

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

**Crim. Case No: HAC 222 of 2015**

**STATE**

**Vs.**

**JD**

**Counsel:** Ms. U. Tamanikaiyaroi for the State  
Ms. S. Prakash for Accused

**Date of Hearing:** 13<sup>th</sup> to 14th August 2018

**Date of Summing Up:** 16<sup>th</sup> August 2018

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## **SUMMING UP**

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1. The names of the complainant and the accused are suppressed.
2. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. As I explained you before the commencement of the hearing, we have different functions. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
3. Your function is to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or

refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

4. I may comment on the facts if I think it will assist you when 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 facts. Hence, it is entirely upon you to accept or disregard any comment I make about the facts of this case, unless it coincides with your own independent opinion.
5. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The purposes of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. Therefore, the opening address of the prosecution is not evidence. The closing addresses of the counsel of the prosecution and the defence are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
6. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. As judges of facts you are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own conclusion or form your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I make my judgment.



7. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

### **Burden and Standard of Proof**

8. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused is guilty for the offence.
9. The burden of proof of the charge against the accused is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused person to prove his innocence, as his innocence is presumed by law.
10. The standard of proof in criminal trial is “proof beyond reasonable doubt”. It means that you must be satisfied in your mind that you are sure of the accused’s guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you find any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

### **Information and elements of the offence**

11. The accused is charged with one count of Rape contrary to Section 207 (1) and (2) (b) of the Crimes Act and two counts of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act. The particulars of the offence are before you. Please take your attention to it, as I do not wish to reproduce it in my summing up.

12. The main elements of the first count of Rape are that:

- i) The accused,
- ii) Penetrated into the vagina of the complainant with his finger,
- iii) The complainant did not consent to the accused to penetrate into her vagina with his finger,
- iv) The accused knew or believed or reckless that the complainant was not consenting for him to insert his finger in that manner.

13. The main elements of the second and third count of Rape as charged are that:

- i) The Accused,
- ii) Penetrated into the vagina of the complainant with his penis,
- iii) The complainant did not consent to the accused to penetrate into her vagina with his penis,
- iv) The Accused knew or believed or reckless that the complainant was not consenting for him to insert his penis in that manner.

#### **Agreed Facts**

14. I now request you to draw your attention to the agreed facts, which are before you. They are the facts that the prosecution and defence have agreed without dispute. Hence, you are allowed to consider them as proven fact by the prosecution beyond reasonable doubt.

#### **Separate Consideration**

15. The accused is charged with three counts of Rape. It is your duty to consider each of these three counts separately. If you find the accused guilty for one count that does not automatically make him guilty for the remaining count for which he is charged with. Likewise, if you find the accused not guilty for one count, that does not automatically make him not guilty for the remaining count.



### The First Element

16. It is the onus of the Prosecution to prove that it was the accused who has committed these crimes on the Complainant. As I explained above, at no point of time the onus shift on the Accused to prove that it was not him who has committed this crime.

### Penetration

17. I will now explain you the element of penetration. Evidence of slightest penetration of the finger and/ or the penis of the accused into the vagina of the Complainant is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

### Consent

18. Let me now draw your attention to the issue of consent. It is your duty to decide whether the prosecution has proven beyond reasonable doubt that the complainant did not give her consent to the accused to insert his finger and /or his penis into her vagina on the two respective occasions.
19. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of rape, the complainant consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. A consent obtained through fear, by threat, by exercise of authority, by use of force or by intimidation could not be considered as a consent given freely and voluntarily. A submission without physical resistance by the complainant to an act of another person shall not alone constitute consent.
20. The complainant must have the freedom to make the choice. It means that she must not being pressured or forced to make that choice. Moreover, the complainant must have a mental and physical capacity to make that choice freely. The consent can be withdrawn at

any time. The consent is an ongoing state of mind and is not irrevocable once given. The consent for sexual intercourse must be comfortable to the person who makes such choice. It should not be an optional choice. The consent of a person for sexual intercourse should not be assumed.

21. If you are satisfied, that the accused had inserted his finger and/or the penis into the vagina of the complainant and she had not given her consent, you are then required to consider the last element of the offence, that is whether the accused honestly believed or knew or reckless that the complainant was freely consenting for this alleged sexual intercourse. I must advice you that belief in consent is not the same thing as a hope or expectation that the complainant was consenting. You must consider whether the accused knew either that the complainant was not in a condition or a position to make a choice freely and voluntarily, or the complainant had made no choice to agree to sexual intercourse. If you conclude that the accused believed or knew that the complainant was consenting, you must then consider whether such belief of the accused was reasonable under the circumstance that was prevailed at the time of the alleged incident.

### **Corroboration**

22. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. It means that if you are satisfied with the evidence given by the complainant and accepts it as reliable and truthful; you are not required to look for any other evidence to support the account given by the complainant.
23. One or more of you may have assumptions as to what constitutes rape, what kind of person may be the victim of rape, what kind of person may be the rapist or what a person who is being or has been raped will do or say. Though such assumptions are natural in ordinary life, it is important that you must leave behind such assumptions as there is no stereotype of circumstances for a rape, a rapist or a victim of rape.



24. Offences of this nature can take place in any circumstance between any kinds of persons, who act in a variety of ways. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgment strictly on the evidence that you have heard from the witnesses during the course of the hearing.
25. You must be mindful that not to bring in to the assessment of the evidence any preconceived views as to how a victim of rape in a trial such as this should react to the experience that the victim had gone through. Every person has his or her own way of coping with such incident. Some may display obvious signs of distress and others may not. Demeanours of the victim in the court while giving evidence is not necessarily a clue to the truth of the victim's account.

#### **Evidence of the Prosecution**

26. Let me now remind you briefly the summary of the evidence presented by the prosecution during the course of the hearing. This is a fairly short hearing and lasted only for two days. Therefore, I trust that you can properly and correctly recall all of the evidence adduced during the hearing.
27. According to the evidence of the complainant, she was living in Kadavu with her parents and three siblings in 2013. The house had two bedrooms, one of the rooms was used by her parents and the younger sibling and the other one was used by the complainant and two siblings. They had two missionaries, staying with them at their house in 2013. One of them was the accused and other one was Sireli.
28. The complainant could recall that one night in 2013, she felt that something heavy was on her back, while she was sleeping in her parents' room with her two siblings. On that day, her parents had gone to Suva with her younger sibling. Only the complainant, her two siblings and the accused were in the house. She slept in her parents' room with her two siblings. Two siblings slept on the bed, while she slept on the floor beside the bed. The

accused was sleeping in the kid's room. She closed the door, but did not lock it. She had left the light in the room on as she gets scared in the dark. The room had four windows and all of them had curtains. The light on the front porch was on. She was sleeping on her stomach when she felt that something heavy was on her back. She tried to turn back, to see what was it. The light of the room had been switched off at that time. However, the room had sufficient light for her to recognise what was it. From the light came through the windows, she recognised that it was the accused who was behind her. He turned her to upward and told her to keep still and do not shout. She was scared and frightened. She tried to free herself and move away from the accused. He then put one of his hands under her clothes and touched her breasts. With his other hand, he has touched her tights up to her vagina. He had removed her undergarment and then tried to insert his fingers into her vagina. The complainant said that she felt that the fingers of the accused inserted into her vagina as she felt pain. The fingers went into her vagina little bit. She had not done anything and just tried to stay away from the accused. The accused had told her to keep still and not to say anything. The complainant had told the accused that it was painful.

29. Her two siblings were sleeping at that time and did not see what was happening to her. Esther, one of her siblings, said something in her sleep, but did not wake up. After inserting his fingers into her vagina, the accused had tried to insert his penis into her vagina. While he was trying to insert into her vagina with his penis, the penis of the accused went into her vagina little bit. She felt pain in her stomach and vagina when it went in. She was just lying down and tried to move away from the accused. She did not want to see him. The accused did not say anything when he tried to insert his penis into her vagina. The complainant in her evidence, said that she did not allow the accused to insert his fingers or the penis into her vagina on that night. While he was trying to insert his penis into the vagina of the complainant, Esther moved in her sleep, with that, the accused got up and walked out. The complainant explained that she did not shout for help as the houses in the area are far apart and no adult person was in her house apart from the accused and her two siblings on that night.



30. Just a week after this incident, the complainant had written down a note to her mother, stating what the accused had done to her and left it in the drawer for her to read. The complainant said that she was comfortable in writing that note than telling it to her. (inconsistency about the content about the note).
31. Having read the said note, her mother had gone to the accused and inquired from him. She had then called and asked the complainant what she had written in the note was true. The mother had then warned the accused and told the complainant that this must be the first and last occasion. The accused had sought forgiveness from the complainant.
32. Few months after the first incident, the accused had come to the room of the complainant in the night, while she was sleeping with her two siblings in their room. Her mother was sleeping in the other room. Her siblings were sleeping in the bunk bed while she was in the other bed. She had felt that someone had entered into the room and closed the door. The light of the room had been switched off. She had recognised that it was the accused from the light that came into the room from the street lights. The room has two windows, where one was facing the street. Moreover, the complainant said that she recognised the accused from his voice and he was the only person in the house, apart from her mother and her siblings. Her father had gone to Suva for work on that night.
33. The accused came and laid down beside her in the bed. She was facing the wall when he came. He turned her and told her not to shout and keep still. He then put his hand inside her clothes and touched her breast. He had then removed her underwear and tried to insert his penis into her vagina. He had tried to slide his penis into her vagina. While he was trying to do it, the penis had gone into her vagina little bit. She had felt the pain in her stomach and vagina when it went into her vagina. He tried several times to insert into her vagina with his penis. He then stood up and went away. She was scared and frightened when he came as she had thought that he would never come back after her mother warned him.

34. The complainant in her evidence explained that she tried to scream and shout for help from her mother, but the accused had told her stay still and do not shout. She had not alarmed her siblings who were sleeping in the bunk bed. The complainant had decided that she would solve this issue this time as her mother had solved it for her at the first instance. Moreover, the complainant did not want to inform her mother, as she was afraid that she will report this to the police and then her friends would point finger at her. She said that if it reported to the police, it will bring bad image to her family. The complainant had not informed anyone about this second incident until it came out in 2015.
35. In 2015, she was sent for counselling at school and the counsellor had asked her many questions. During that questioning, she had accidentally told the counsellor about this second incident.
36. I now take your attention to the cross examination of the complainant by the learned counsel for the defence. During the cross examination, the learned counsel put the case of the defence to the complainant to make her comment on it.
37. During the cross examination, the learned counsel for the defence suggested to the complainant that the accused had called her to the kid's room while she was sleeping in her parent's room. The complainant had then gone into the kids' room and laid down in the bed. The accused had asked her to have sexual intercourse at that time. The complainant had agreed not to shout or scream for help. They had then kissed each other. The accused had then removed his trousers and put his penis on top of her vagina. He had then gone out of the room. When these propositions were suggested to the complainant during the cross examination, the complainant denied them in her answers. She said that he forced her on that night and touched her vagina with his fingers.
38. The complainant said that she only wrote in the note that the accused had done something to her on that night. She had told her mother that the accused had touched her private parts. She denied that the accused told her mother that the complainant was coming after the accused.



39. In respect of the second incident, the learned counsel for the defence suggested to the complainant that she came to the accused while he was sleeping in the living room on that night. She had then asked him to sleep in the kid's room as her mother had allowed him to do it. The accused had then gone to the kid's room and laid down on the floor. The complainant had then came on top of him and started to kiss him. She then rubbed her body on the accused. The complainant denied these propositions put to her by the learned counsel for the defence during her cross examination.
40. You may recall that the mother of the complainant then gave evidence for the prosecution. Her name is Merewalesi Sivo. Ms. Sivo in her evidence said that she went to the accused soon after she read the note written by the complainant. She had confronted the accused about the contents of the note. The accused had admitted what had written in the note and sought forgiveness from her. She had gone to the accused with the complainant, while he was sleeping in the room. The accused had requested her not to tell anyone and keep this between three of them. He did not want her to tell husband about this incident. The accused had promised her that he will not do it again.
41. The accused had slept in the room sometimes when her husband had gone to Suva for work. At such instances, he slept with boys in the kid's room while girls always sleep with her in her room. Ms. Sivo said that her family met the accused after these incidents were reported to the police as they all go to the same church.

### **Case of the Defence**

42. You may recall that the learned counsel for the defence cross examined the two witnesses of the prosecution.
43. The learned counsel for the prosecution suggested to the complainant that she willingly went to the kid's room when the accused called her on that night. She then laid on the bed, while the accused removed his trousers. The accused then kissed her and only put his penis

on her vagina. The complainant denied this proposition suggested by the learned counsel for the defence.

44. In respect of the second incident, which is linked to the third count, the learned counsel for the defence suggested to the complainant, that she came and informed the accused that he can sleep in the kid's room, while he was sleeping in the sitting room. The accused had then went and slept on the floor of the kid's room. The complainant had then sat on the accused and rubbed her body against the accused's. The complainant denied this proposition suggested by the learned counsel for the defence during the cross examination.

### **Right to Remain in Silence**

45. At the conclusion of the prosecution's case, the accused was explained about his rights in defence. The accused opted not to give evidence. The accused does not have to give evidence. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing. It does nothing to establish his guilt.
46. This is the summary of the evidence presented during the cause of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence. What I did only to draw your attention to the main items of evidence and help you in reminding yourselves of the evidence.

### **Analysis and Directions**

47. You heard the evidence presented by the prosecution. The defence presented their case by cross examined the witnesses of the prosecution. The prosecution and the defence have conflicting versions of events. The prosecution alleges that the accused came into the room while the complainant was sleeping on the floor. He had then inserted his fingers into her vagina without her consent. Moreover, the accused had inserted his penis into her vagina without her consent. Few months after the first incident, the accused had once again came



to the room, while the complainant was sleeping. He had then inserted his penis into her vagina without her consent.

48. The defence suggested that the complainant had willingly come to the room, and the accused had only put his penis on the vagina of the complainant on that night. In respect of the second incident, the accused.
49. You must be keep in your mind that questions put to the witnesses by the counsel are not evidence, unless they are admitted or affirmed by the witness in his or her answering.

### **Evaluation of Evidence**

50. Madam and gentleman assessors, I now kindly request you to draw your attention to the directions on evaluation of evidence. It is your duty to determine this case based on the evidence. In doing that, you are required to evaluate the evidence in order to determine the credibility, reliability and truthfulness of them. That will assist you to determine what evidence you may accept and what part of the evidence you may refuse. In doing that, 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 is correctly recalling the facts about which she or he has testified.
51. Moreover, you must bear in your mind that a witness may tell the truth about one matter and lie about another; he or she may be accurate in saying one thing and not accurate in another thing.
52. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking about in the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with her own evidence but also with other evidence presented in the case.

53. It is your duty to consider the demeanour of the witnesses, how they react to being cross examined and re-examined and were they evasive. in order to decide the credibility of the witness and the evidence.

#### **Presentation of the Evidence by the Complainant**

54. You have seen that the Complainant gave evidence behind a screen. Giving of evidence in this way is perfectly normal in cases like this. It is designed to enable the witness to feel more at ease when giving evidence. It is not intended to prejudice the evidence which the witness gives. The fact that the evidence has been given in that manner, must not in any way be considered by you as prejudicial to the accused.

#### **Evidence of the Complainant**

55. The most important part of your task is to judge whether the complainant has told the truth, and has given a reliable account of the events that she was describing. The complainant is young adolescent. Some of you will have children and grandchildren who are of a similar age to the complainant. If so, I think you will recognize the sense of the advice that I am going to offer you about your judgment of the evidence of such a witness, but remember that I am speaking only about an approach to consider the evidence. Still the evaluation of the evidence is your responsibility. You do not have to accept my advice if you do not agree with it.
56. Young adolescent as of this complainant may not have the same life experience as adults. They may not have the same standards of logic and consistency. Their understandings of life may be severely limited for a number of reasons, such as their age and immaturity. Life viewed through the eyes and mind of a young adolescent may seem very different from life viewed by an adult.



57. Remember how you normally talk to a person of this age. You should bear those considerations in mind when you consider the evidence given by the complainant. All decisions about the evidence are for you to make.

### **Evidence of Recent Complaint**

58. You have heard that the complainant had written a note to her mother, stating that the accused had done something to her on that night. The mother of the complainant gave evidence explaining the contents of the note and subsequent incidents that took place after she wrote the note.
59. This form of evidence given by the mother of the complainant is known as evidence of recent complaint. It is not an evidence as to what actually happened between the Complainant and the accused. Mother of the complainant was not present and witnessed what happened between the Complainant and the accused.
60. You are entitled to consider the evidence of recent complaint in order to decide whether or not the Complainant has told the truth. It is for you to decide whether the evidence of recent complaint helps you to reach a decision, but it is important that you must understand that the evidence of recent complaint is not independent evidence of what happened between the Complainant and the victim. It therefore cannot of itself prove that the complaint is true.

### **Delay in Reporting**

61. You have heard that the complainant had not immediately informed her mother about the first incident. She had waited for a week and then wrote a note, explaining what had happened to her. The complainant explained the reason for writing a note than telling it verbally. Moreover, the complainant had not informed anyone about the second incident. It came out accidentally from her, when she was questioned by the school counsellor in 2015. The complainant explained the reasons why she decided not to tell anyone about the

second incident. You have further heard that the complainant had tried to alert her mother, when the second incident was taking place, but the accused had told her not to shout and stay still.

62. It is a matter for you to consider and resolve. However, it would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible. The experience of the court is that, victims of sexual offences can react to the trauma that they have faced in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion or cultural taboos, do not complain or go to authority for some time. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response. A late complaint does not necessarily signify a false complaint; likewise an immediate complaint does not necessarily demonstrate a true complaint.

### **Inconsistencies and omissions**

63. You may recall that the learned counsel for the defence in her closing address emphasised that the evidence given by the complainant is not consistent with the evidence of her mother in respect of certain incidents such as the content of the note, the place where the accused slept after the first incident and also meeting of the accused after this incident was reported to the police.
64. You are allowed to take into consideration about the inconsistencies and the omissions when you consider whether the witness is believable and credible as a witness. In doing that, you have to take into consideration 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. Moreover, as I explained above, the victims of rape react differently to the trauma and the experience they have gone through, especially in revealing those incidents to another person. Sometimes they are unable to recall every minute detail soon after the incident due to the traumatic impact or the experience they undergo *et cetera*.



Sometimes, with the passage of time they would be able to resurrect their memory and recall some details of those traumatic experiences.

65. If there is an inconsistency, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.

66. **Final Directions**

67. Madam and gentleman Assessors, I now take your attention to the final directions of the summing up.

68. Having taken into consideration all the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count one, you can find the accused guilty for the said offence of Rape.

69. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count one, you must find the accused is not guilty for the said count of Rape.

70. Likewise, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count two, you can find the accused guilty for the said offence of Rape.

71. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count two, you must find the accused not guilty for the said count of Rape.
72. If you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count three, you can find the accused guilty for the said offence of Rape.
73. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged under count three, you must find the accused not guilty for the said count of Rape.

### **Conclusion**

74. Madam and gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.
75. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



  
R.D.R.T. Rajasinghe  
Judge

**At Suva**  
16<sup>th</sup> August 2018

**Solicitors**  
Office of the Director of Public Prosecutions for the State.  
Office of the Legal Aid Commission for the Defence.