

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 44 of 2016

STATE

V

RINESH ANAND LAL

Counsel	:	Ms. Susan Serukai for the State Mr. Sunil Kumar for the Accused
Dates of Trial	::	18-22 June 2018
Summing Up	::	25 June 2018

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 has 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 opinions. You must take all evidence into consideration, before you proceed to form your opinions. 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 defence exhibit and any admissions made by 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 and the exhibits 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 and closing submissions made by both Counsels 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 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 sexual offences react differently to the task of speaking about it in evidence. Some will display obvious signs of distress, others will not. The reason for this is that every victim has his or 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 know 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 Ashneel Nand. The witness testified to what the complainant had told him in the morning after the alleged incident. The complainant had told him the whole incident which had happened the previous night. He had then unbuttoned his shirt and the witness saw love bite marks on his neck and a few scratches on his shoulders and chest. You should consider whether this could be regarded as a

complaint made by the complainant of the alleged incident. If so you should also consider whether he made that complaint without delay and whether he sufficiently complained of the offence the accused is charged with.

- [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 he made a prompt and a proper complaint, then you may consider that his 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 his 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 his or her 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 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.
- [20] 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 or omission and consider him or her to be reliable as a witness.
- [21] 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.
- [22] 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.

- [23] 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 guilty of 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.
- [24] 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.
- [25] 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.
- [26] 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. 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.
- [27] 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. 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 facts and the inferences that could be drawn from them.

- [28] 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.
- [29] 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.
- [30] 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 and also called witnesses on his behalf does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence.
- [31] I have said that it is the prosecution who must prove the charge. Then what is the standard of proof or degree of proof, as expected by law?
- [32] 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.
- [33] 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.
- [34] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the complainant 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 adopt a fair, careful and reasoned approach in forming your opinions.
- [35] 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 the complainant. It is believed that when it is a closed court proceedings, the complainant is relieved of any mental pressure to describe the often unpleasant and embarrassing incidents which he was allegedly subjected to. 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.
- [36] Let us now look at the charge contained in the Information.

[37] There is one charge preferred by DPP, against the accused:

FIRST COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and 2 (a) of the Crimes Act No. 44 of 2009.

Particulars of Offence

RINESH ANAND LAL on the 6th day of July 2014, at Nausori, in the Central Division, had carnal knowledge of **KAUSHIK AKSHAY RAM**, without his consent.

[38] Section 207(1) of the Crimes Act No. 44 of 2009 (Crimes Act) reads as follows:

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

[39] Section 207(2) (a) of the Crimes Act provides that:

(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;

[40] 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.

[41] 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. The law provides that carnal knowledge includes sodomy, which is anal sexual intercourse or anal penetration.

- [42] 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 on 6 July 2014);
 - (iii) At Nausori, in the Central Division;
 - (iv) Penetrated the complainant's anus, 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 he was consenting.
- [43] 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.
- [44] 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.
- [45] The fourth element involves the penetration of the complainant's anus; with the accused's penis. The law states, 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 anus of the complainant with his penis to any extent.
- [46] 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 anus, with his penis, without his consent.
- [47] 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 shall not alone 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.

[48] Apart from proving that the complainant did not consent for the accused to insert his penis, into his anus, 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 he consented. The accused was reckless, if the accused realised there was a risk that he 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 a reasonable doubt.

[49] 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.

[50] If you are satisfied beyond any reasonable doubt that the accused, on 6 July 2014, penetrated the complainant's anus with his penis, without the consent of the complainant, and the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not he was consenting, then you must find him guilty of the count of Rape.

[51] 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.

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

[53] 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. That the complainant in this matter is Kaushik Akshay Ram, aged 21 years at the time of the alleged offence.
2. That the Accused in this matter is one Rinesh Anand Lal, aged 27 years at the time of the alleged offence.
3. That the victim was medically examined on 30 August 2014.

[54] You must therefore, treat the above facts as proved beyond reasonable doubt.

Case for the Prosecution

[55] The prosecution, in support of their case, called the complainant, Kaushik Akshay Ram, his sister Sheenal Swastika Ram and Ashneel Nand.

[56] Evidence of the complainant Kaushik Akshay Ram

- (i) *The complainant is a registered nurse working at the Rotuma Hospital.*
- (ii) *He resides at Lot 15, Vusuya Road in Nausori. He has been residing at this residence since his birth. He is currently 25 years of age. In 2014 he was 21 years of age.*
- (iii) *He testified to the incident which took place in 2014. He had returned home from nursing school on a Friday to attend a wedding. The wedding was of Avinash Nand's and it was held at Ashneel's place (Ashneel Nand), which is in front of his house. He said it was about 25 to 30 footsteps away. Ashneel Nand is Avinash Nand's brother. (Both Avinash and Ashneel reside at the same residence).*
- (iv) *The complainant testified that after the wedding, there was a reception on Sunday at the same venue where the wedding was held. They were all invited for the reception. He had gone for the reception around 9.00 pm.*
- (v) *The witness said that he had been at home. His mother had sent him to call his elder brother- Krishal Ram- who was drinking with his cousins at Avinash's place. When he went to the venue to call his brother, he got to know that his brother had already left to his maternal grandmother's house which is just in the neighbourhood.*
- (vi) *His cousins had then asked the complainant to drink with them. The first two times the complainant had refused saying that he does not drink. His cousins had then told him that since he had played a major role at the wedding, being a "saibala" (like the best man), that he should drink with them. Therefore he sat down and started drinking with his cousins.*
- (vii) *His cousins, whom he was drinking with, were Rinesh Lal, Avneet Nand, Elvin and Shaneel Prasad. They are all related from his mother's side.*
- (viii) *The complainant testified that he was drinking beer. After drinking for a while, only a few bottles were left. At this stage all of his cousins decided to buy a few more drinks from a nearby shop. The witness said that he had drunk less than 3 bottles of beer (long neck).*

- (ix) *As his cousins stood up and began to leave to buy more drinks, Ashneel Nand came out of the house and had advised the witness not to go with the others, and to just go home and sleep. The complainant had responded that he will buy some drinks and return to Ashneel's house. This was around 10.30-11.00 in the night.*
- (x) *When the witness was asked as to when Avinash Nand's wedding was, he stated that he had come for the wedding on a Friday. He stayed for the wedding on Friday, Saturday and Sunday at his home. He had left from Tamavua Nursing Quarters on 4 July 2014. The wedding was on 5 July 2014. The reception was on 6 July 2014, which was a Sunday.*
- (xi) *The witness had left along with Rinesh Lal, Avneet, Elvin and Shaneel Prasad. While they were walking to get a few more drinks, one of his cousins mentioned that he has a few more bottles of beer with him (at his house). He does not recall as to who said this. Therefore all of his cousins decided to go and drink the remaining bottles at Elvin's place, which is across the road to Avinash Nand's house. The witness decided not to go to Elvin's house, because it was already late in the night. He had wanted to go back home and sleep.*
- (xii) *However, all of his cousins insisted that he too comes to Elvin's house and finish off the leftover bottles of beer. In fact, one of his cousins had pulled his hand and wanted him to accompany them. So the complainant had gone with them. They had all gone to Elvin's place and sat at the terrace and were drinking. It was Rinesh Lal, Avneet, Elvin, Shaneel Prasad and the witness.*
- (xiii) *After drinking two bottles, the complainant had wanted to pass urine. He had asked his cousin Elvin where the washroom was. Elvin had directed him to the washroom by pointing with his hand. The complainant had then gone to the washroom.*
- (xiv) *While he was urinating, he had left the door of the toilet open. He closed the door but did not lock it. Rinesh Lal had come and pushed the door. The complainant had told him wait, when I am done you can come and use the washroom. Rinesh Lal was one or two footsteps behind him at the time. Rinesh Lal had forced himself into the washroom and pushed the witness's neck down. The witness demonstrated in Court how Rinesh Lal had pushed his neck/head down. He had pushed the complainant's head towards the pan seat – the concrete part of the toilet seat. The complainant had hit the left side of his forehead on the pan.*
- (xv) *After hitting his forehead on the pan, the complainant had been in pain. At the same time Rinesh Lal had been holding the complainant's*

head down. The complainant had felt scared and had asked Rinesh Lal "hey what are you doing?" Rinesh Lal had not replied. He had pulled the complainant's pants down using one hand. The complainant was trying to stop him. He was trying to push him away using his hands towards his back. The witness demonstrated in Court how he was doing this. However, Rinesh Lal had overpowered him and held firmly onto his neck. Within one or two seconds, Rinesh Lal had pulled the complainant's pants down and inserted his penis into the complainant's anus. The witness testified that he had felt hopeless and really scared at the time. He had also felt pain at the time.

- (xvi) The witness had been struggling to push Rinesh Lal away. Within a minute or so his cousin Elvin had come into the toilet and pulled Rinesh out. He testified that Rinesh Lal had inserted his penis into his anus for about 15 to 20 seconds.
- (xvii) The complainant, Kaushik, testified that he did not consent at any time for Rinesh Lal to insert his penis into his anus and he did not like what happened.
- (xviii) The complainant clearly identified Rinesh Lal as the accused in Court.
- (xix) After Elvin had pulled the accused out, the accused had run out of the toilet. Elvin had then taken the complainant out of the washroom (and made him lie down outside the washroom) and had pulled his pants up. At that time the witness was already in a lot of pain and traumatised as to what had happened within a few seconds. He had begged his cousin Elvin to drop him at home. Elvin had called his other cousin Avneet Nand and asked him to lift the complainant up and drop him at home. After Elvin and Avneet had helped the complainant get up, Avneet had taken him home. He recalls the time was around 12.00 am.
- (xx) When Kaushik had arrived home everyone was sleeping. Therefore, he did not tell anyone about what happened at the time.
- (xxi) The next day when he woke up he was in a lot of pain. He was having a really bad body ache and pain. He was really scared, traumatized and embarrassed of the incident which took place the night before. He had also noticed two bite marks on his neck. So he decided to pack his bags and run away from home to his nursing school at Tamavua.
- (xxii) When questioned as to whether he recalls how those bite marks came on his neck, the complainant said he does not know, but the only person present in the toilet at the time was the accused.
- (xxiii) The next morning, while the complainant was leaving home for the nursing school, he had met Ashneel Nand on his driveway. It was on

the following morning, which was a Monday. This may have been the 7 July. He had told Ashneel Nand that his four cousins, Rinesh, Avneet, Elvin and Shaneel had taken him to Elvin's house. He had shown Ashneel Nand the bite marks on his neck and informed him of the incident which took place the night before. Ashneel Nand had advised the complainant to go and make a complaint to the Police. However, the witness had said no because the accused was related to him and because he was shy and embarrassed to complain to the Police. Ashneel Nand had told the witness that it was up to him (whether to complain to the Police or not).

- (xxiv) After reaching nursing school the complainant had informed his close friends about the incident. He said he had confided in his close friends as he wanted to share his feelings with someone. The complainant testified that he had been emotionally traumatized by the incident.*
- (xxv) Six days after the incident the witness had told his sister, Sheenal Ram, about the incident. He had been leaving to Nal Tuvatuvatu village in Tailevu for his 2 months of rural attachment. Prior to leaving he had told his sister about all what happened to him on the reception night. The complainant testified that he had wanted to tell his sister (who was 17 years old at the time) because he was scared that if an incident of this nature can happen to him, it can happen to his sister as well. This was due to the fact that most of his cousins came to his house on an occasional basis.*
- (xxvi) About 3 weeks later, his mother had called and informed him that his sister, Sheenal Ram, had told her everything about the incident. His mother advised him to come and report to the Police. Since he was on his rural attachment he was not supposed to leave the village for 2 months. However, after about 5 weeks, he obtained permission from the village headman and came home for a weekend. He reported the matter to the Nausori Police Station the following day. This was on 19 August 2014.*
- (xxvii) The complainant was cross examined at length by the learned counsel for the Defence.*
- (xxviii) In cross examination the complainant said that he was not sure of the exact dates but he was sure that he had come home from the nursing school on a Friday and that the wedding was on Saturday and reception was on Sunday of the same weekend.*
- (xxix) It was suggested to the complainant as follows: "You never stated (in your complaint to the Police) that you never consented to those things being done to you?" The witness answered in the affirmative.*

(xxx) *It was also suggested to the complainant that this was the reason why no action had been taken by the Police until a further statement of his had been recorded.*

(xxxi) *The complainant initially admitted to making a further statement to the Police (on 10 February 2015). However, he denied that the signatures on the statement were his. The witness said that "It (the signatures) is circled. It is not my signature." However, later in cross examination he denied that the Statement was his.*

(xxxii) *The following further questions were put to the witness in cross examination:*

Q: *Do you agree that at 12.00 am, on the day in question, your two cousins took you to the washroom to urinate?*

A: *I don't remember, I only remember them directing me towards the washroom.*

Q: *Were you so drunk that you did not feel the pain of penetration?*

A: *I didn't feel the pain at that moment, when he first penetrated. Because I hit my head on the side of the pan. There onwards I felt the pain.*

Q: *Do you recall who all penetrated you on that particular day?*

A: *I only recall Rinesh.*

Q: *I am putting it to you that you did not recall at all who all penetrated your anus, as it is written in your statement of 19 August 2014?*

A: *Yes. At that moment, after Rinesh Lal went out I thought the rest of my cousins came in to abuse me the same time. But they pulled me outside. That is when I thought the rest of my 3 cousins also wanted to sexually abuse me.*

.....
Q: *Did you get injured in your anus as a result of this incident?*

A: *Yes.*

Q: *Was it bleeding?*

A: *No.*

.....
Since there was a dispute on the dates, Court called for the official diary for the year 2014 and showed the witness. The witness

confirmed that the 4 July 2014 was a Friday, 5 July 2014 was a Saturday and 6 July 2014 was a Sunday.

Q: I put it to you that whatever you are saying happened did not happen and that you are not telling the truth?

A: While I was giving my statement I thought Friday was on 3 July and the incident happened on Sunday 5 July.

Q: What you are thinking and telling the Court what happened- it did not happen?

A: It happened.

Q: You had told the Court within seconds the accused inserted his penis into your anus?

A: Yes.

Q: I am putting it to you that it is not correct because the way you were demonstrating and the way you were trying to protect your back – so it is not possible?

A: It is possible.

Q: So are you saying that in self-defence you moved in all directions?

A: Yes

Q: So in seconds he could not have penetrated your anus?

A: I was injured. The penetration was within seconds. The self-defence was for more than a minute.

Q: I am putting it to you that whatever that you so far told the Court did not happen?

A: It did happen and whatever I am saying is true.

.....

Q: Did this incident occur before or after you were urinating?

A: While I was urinating.

Q: So you would be standing up to urinate?

A: Yes.

Q: Did you actually see whether it was the accused or somebody else who had pushed you down?

A: It was Rinesh Lal.

- Q: *And when you went to urinate, what type of clothes were you wearing?*
- A: *Long pants. I don't remember if I was wearing a belt.*
- Q: *What about the opening in the front? Was there a zip in the trouser?*
- A: *Yes.*
- Q: *So to urinate, you have to pull the zip down. It will take a few seconds?*
- A: *Yes.*
- Q: *I am putting it to you that long trousers have buttons on the hip in the front and if those buttons are not loosened you cannot pull the trouser down?*
- A: *It is possible. When someone forcefully pulls your pants down and it did happen.*
- Q: *Did it take a few seconds or went down straight away?*
- A: *It took a few seconds. I don't know the exact time when he pulled the pants down.*
- Q: *Do you remember what the accused was wearing that day?*
- A: *No.*
- Q: *Was he wearing long trousers or shorts?*
- A: *I don't remember.*
- Q: *For wedding receptions, do people wear shorts?*
- A: *In family functions, people may wear long pants or shorts.*
- Q: *Did everything happen in the washroom?*
- A: *Yes.*
- Q: *It is my instructions that you are not telling the truth to this Court?*
- A: *What I have all said is the truth.*
- Q: *It is my instructions that nothing like this happened at the reception party?*
- A: *It happened.*
- Q: *I am further putting it to you, that if this had actually happened, which we are denying, you would have made a huge hue and cry about this incident/loud noise?*

- A: *I was embarrassed because I was a boy and secondly he was related to me, that's why I kept quiet.*
- Q: *What relationship do you have with the accused?*
- A: *He is my mother's cousin brother-so it is uncle and nephew.*
- Q: *So he is not your cousin as you have been referring to?*
- A: *Yes.*

[57] Evidence of Sheenal Ram

- (i) *She is the complainant's younger sister and is now 21 years old.*
- (ii) *She recalls the month of July 2014. She was 17 years at the time and was in Form 6.*
- (iii) *The witness testified that her brother Kaushik was going to an island for his job. He had told her about the incident which had happened to him. "He told me that he was sexually abused by 4 people". When asked as to what he meant by sexually abused, the witness said that he was raped.*
- (iv) *The four people her brother referred to were Elvin, Shaneel, Avneet and Rinesh. He had said that the said 4 persons had sexually abused him after her cousin's wedding. Her cousin being Avinesh Nand.*
- (v) *At the time the complainant was telling her about the incident, he had been really emotional, crying and really afraid.*
- (vi) *The witness testified that Kaushik had told her that when he was returning after the wedding to go home the 4 persons he named had forced him to drink alcohol. Then they took Kaushik to Elvin's home and after that at Elvin's place, all this had happened.*
- (vii) *Kaushik had said the 4 persons had sexually abused him and she should be careful of them because they all were coming to their place. The 4 persons referred to were all family and they were coming to their home every day.*
- (viii) *Sheenal Ram testified that Elvin, Shaneel, Avneet and Rinesh were all neighbours and related to her grandfather and grandmother.*
- (ix) *The witness said that she had informed her mother about what the complainant had told her.*
- (x) *She further testified that the next day after the incident, she had seen big love bites on Kaushik's neck. Kaushik was not really sure as to who made them. He had told her that it was one of her cousin's named Avneet, but he was not sure.*

[58] Evidence of Ashneel Nand

- (i) He is a practicing solicitor and barrister.*
- (ii) He recalls that on 5 July 2014, there was a small gathering at his place. The reason for the gathering was that it was his elder brother Avinash's wedding reception.*
- (iii) He testified that around 10.30 – 11.00 in the night, most of the people had left and only the neighbours and certain groups of boys were left behind. They were continuing with their drinking. He said Rinesh Lal, Elvin Lal, Avneet Adash and Shaneel Prasad were present. Kaushik Ram was also present.*
- (iv) Kaushik came and joined the group around 10.40-11.00 pm. Kaushik had come looking for his brother Krishal. He had said that his mother was calling Krishal home. After that Krishal had gone home and Kaushik stayed behind.*
- (v) The witness testified that after a while, there was a strange behaviour by Rinesh towards Kaushik. There was soft music playing and whilst the music was playing, Rinesh pulled down the three quarter pants he was wearing up to his thighs. Rinesh was dancing in front of Kaushik saying, "drink this" (meaning drink my penis). At this point in time Rinesh was exposing his undergarments. When the witness saw this he had told Rinesh not to do any such acts because if his mother sees this, then most probably all the boys will have to leave the property.*
- (vi) Thereafter everyone started behaving in a good manner and continued with their drinking.*
- (vii) Once the alcohol had finished, they wanted to drink more. The witness had said if they wanted to drink more they need to buy it themselves and take it somewhere else and drink.*
- (viii) Thereafter all the boys went to Elvin's place and Ashneel had gone inside his house.*
- (ix) The witness testified that Kaushik had actually wanted to go home as he had enough. But Elvin and Avneet Adash had told him to come along and that they will drop him home.*
- (x) The witness testified that normally every morning Kaushik goes with him and catches a ride to his workplace. The next morning he had seen Kaushik with red eyes and he had buttons (on his shirt) tied all the way up to his neck.*
- (xi) The witness had asked Kaushik as to what happened. Kaushik had then told him the whole incident which had happened the previous day. He had*

then unbuttoned his shirt and the witness saw love bite marks on his neck and a few scratches on his shoulders and chest.

- (xii) The witness testified that he advised Kaushik to report the matter to the authorities.*
- (xiii) When asked as to what exactly Kaushik had told him about the incident, the witness said that Kaushik had told him that he had been molested by Rinesh. As for the love bites, he had said that these might have been made by Avneet Adash.*
- (xiv) When asked as to what Kaushik meant when he said that he was molested by Rinesh, the witness said that the word Kaushik used was that he was raped by Rinesh.*
- (xv) Ashneel Nand was cross examined at length by the Counsel for the Defence.*

[59] That was the case for the prosecution. 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 have even remained 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 witnesses in support of his case.

Case for the Defence

[60] The accused gave evidence in support of his case. The defence also called WDC Anjaleen Kumar, Verenaisi Naivalu and Avneet Adarsh Kishore as witnesses.

[61] Evidence of the Accused – Rinesh Anand Lal

- (i) The accused testified that the allegation made against him by Kaushik Ram, that he had sexually abused Kaushik was a false allegation. The accused said that he did not do any such thing.*
- (ii) The accused testified that he had not been taken into custody as soon as the complainant had lodged his complaint to the Police.*
- (iii) He had been taken to the Nausori Police for questioning only about a month later. He had then been cautioned interviewed by the Police. His caution interview statement was tendered to Court as a Defence exhibit.*
- (iv) The accused totally denies the allegation against him. He testified that the allegation against him is totally false.*

- (v) *The accused was cross examined at length by the prosecution. However, he continued to deny the allegation against him.*

[62] Evidence of Woman Detective Corporal (WDC) 2763 Anjaleen Kumar

- (i) *She is an officer based at the Crime branch of the Nausori Police Station.*
- (ii) *She is the investigating officer in this case. She had recorded the statement of the complainant on 19 August 2014.*
- (iii) *She also recorded the caution interview statement of the accused on 15 September 2014. The caution interview statement was tendered to Court as Defence Exhibit "D1".*
- (iv) *The witness testified that 3 other suspects had also been taken into custody for the case. They were Elvin Jaitesh Lal, Saneel Prasad and Avneet Adash Kishore. The caution interview statements of the said 3 suspects had been recorded on 29 September 2014 (Elvin's) and on 3 October 2014 (Saneel's and Avneet's).*
- (v) *The witness testified that she had recorded a further statement of the complainant on 10 February 2015. She confirmed that the signatures on the said statement was that of the complainant.*

[63] Evidence of Verenaisi Naivalu

- (i) *In 2014 she was staying at Vusuya in Nausori.*
- (ii) *She recalls an incident which took place on 6 July 2014 which was a Sunday.*
- (iii) *She said she had finished her work at Vinod Maharaj's place and was going back home.*
- (iv) *She testified that the accused had called her to have one glass of beer. She had then gone to Elvin's house and was drinking beer. She said that the accused, Elveen and Chotu were present at the time. By Chotu she meant Avneet Kishore. She had not seen anybody else present.*
- (v) *The witness said that around 10.30 pm she had left Elvins house.*

[64] Evidence of Avneet Adarsh Kishore

- (i) *He is related to both Kaushik and the accused. His nickname is Chotu.*
- (ii) *He confirmed that the wedding was on Saturday 5 July 2014 and that the reception was on Sunday 6 July 2014.*
- (iii) *He had been invited for the reception which was held at Ashneel Nand's place. The accused, Elvin, Shaneel, Kishal, Avinash, Ashneel, Mere and he had present.*
- (iv) *They had been drinking till about 9.00 at Ashneel's place.*
- (v) *Thereafter, they had proceeded to Elvin's place around 9.00 – 9.30 pm and continued with their drinking. Only the accused, Elvin, Shaneel, Mere and himself were present. Nobody else had been there. They had continued with their drinking up to about 10.00 – 10.30.*

- (vi) *The witness testified that while they were so drinking, Kaushik had come to Elvin's place. He had been fully drunk at the time. So he did not join them in drinking anymore. Since Kaushik was fully drunk, he had slept on the porch.*
- (vii) *After the beer had finished they had all gone to the road. He had taken Kaushik home. He had taken Kaushik half way up his driveway and dropped him there.*
- (viii) *The witness testified that nothing unusual happened at Elvin's house.*

Analysis

- [65] The above is a brief summary of the evidence led at this trial. The prosecution relied on the evidence of the complainant, Kaushik Akshay Ram, his sister Sheenal Swastika Ram and Ashneel Nand. The defence relied on the evidence of the accused himself and witnesses WDC Anjaleen Kumar, Verenaisi Naivalu and Avneet Adarsh Kishore.
- [66] 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.
- [67] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [68] 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. Based on the said agreed facts the identity of the accused is proved as it has been agreed that 'The accused in this matter is one Rinesh Anand Lal.....' All the other elements of the offence must be proved by the prosecution beyond reasonable doubt.
- [69] The accused has testified in Court and totally denies the allegation against him. The defence is also relying on the evidence of WDC Anjaleen Kumar, Verenaisi Naivalu and Avneet Adarsh Kishore.
- [70] During the course of a criminal investigation the police would record statements of witnesses relevant to the case. However, when such persons are called to testify during the course of the trial they need not necessarily have to confine or limit their testimony to the police statements given by them. However, in assessing the credibility of that particular witness, it would be relevant for you to consider whether the witness has not maintained the same position and has given different versions with regard to the same issue. In other words whether there are any inconsistencies or omissions in his or her evidence.
- [71] In this case the defence highlighted certain inconsistencies and omissions in the evidence given by the complainant and the other prosecution witnesses during their testimony in Court. I have already directed you on 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. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected. 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.

- [72] 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.
- [73] In this case the defence is relying on the caution interview statement made by the accused. Any admission made by the accused in his caution interview statement is admissible and sufficient evidence to prove the charge against him. However, in this case, as you would have noted, no admissions have been made by the accused in his caution interview statement.
- [74] The statement has been tendered to Court as a defence exhibit. The accused also admits to making the statement. However, the truthfulness of the statement and the question of what weight you can give to the contents of the said statement is a matter of fact for you to decide.
- [75] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by the prosecution witnesses are 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 had proved the elements of the offence of Rape, beyond any reasonable doubt.
- [76] 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 of the defence. You must consider the defence evidence also for its consistency and also the probability of its 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.
- [77] 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.
- [78] 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.

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

- i. *If you believe the evidence of the accused, then you must find the accused not guilty of the charge;*
- ii. *If you neither believe nor disbelieve the evidence of the accused, then again you must find the accused not guilty of the charge;*
- iii. *If you reject the version of the accused, 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;*
- 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 has been established beyond reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*

[80] Any re directions the parties may request?

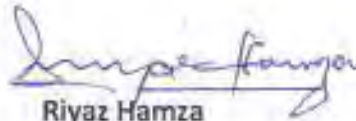
[81] Madam Assessors and Gentleman Assessor, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions on the charge against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[82] Your possible opinions should be as follows:

First Count

Rape- Guilty or Not Guilty

[83] I thank you for your patient hearing.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



Dated this 25th Day of June 2018

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : Sunil Kumar Esquire, Suva.