be imputed to him for choosing to remain silent, because he was merely exercising his right.

24. However, he called five witness. Viliame Gauna (DW1) said, the complainant's husband (PW2) met him in Navua Town on 12 December 2016. According to DW1, PW2 told him to tell the accused to give \$40,000 to him, and they will cancel the case. DW1 said, PW2 said he will give him \$10,000 from the \$40,000. DW1 said, he went to the accused on 14 December 2016, and told him the above. DW1 said, the accused never gave the money. DW1 said, he used to work for the accused in 2016. Note that in his evidence, PW2 denied the above.
25. Kewal Chand (DW2), C. Goundar (DW4) and Ashnil Prasad (DW5) gave evidence on the alleged fights between the complainant (PW1) and her husband (PW2). They alleged that they witnessed fighting between the couple in 2016. However, none of them were at the crime scene, to witness the alleged crimes in count no. 1, 2 and 3. As assessors and judges of fact, how you treat the defence witnesses' evidence, is entirely a matter for you. If you accept DW1's evidence that PW1 and PW2 were trying to extort money from the accused, then you may take that into account in deciding whether or not the accused was guilty as charged.
26. In any event, the accused pleaded not guilty to the charges. He denied the allegations against him. He is asking you, as assessors and judges of fact, to find him not guilty as charged on all counts. That was the case for the defence.

H. ANALYSIS OF THE EVIDENCE

(a) Introduction:

27. In analysing the evidence, please bear in mind the directions I gave you in paragraphs 4, 5 and 6 hereof on the burden and standard of proof. In the acceptance and/or rejection of the evidence presented at the trial and your role as assessors and judges of fact, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analysing the evidence, we will first discuss the Agreed Facts, then the State's case against the accused. Then, we will discuss the accused's case. Then we will consider the need to look at all the evidence.

(b) The Agreed Facts:

28. The parties had submitted an "Agreed Facts", dated 9 November 2017. A copy of the same is with you. Please, read it carefully. There are two paragraphs of "Agreed Facts". Because the parties are not disputing the same, you may treat the same as established facts, and that the prosecution had proven those facts, beyond a reasonable doubt. The significance of the "Agreed Facts" were that the parties' identities were not disputed. That is the setting for this case.

(c) **The State's Case Against the Accused:**

29. A crime can be proven on the basis of a witness's verbal evidence, if you as assessors and judges of fact, accept the same. In this case, the state's case against the accused, was based fundamentally on the complainant's (PW1) verbal evidence given in court on 20, 21, 22 and 23 February 2018 (4 days). You have heard her evidence in court. You have watched her in court. You have observed her demeanour while giving evidence in court. I am sure her evidence is still fresh in your minds and I will not bore you with the details. However, I will summarize to you the salient points, as far as the elements of the offences, in each of the counts are concerned, to assist you in your deliberation.

Complainant (PW1): Count No. 1 (Rape):

30. Before discussing the complainant's (PW1) evidence against the accused, it would be prudent to look at Prosecution Exhibit No. 1, that is, the rough sketch plan of the Accused's House at Raiwaqa Farm Navua on 4 November 2016. The rough sketch plan was taken by police, and submitted by consent of the parties during the trial, as Prosecution Exhibit No. 1. The rough sketch plan was the sketch plan of the alleged crime scene. The accused's farm house had two bedrooms, a bathroom, a kitchen, a vacant room and a warehouse. According to PW1, bedroom No. 2 was occupied by her and her husband (PW2). PW2, according to PW1, was employed by the accused as caretaker of the farm house. He also works for the accused attending to his animals and vegetables at the farm. According to PW1 and PW2, the accused paid for everything at the farm house, that is, electricity, water and rent. According to PW1 and PW2, the accused normally visits the farm house every now and then, and he stays in bedroom no. 1, when he was there. According to PW1 and PW2, they normally cooked in the kitchen, and the accused cooks on the porch, in front of the warehouse. They shared the bathroom. The warehouse has tables and various machineries in the same. They also stored working tools and manure in the same. According to PW1, the warehouse was always cluttered with the above items.

31. On the rape allegation in count no. 1, PW1 said, she was in bedroom no. 2 sometime in July 2014 after 1 pm. PW1 said, she had finished her house chores. PW1 said, she heard someone calling her name from outside. She looked out and saw the accused calling her. Because he was the farm boss, she went to him. PW1 said, the accused came into the house. PW1 said, the accused harshly told her to take off her pants. PW1 said, the accused wanted to have sex with her. PW1 said, she told the accused she cannot have sex with him. PW1 said, she respected him as their boss. PW1 said, the accused was bigger than her physically. PW1 said, only her and the accused were alone in the house. PW1 said, her husband (PW2) was away working in the farm. PW1 said, she was scared and frighten. PW1 said, she was shaking and took off her pants. PW1 said, the accused was behind her and they were standing. PW1 said, the accused was holding her from behind and fondling her breasts. PW1 said, he took out his penis and inserted the same into her vagina. PW1 said, she felt his penis inside her vagina. PW1 said, the accused was pushing her back down and she was bending down. PW1 said, she told him to stop. PW1 said, they had sex for about 3 minutes. PW1 said, she did not consent to the accused having sex with her at the time. PW1 said, after having sex with her, the accused told her to go. PW1 said, she reported the matter to her husband (PW2) when he returned from the farm. PW1 said, her husband did not believe her.
32. When cross-examined, PW1 said, she could not flee because the accused was blocking her way. PW1 said, he verbally threatened her. PW1 said, she could not scream because no-one would hear her. PW1 said, the accused talked harshly to her to take her pants off. PW1 said, she told the accused she did not want to have sex with him. Despite this, PW1 said the accused kept on demanding that she took her pants off. She said, she was frightened of him and took her pants off. PW1 said, she did not give her consent to the accused to have sex with her.

Complainant (PW1): Count No. 2 (Rape):

33. PW1 said, on 25 October 2016, she was in bedroom no. 2 in the farm house at Navua. PW1 said, her husband (PW2) had told her to wash the boss's clothes, as he was paying for everything at the farm. PW1 said, between 1 pm to 2 pm on 25 October 2016, she was folding her boss's clothes in her bedroom. PW1 said, only her and the accused were in the farm house. Her husband was away in the farm working. The accused was sitting in front on the porch of the house. PW1 said, she decided to take the accused's clean clothes to his bedroom. While in his

bedroom, the accused came into the same and confronted her. PW1 said, he asked her what she was doing. PW1 said, she told him she brought his clean clothes to put in a basket. PW1 said, he stood in front of her and blocked her going anywhere. PW1 said, he demanded she took off her trousers. PW1 said, he began to push her backwards towards his bed. PW1 said, she fell into his bed. PW1 said, she told him she didn't want him. PW1 said, he told her he wanted to have sex with her. PW1 said, he took off her trousers. PW1 said, he took off his clothes, then inserted his penis into her vagina, without her consent. PW1 said, she was lying down facing upwards, and the accused was kneeling in front of her. PW1 said, she told him to stop, but he kept having sex with her for about 3 minutes. PW1 said, she did not consent to sex with him, at the time.

34. When cross – examined, PW1 said, the accused pushed her into his bed. PW1 said, she could not flee because the accused was holding onto her. PW1 said, she wasn't making things up and that she was telling the truth.

Complainant (PW1): Count No. 3 (Indecently Annoying a Person):

35. PW1 said, she recalled 29 October 2016. She said, she was at her aunty's place at Raiwaqa, Navua. PW1 said, her husband (PW2) was in Suva to attend a funeral. PW1 said, she later went to the accused's farm house to bring some of her clothes. PW1 said, the accused was at the farm house at the time. PW1 said, when she arrived at the farm house, the accused called her and asked her, "Where she was?" PW1 said, she told him she was at her aunty's house. PW1 said, he called her and she went to him. PW1 said, the accused told her he wanted to have sex with her. PW1 said, she told him she cannot have sex with him. PW1 said, he was standing in front of her. PW1 said, he opened his trousers and told her to suck his penis. PW1 said, she told him "no". PW1 said, he kept on asking her, until she started to cry. PW1 said, he had exposed his penis to her. PW1 said, she cried because she was scared and because she did not want to suck his penis. PW1 said, he displayed his penis to her for about 2 minutes. PW1 said, she later reported the matter to her husband (PW2). PW1 said, she told him if he didn't help her, she was going to leave him. They later reported the matter to police.
36. When cross – examined, PW1 said she reached class 5 education. PW1 said, on 29 October 2016, the accused was angry at her and shouted at her when she returned to the house. PW1 said, she reported the incidents to the police. PW1 said, she did not complain to the police to

extort money from the accused. PW1 said, she knew nothing about any extortion of money from the accused. PW1 said, when she cried, the accused stopped showing her his penis.

37. The above are the complainant's evidence on the three allegations in count no. 1, 2 and 3. There were only two persons at the crime scene at the material time, that is, the complainant and the accused. No other persons were present at the crime scene, at the material time, to confirm or otherwise, the complainant's version of events. The accused chose to remain silent. If you accept the complainant's evidence as credible, you must find the accused guilty as charged on all counts. If otherwise, you must find the accused not guilty as charged on all counts. It is a matter entirely for you.

(d) **The Accused's Case:**

38. I have summarized to you the accused's case in paragraphs 22, 23, 24, 25 and 26 hereof. You are aware that the accused chose to remain silent and nothing negative whatsoever can be imputed to him for choosing to exercise his right to remain silent. You have heard his five witnesses give evidence in the courtroom on 26 and 27 February 2018. None of his witnesses were present at the crime scene at the material time to assist us confirm or otherwise the complainant's version of events. The most damaging evidence was Viliame Gauna's (DW1) allegation that the complainant's husband was trying to extort \$40,000 from the accused. However, a charge can only be "cancelled" by the Director of Public Prosecution, and no other. What you make of the defence's case is entirely a matter for you.

(e) **The Need to Consider All the Evidence:**

39. Two witnesses gave evidence for the prosecution:

- (i) Ms. Atelaite Cabebula (PW1);
- (ii) Mr Vikendra Prasad (PW2).

The prosecution tendered the police rough sketch plan of the Accused's Farm House at Raiwaqa, Navua as Prosecution Exhibit No. 1.

40. The defence called the following witnesses:

- (i) Mr Viliame Gauna (DW1);
- (ii) Mr. Kewal Chand (DW2);
- (iii) Mr. Pravin Singh (DW3);
- (iv) Mr. C. Goundar (DW4) ; and

(v) Mr. Ashnil Prasad (DW5)

41. Altogether, there are seven witnesses, on whose evidence, you will have to make a decision. Please read and compare their evidence. Analyse them. If you find a piece of evidence important and I haven't mentioned it, please take it on board in your deliberation. If you find a witness credible, you are entitled to accept the whole or some of his or her evidence, in your deliberation. If you find a witness not credible, you are entitled to reject the whole or some of his or her evidence, in your deliberation. You are the judges of fact.

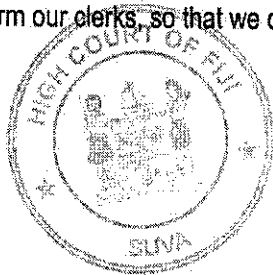
I. **SUMMARY**

42. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it 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. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. 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.

43. Your possible opinion are as follows:

(i)	Count No. 1:	Rape	:	Guilty or Not Guilty
(ii)	Count No. 2:	Rape	:	Guilty or Not Guilty
(iii)	Count No. 3	Indecently Annoying A Person	:	Guilty or Not Guilty

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



Salesi Temo
JUDGE

Solicitor for State : Office of the Director of Public Prosecution, Suva.
Solicitor for Accused : Reddy & Nandan, Barristers & Solicitors, Suva.

