

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 377 OF 2016

STATE

v

AVINESH KUMAR

Counsel: Mr. Lee Burney with R. Kumar for State
Mr Jiten Reddy with Ms Satala for Accused

Dates of Trial: 8, 9, 10, 11 April 2019

Date of Summing Up: 11 April 2019

SUMMING UP

Madam and Gentlemen Assessors:

1. We have now reached the final phase of this case. The law requires me, as the Judge who presided over this trial to sum up the case to you. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.
2. I will direct you on matters of law which you must accept and act upon.
3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So, if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. In other words you are the judges of fact. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The counsel for Prosecution and the Defence made submissions to you about the facts of this case. That is their duty as the counsel. You are not bound to accept their arguments. However you may properly take into account their submissions when evaluating the evidence. It is a matter for you to decide which version of the facts to accept, or reject.

6. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law that accused person is innocent until he is proved guilty. The burden of proving guilt of the accused person rests on the Prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find an accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.
9. Your opinions must be solely and exclusively upon the evidence which you have heard in this court and upon nothing else. You must disregard anything you might have heard or read about this case, outside of this court room. Your duty is to apply the law as I explain it to you to the evidence you have heard in the course of this trial. 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 being true.

10. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity.

11. An incident of rape would certainly shock the conscience and feelings of our hearts. It is quite natural given the inherent compassion and sympathy with which human-beings are blessed. You may, perhaps, have your own personal, cultural, spiritual and moral thoughts about such an incident. You may perhaps have your personal experience of such a thing, which undoubtedly would be bitter. You must not, however, be swayed away by such emotions and or emotive thinking. That is because you act as judges of facts in this case not to decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law to which every one of us is subject to.

12. It would be understandable if one or more of you came to this trial with certain assumptions as to what constitute rape, what kind of person may be the victim of rape, what kind of person may be a rapist, or what a person who is being, or has been, raped will do or say. It is important that you should leave behind any such assumptions about the nature of the offence because experience tells the courts that there is no stereotype for a rape, or a rapist, or a victim of rape. The offence can take place in almost any circumstances between all kinds of different people who react in a variety of ways. Please approach the case with open mind and dispassionately, putting aside any view as to what you might or might not have expected to hear, and form your opinion strictly on the evidence you have heard from the witnesses.

13. I must emphasize that the assessment is for you to make. However, it is of paramount importance that you do not bring to that assessment any preconceived views or stereotypes as to how a complainant in a rape case such as this should react to the experience. Any person who has been raped, will have undergone trauma whether the accused was known to her or not. It is impossible to predict how that individual will react, either in the days following, or when speaking publically about it in court or at the police station. The experience of the courts is that those who have been victims of rape react differently to the task of speaking about it in evidence.
14. As assessors you were chosen from the community. You, individually and collectively represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in a trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.
15. In assessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole.
16. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth.
17. The following facts are admitted between the Prosecution and the Defence under the provisions of Sections 134 and 135 of the Criminal Procedure Act 2009.

1. The accused is Avinesh Kumar, 39 years of Bulileka, Labasa as at March 2016.
2. The complainant is Nafiza Bi, 18 years of USP, Lot 35 Ibo Road, Nadawa as at March 2016.
3. The accused was the complainant's high school teacher at Tabia College, Labasa.
4. The accused and the complainant were previously in a relationship whilst the complainant was a student and the accused was her teacher at Tabia College, Labasa.
5. In January 2016 the complainant moved to Suva to further her studies at the University of the South Pacific, Laucala campus.
6. On Friday 12/02/16, the accused met the complainant at the University of the South Pacific, Laucala campus, he then took her to Outrigger Hotel in Suva.
7. On Saturday 13/02/16, the accused took the complainant from her home in Caubati and took her to Outrigger Hotel in Suva.
8. The authenticity and admissibility of the following documents are not in dispute and will be tendered into evidence by consent:
 - i. Records of interview of the accused, conducted on 11/03/16 at Seaqaqa Police Station (typed and handwritten);

- ii. Charge statement of the accused, conducted on 12/10/16 at Labasa Police Station (typed);
- iii. Statement of Bandhani D. Lal dated 27/06/17;
- iv. 02 Receipts and 02 daily log book excerpts from Sunseekers Outrigger Hotel at Waimanu Road for dates covering 12/02/16 and 13/02/16.

18. The accused is charged with one count of Rape. The Information reads as follows:

FIRST COUNT

REPRESENTATIVE COUNT

Statement of Offence

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

Particulars of Offence

AVINESH KUMAR on the 12th of February, 2019 at Suva, in the Central Division, penetrated the vagina of **NAFIZA BI**, with his penis without her consent.

SECOND COUNT

REPRESENTATIVE COUNT

Statement of Offence

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

Particulars of Offence

AVINESH KUMAR on the 13th of February, 2019 at Suva, in the Central Division, penetrated the vagina of **NAFIZA BI**, with his penis, without her consent.

19. I will now deal with the elements of the offence of Rape. A person rapes another person if:

- (a) The person has carnal knowledge with or of the other person without other person's consent; or
- (b) The person penetrates the vulva, vagina or anus of other person to any extent with a thing or a part of the person's body that is not a penis without other person's consent; or
- (c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.
- (d) The person knew or believed that the complainant was not consenting, or he was reckless as to whether or not she was consenting.

20. Consent as defined in Section 206 of the Crimes Act, means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Simply put, if somebody does

not resist physically it does not necessarily mean that she or he had given consent. Consent obtained by force, threat or intimidation is not voluntary.

21. According to the Crimes Act, the offence of Rape requires proof that the complainant did not consent. The offence may or may not be accompanied by force or the threat of force, but please note that it is no part of the Prosecution's obligation to prove that the accused used force or the threat of force.
22. If you accept that the complainant was not consenting you must ask yourself did the accused know that she was not consenting, and if not, was that a reasonably held belief, or was the accused reckless in going on knowing that she might not be consenting. In the circumstances of this case you consider whether the accused knew or it was reasonable for him to believe that she was consenting.
23. In evaluating evidence, you should see whether the story relayed in evidence is probable or improbable; whether the witness is consistent in his or her own evidence or with his or her previous statements or with other witnesses who have given evidence. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same tests and standards in applying them.
24. In the course of cross-examination, the counsel referred to previous statements of witnesses recorded by police. A previous witness statement made by a witness is not evidence in itself unless it is adopted and accepted by the witness under oath

as being true. You can of course use those statements to test the consistency and credibility of the witness if you are satisfied that such a statement was made.

25. Documentary evidence is evidence presented in the form of a document. In this case, the medical report is an example if you believe that such a record was made. You can take into account the contents of the document if you believe that contemporaneous recordings were made at the relevant time upon examination of the Complainant.
26. In this case, the record of caution interview and the charge statement were read into evidence as admitted documents. Those documents are evidence in this case. You should properly take into account the contents of those documents in evaluating evidence.
27. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in court. You have seen how the witnesses' demeanor in the witness box when answering questions. How did they conduct themselves in court? In general, what was their demeanor in court? But, please bear in mind that many witnesses are not used to giving evidence and may find court environment distracting.
28. Proof can be established only through evidence. Evidence can be direct evidence that is the evidence of a person who saw it or by a victim who saw, heard and felt the offence being committed. In this case, for example, the complainant was a witness who offered direct evidence as to what she saw, heard or felt. You are

also free to draw reasonable inferences if such inferences are based on facts proved by evidence and reasonable in the circumstances of this case.

29. I will now direct you as to how you should deal with evidence presented by the doctor as an expert witness. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their opinions expressed on a particular fact to aid court to decide the issues/s before court on the basis of their learning, skill and experience.
30. In this case, the doctor gave evidence as an expert witness. Doctor's evidence is not accepted blindly. You will have to decide the issue of rape before you by yourself and you can make use of doctor's opinion if her reasons are convincing and acceptable to you; and, if her opinion had been reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence led in the case.
31. The other important thing you must bear in mind is that the history relayed to the doctor is not evidence as to what actually happened between the complainant and the accused because the doctor was not present during the alleged incident. The history relayed to a doctor by a complainant if admitted as being true or proved can only be used to test the consistency and credibility of the complainant.
32. In this case, the complainant said that she told the doctor that she was punched and slapped and also that the accused made love bites on her neck. Accused also

told us he made love bites. However the doctor could not find any marks during the medical examination and therefore she had not recorded any finding in this regard. It is up to you to decide what weight you should attach to the medical report.

33. In testing the credibility of a witness, you can consider whether there is delay in making a complaint to someone or to an authority or to police on the first available opportunity about the incident that is alleged to have occurred. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation to such delay.
34. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. It is a matter for you to determine whether, in this case, complaint complainant made to police is genuine and what weight you attach to the complaint she eventually made.
35. In testing the consistency of a witness you should see whether he or she is telling a story on the same lines without variations and contradictions. You should also see whether a witness is shown to have given a different version elsewhere and whether what the witness has told court contradicts with his/her earlier version. You must however, be satisfied whether such contradiction is material and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter. If it is shown to you that a witness has made a different statement or given a different version on some point, you must then

consider whether such variation was due to loss of memory, faulty observation or due to some incapacitation of noticing such points given the mental status of the witness at a particular point of time or whether such variation has been created by the involvement of some another, for example by a police officer, in recording the statement where the witness is alleged to have given that version.

36. You must remember that merely because there is a difference, a variation or a contradiction or an omission in the evidence on a particular point or points that would not make witness a liar. You must consider overall evidence of the witness, the demeanor, the way he/she faced the questions etc. in deciding on a witness's credibility.
37. You may also see whether there is a motive or obvious reason to fabricate a false allegation against the accused. If there is an obvious reason to make up a case, then you may think that these allegations have been fabricated.
48. In this case the accused says that she complained to police only because she was caught. The complainant said that she allowed the accused to do whatever he did to get the USB and when she was about to give it police, the accused got caught. The State counsel submitted that if the complainant was in a consensual affair it is not plausible that she would make a false allegation within 72 hours. You decide if the complainant had an ulterior motive to trap the accused or if she had made a genuine complaint to police.

39. Please remember, there is no rule in Fiji for you to look for corroboration of complainant's story to bring home an opinion of guilt in a case of sexual nature. The case can stand or fall on the testimony of complainant, depending on how you are going to look at her evidence.
40. I will now deal with the summary of evidence in this case. In doing this, I do not propose going through all the evidence. It should still be fresh in your minds. If I refer to only some aspects of a witness's evidence it does not mean that the rest is unimportant. You must weigh up and assess all the evidence in coming to your decision in this case.

Case for Prosecution

41. The complainant Nafiza Bi, testified that in 2015 she was a student at Tabia College, Labasa. She developed a boyfriend- girlfriend relationship with her agriculture and career teacher Avinesh Kumar, the accused in this case. She knew Avinesh is a married man. His wife also used to teach in the same school. At the beginning, Avinesh used to send her text messages some of which sounded as if they were in a relationship. Then they used to meet each other and developed a relationship. She was 17 years at that time. When she turned 18 Avinesh wanted to celebrate her birthday in a hotel. On 12th June 2015, he took her to Hotel 88 in Labasa to celebrate her birthday.
42. Instead of celebrating the birthday, they spent time in bed having sex in the hotel room. Over the next few months, between June and November, 2015, they met

each other quite often in the same hotel and also once in his farm house. He used to come to her place in Labasa to pick her up when her parents were away in Suva. They were spending time in the sexual relationship.

43. The relationship became known in the school thus creating problems. Once the students found out the relationship and they had complained to the principal. However Avinesh denied having such a relationship and managed to sort it out with the principal. After the exam in November, 2015, she got an offer from the USP to further her tertiary education in Suva. She was planning to move to Suva in December, 2015, and when Avinesh came to know of her ambition, he became furious and wanted her to pursue nursing studies in Labasa.
44. Until November, 2015, she was in love with Avinesh but when she indicated his ambition to move to Suva, he was getting possessive towards her. He did not want her to be on the Facebook. He was always monitoring her and trying to control her life, making her life really uncomfortable. He told her not to talk to any other boys in the school and if he did he would punish her. She informed him that she wants to end the relationship. He got angry and threatened to distribute letters she had sent to him amongst her neighbours. She felt obliged to go with him day and night because she was frightened.
45. After sitting for the exam in November, 2015, she started to work for a shop as a sales girl. During that time she indicated that she did not want to continue with this relationship. He then threatened to make the affair public. Once, Avinesh's wife called her and swore at her. She told everything to his wife.

46. She said that the last time she had sex with Avinesh was in November 2015. Avinesh said that he wants to see her for the last time to give her something and wanted her to come to Hotel 88. She knocked off from work in mid-day and went to Hotel 88. Avinesh was already in the hotel room when she went there. He said he wanted to spend time with her to end the relationship in a good way. He said everything was over. She was happy. She had sex with him during the three hour stay in the hotel. She said that it was the last time she had had sex with Avinesh in Labasa.
47. Nafiza said that after she had moved to Suva in January, 2016, she continued to have contacts with Avinesh in a professional way. He was helping her in her education and he even stood guarantor for her to obtain the loan. She thought he had changed.
48. When she moved to Suva she was staying with her brother at Caubati. He continued to send her text messages as a friend and once he had sent a message on Messenger saying that it was a gift for her. When she opened the message she saw some screenshots taken from a sex video of them having sex. It came to her mind that this video would have been done when they were having sex in Labasa for the last time. She was feeling dirty and was really worried. She said she did not know that he had done that and she called him to expressed her anger to him. Avinesh said "will you be able to go away from me?" and he threatened to post the video on social media if she did not agree to be in touch with him. She pleaded "please do not do that". He agreed to hand over the USB stick if she agreed not to leave her. She agreed. From that message it just came into her mind that he had never changed. The way he was possessive he is still having that possessiveness in him. She said that she needed the evidence that he

really made the video. Then he said very soon he will be coming to Suva and then he will give her the video. She said that she agreed to his request because she wanted some evidence to report the matter to police.

49. On 12th February 2016, he contacted her over the phone and informed that he is on the way to Suva to meet her. She informed him that she is at the upper gate of the USP campus. He came there in a taxi and asked her to get in if she needed the USB stick. He took her to Outrigger Hotel in Suva. He gave her the USB stick in the hotel room and said that he was having copies of the video in her laptop. She was really scared. He said that he made the video just to ensure that she did not go away from him.
50. Nafiza wanted to leave the room but Avinesh wanted to spend time with her. When she tried to leave, he locked the door. She said she was not ready to have sex with him. Then he took her phone and searched the messages. He found out some messages shared with her friends. He got angry. He slapped her on the face and punched her on her back. She cried and tendered an apology. But he did not take her apology. He undressed her and started having sex with her. During the stay in the room he was having sex with her 4-5 times. She was not ready to have sex with him and she told him that she did not want to have sex. After having sex, he took her home in a taxi at around 7.45 p.m on the condition that she comes to the hotel next day. He threatened to create a scene at the gate if she did not agree to come again.
51. Nafiza said that she did not watch the sex video that night because she was tired. She had a wash and went to bed. She said that she did not tell anyone about the

incident when she got back home. She said that by the time she could tell her sister-in-law of anything on Saturday, Avinesh came up to pick her up early in the morning.

52. On the following day, that was 13th February, 2016, he came to the gate at around 8 a.m. to pick her up. She did not want to go and said that she was really tired. Then he said if you don't want me to create a scene at you gate you better come. He had no option.
53. He took her to the same room at Outrigger Hotel and took her to breakfast and then to the room. She told him *'you better don't hit me today. You really make marks on my body and it's really painful'*. She even apologised because he misunderstood her messages. She was really tired and she said that she cannot be having sex today again. She did not agree to have sex with him. He said he was there for just for three days and he said he needs to spend time with her.
54. She was asked to undress herself. Then he had sex with her 2-3 times. It was really rough and hard. He was beating, punching her back and slapping whilst having sex with her. After having sex, he dropped her home at around 6 pm. He wanted to meet her again on Sunday. She did not agree. He came on Sunday to pick her up in the early morning. When he came to pick her up she said *'today I cannot come. No matter what you'll do, I will not be able to come today'*.
55. He was at the gate. She refused to go with him. She did not want to see him again. He then wanted the laptop and the phone because he wanted to see the messages on her facebook. *'He said that if you can't spend the time with me on that*

day, you'll not be talking to anyone'. She gave the laptop, the phone and the flash net. She said that she took one SIM card out and put it her sister-in-law's phone before giving the laptop and the mobile phone. She said she never wanted to see him. She was just waiting for her brother to come so that she could tell him everything and then they could go and report the matter.

56. In the meantime she got a call in the morning from the Muslim League asking her to come to arrange her house as part of her scholarship. One person came to pick her up and she rushed to that place with him. By the time she returned home at around 12 noon, Avinesh had called and the call had been received by her sister-in-law because she had put her SIM in her phone. Avinesh had told her sister-in-law about the relationship. When she returned home, her brother was home. She told him that she was in a relationship with Avinesh and that he had a video. He was really angry.
57. Nafiza said that she did not show the video to her brother. She called her mother and told everything. She was asked to go to go with uncle by her parents to lodge a complaint. She lodged a report with police on the 15th February, 2016. She gave the USB stick to police officers and watched the sex video at the police station. She realised that the video had been shot at the hotel in Labasa.
58. She was medically examined by a doctor on the 15th February, 2016. She said that she did not give consent to have sexual intercourse with Avinesh on the 12th and 13th of February, 2016.

59. Lady and gentlemen assessors, you had the opportunity to watch the video in court towards the end of examination-in -chief.
60. Under cross-examination, Nafiza said that she became aware of the sex video only in January 2016 when she was in Suva. She said that she had no idea when the video was shot. She denied that she had made the video. She admitted that Avinesh was invited by her parents to the prayer function at her place that took place the day before she left for Suva. She was not sure if Avinesh attended the prayer function but she admitted calling Avinesh asking him as to why he did not attend. She admitted that she was having contacts with Avinesh even after she left for Suva although she had terminated her relationship with him in November, 2015. She admitted that Avinesh stood guarantor for her for TE loan scheme. She denied that she had plans to celebrate Valentine's Day with Avinesh in Suva. She admitted that she was excited to see Avinesh in Suva when she was informed about his visit in February. She said that the screenshots taken from the sex video that was sent on FB Messenger could not be given to police because Avinesh had closed her fb account.
61. Nafiza said she was not ready to have sex with Avinesh on the 12th and 13th of February. She denied that she had consented to have sex with Avinesh despite her statement to police which states that she had consented. She said that she consented to have sex with Avinesh because she feared that Avinesh will post her nude photos on social media.
62. She said that he was slapping and punching whilst having sex at the same time. She admitted that she did not have visible injuries on her body. She admitted

that they had sex in different angles and she once went on top of him to have sex with him. She admitted that she had allowed him to have sex, lick her vagina and breast. She admitted kissing each other mouth to mouth. He admitted sucking his penis and sitting on it on his request. She admitted making mourning sounds while having sex. She denied that she enjoyed having sex with him and that she had given her consent to have sex with him. She admitted that she was treated like a wife.

63. She said she went to the hotel room for the purpose of getting the USB. She admitted that she was given the USB on the 12th February, 2016. She said that she went to the hotel again on the 13th because he told her that he was having copies of the sex video on his laptop.
64. She said that the Chinese fan (DE.1) was a gift she received and it was to be given to her best friend. When Avinesh saw it being decorated in the classroom he took it. She denied that it was given to Avinesh on 12th February 2016 as a Valentines' Day gift. She admitted that DE2 containing the phrase '*I love you Avinesh Kumar*' was written by her but denied that it was given to Avinesh with the fan (DE1) on the 12th February, 2016. She said that DE.2 was written as a result of a punishment given by his teacher Avinesh to write 'I love you Avinesh kumar' 500 times.
65. Nafiza admitted that Avinesh was charged with rape in Labasa based on the her statement dated 15th February 2016 and that the charge was later withdrawn by the DPP. She admitted giving two statements to police thereafter, one on 20.02.2017 and the other on 31.03. 2019.

66. She said that she could not leave the hotel room when Avinesh went out to bring lunch and recharge because he had locked the door.
67. She admitted that on 13th February, 2016, Avinesh made love bites on her neck, but denied that it was given on her request as Valentine's Day gift.
68. She denied the proposition that she made the video because she wanted Avinesh to be with her for lifetime as her lover.
69. She admitted writing the love letter (DE3) during her school days when she was in a relationship with Avinesh and it was used later to threaten her that it will be made copies and distributed where she was living. She said that she told the doctor that she was slapped and punched but she did not find any marks or injuries on her body.
70. Under re-examination, Nafiza said that she was excited to see Avinesh in Suva in February because she wanted to get the USB stick which he had promised to give. Avinesh was controlling her life that is what she meant when she said that she was treated like a wife. She said that she allowed him to do whatever he did only because she feared that the sex video will be put on the Facebook and she believed in his promise that the USB will be given to her and feared that he will create a scene where she was living.

71. That is the case for the Prosecution.
72. At the close of the Prosecution case, you heard me explain to the accused what his rights were in defence and how he could remain silent and say that the Prosecution had not proved the case against him to the requisite standard or he could give evidence in which case he would be cross-examined.
73. As you are aware, accused elected to give evidence and call a witness on his behalf. That is his right. Now I must tell you that the fact that an accused gives evidence in his own defence does not relieve the Prosecution of the burden to prove their case to you beyond reasonable doubt. Burden of proof remains with the prosecution throughout. Accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.

Case for Defence

Avinesh Kumar (The Accused)

74. Avinesh in his evidence admits having sexual intercourse with the complainant more than 20 times. He denies having done so without her consent on 12th and 13th of February 2016. She denies making a sex video or ever having it in his possession and using such a video to blackmail the complainant. He denies sending sex video screenshots on Messenger. He said he saw the USB for the first time in Court. He admits that he is the male partner in the sex movie.

75. He said that the sex video was done by the complainant. He said that the complainant was blackmailing him saying that she had evidence against him and asked him to come to Suva to collect the sex video. He would not have come to Suva if not for her promise that she will give the video to him.
76. He said that DE. 1 to DE2, DE4 and DE 5 were given to him by the complainant on the 12th and 13th February to express her love towards him. But he said that the DE 3 was given to him at school. He described how he was engaged in love and sex during the time they spent in Outrigger.
77. He said that the complainant was engrossed in love with him and that is why she came with him to the hotel and had sex with him. She never said that she could not have sex with him.
78. He said that he would not have come all the way from Labasa and booked the hotel if she did not agree. When she saw him at the upper gate of USP, she was laughing as if it was dream coming true. She denied punching and slapping the complainant and said that it is not possible to punch and slap while having sex. He admits making love bites on her neck as a Valentine's Day gift.
79. He described how the teacher- student relationship developed into a full-fledged love affair. He said that the invitation to attend the prayer ceremony was extended by the complainant and she was worried that he did not attend.

80. Avinesh said that the laptop and the phone were given to him by Nafiza on the 14th February as a strategy for her to come out of the house to spend the Valentine's Day with him in the Hotel. He said that Nafiza did not come to her as promised until 10 am and that she had put her SIM in her sister-in-law's phone which ultimately led to their affair being caught.
81. Answering a question by the court, whether he had ever made inquiries about the USB stick, Avinesh said that she had promised him that she will give it before he leaves Suva after his three day stay in the hotel, but she never gave it.
82. Under cross examination he admitted that sleeping with a student is wrong and having an extramarital affair is not ethical. He said that having an affair with an overage girl was not wrong in the circumstance of the problems he was having with his wife.
83. He denied that he made the video. He denied ordering the complainant to write I love you Avinesh Kumar 500 times. He admitted that he did not complaint to police that he was being blackmailed by the complainant because he was not sure if she was having such a sex video.

Dr Elvira Orgbit

84. The doctor tendered the medical report prepared by her upon examination of the complainant on 15th February, 2016. Dr. confirmed that she had not observed any

external injuries on complainant's body. She said that complainant had not told her that she was punched and slapped.

That is the case for Defence

Analysis

85. Lady and Gentlemen assessors, the accused Mr. Avinesh Kumar is charged with two representative counts of rape. To find the accused guilty on the 1st count, the Prosecution must prove beyond reasonable doubt that the accused, on the 12th February, 2016, penetrated complainant's vagina more than once with his penis, without her consent. To find the accused guilty on the 2nd count, the Prosecution must prove beyond reasonable doubt that the accused, on the 13th February, 2016, penetrated complainant's vagina with his penis more than once, without her consent. You have to consider evidence on each count separately for you to be satisfied that each charge has been proved beyond a reasonable doubt.

86. The accused does not deny that he had sexual intercourse several times with the complainant on the 12th and the 13th of February, 2016. However he denies having had sexual intercourse with the complainant without her consent. He says that at all times the complainant was consenting. The only dispute is in relation to the consent and the case turns on one word against the other.

87. The resolution of the dispute in this case depends on whether you accept the complainant as a truthful witness. Prosecution called the complainant and its case is substantially based on her evidence. To support the version of the complainant, the Prosecution also relies on the caution statement and the charge statement of the accused.
88. The Prosecution says that the complainant is a genuine and reliable witness and her evidence is credible and believable. They say that the accused is not morally right and he is not credible in his evidence and that his evidence should be rejected.
89. Having heard the evidence and observed complainant's demeanour, if you are satisfied that the evidence she gave in court is truthful and believable, then you can safely act upon her evidence in coming to your conclusion. No corroboration is required. However, you may look at other pieces of evidence for you to be satisfied that the complainant's version is credible and believable.
90. The complainant does not deny that she was in a romantic relationship with the accused until November, 2015. She also does not deny that she went to a room at Outrigger Hotel on the 12th and the 13th of February with the accused and that she had allowed him to have sexual intercourse and to be engaged in sexual activities which she described in her evidence. The case of the Prosecution is that the so called consent was not freely and voluntarily given.

91. Therefore, for the accused to be found guilty of rape in this case, it is very important for you to be satisfied that the consent was not freely and voluntarily given by the complainant and that the accused knew or had reason to believe that the complainant was giving her consent not out of her own freewill but as a result of fear of being exposed in social media or any other tactics allegedly used by the accused.

92. The complainant said that the accused, who was a former teacher cum career guide, used various tactics to make her subservient to his lustful demands for sex. She alleges that the accused, without her knowledge, secretly made a sex video of them having sex when they were in the relationship and that it was being used to blackmail her saying that it will be posted on social media. She also said that the accused was threatening to distribute the love letters she had given to him during the relationship and also to create a scene at her place of residence.

93. There is no dispute that the complainant authored the so called love letter (DE3) and other documents tendered (DE 2, DE 4 and DE5) by the Defence. However she denies the dates and the circumstances under which they were given to the accused. Complainant says that those documents including the Chinese Fan (DE1) were given to the accused during the course of relationship and not immediately after having sexual intercourse in February, 2015, as told by the accused. It is for you to decide when they were given and what prompted her to give those exhibits for you to be satisfied that the relationship was still in existence when the alleged rapes occurred.

94. There is no dispute that the sex video had been produced when the complainant and the accused were having sex in a hotel room. The complainant's version is that it was secretly made by the accused when she broke up with him in November 2015 in order to ensure that she is kept under his obligation so that he can blackmail her and it was in fact being used to intimate her to get her consent for sex.
95. The accused on the other hand says that the sex video had been produced by the complainant so that she could use it to blackmail him in order to keep him as her lover or companion for her life time. The Prosecution says that the Defence's blackmail theory is belatedly made up and this theory is not plausible and also not consistent with his previous statement to police that the sex video was to be used to demand money from him.
96. Prosecution led evidence that after the alleged incident the complainant had made a complaint to Police on the 15th February 2016 and she was medically examined by Dr. on the same day. Defence says that the complaint was belated and the eventual complaint was to cover up her wrong after being caught. You heard what the complainant said in her explanation. It is up to you to decide what weight you give to her complaint.
97. Defence says that doctor's observations are not consistent with complainant's evidence and that of a forceful sexual intercourse. It is for you to decide.

98. The accused denies the allegations and gave evidence in his defence although he was not required to prove his innocence or prove anything at all. He also called the doctor. You must consider evidence adduced for defence and evaluate the same using the same tests that you have used to test the credibility of Prosecution's witnesses.
99. The State Counsel submitted to you that the accused lied in this court. You decide if the accused is a credible and believable and what weight you should attach to his evidence.
100. If you believe the version of the Defence, you must find the accused not guilty. Even if you don't believe the version of the Defence, Prosecution must still prove the charges beyond reasonable doubt. Remember, the burden to prove the charges rests on the Prosecution. Accused is under no obligation to prove his innocence or prove anything at all.
101. If you are satisfied that the version of Prosecution is credible and believable, then you have to be satisfied that each element of the offence of rape as charged had been proved beyond reasonable doubt.
102. If you are sure that the accused had penetrated the complainant's vagina without her consent on each occasion, then you can find the accused guilty on rape as charged.

103. That concludes my summing up of the law and the evidence in this particular trial. We have now reached the stage where you must deliberate together and form your individual opinions on whether the charges have been proved against each accused. On your return, you will be asked to separately state in court your opinion in respect of each count whether he is guilty or not guilty.

104. Any re-directions?



AT SUVA

11th April, 2019

**Solicitors: Office of the Director of Public Prosecution for State
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