

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

High Court Criminal Case No. HAC 096 of 2016

BETWEEN : STATE

AND : RAKESH CHAND

Counsel : Ms Naibe for the State
Mr Tunidau for the Accused

Dates of Hearing : 13 and 14 May 2019

Closing Speeches : 14 May 2019

Date of Summing up: 15 May 2019

SUMMING UP

Madam and gentleman assessors,

1. I must now sum up the case to you. You must then retire to consider your opinion. I will direct you on the law that applies. You must accept those directions I give you on matters of law. You are to decide the facts of the case, based on the evidence that has been led before this court. You will then apply those directions to the facts and give me your opinions as to whether the Accused person is guilty or not guilty to the offence he is indicted for.

2. You are bound by the directions I give you as to the law. But you are not obliged to accept any opinion I may express or appear to have expressed while going through evidence. If you do not agree with that opinion you will ignore it and form your own opinion with that evidence.
3. You must base your opinion only and only on the evidence given by the witnesses. But a few things that you heard in this court are not evidence. Opening submission, closing submissions, statements, arguments and comments made by the counsel and this summing up are not evidence. I must say that the purpose of the closing speech is to outline the evidence that each party rely on to fall in line with their respective arguments.
4. You may act only upon the evidence given by the witnesses in this case and nothing else. But you may consider those submissions and arguments only as a guidance to understand the case put forward by each party when you evaluate evidence and the extent to which you do so is entirely a matter for you.
5. If you have acquired any knowledge about the facts of this case outside this court room, you must exclude that information from your consideration. Make sure that external influences play no part in forming your opinion. You will also not let any sympathy or prejudice sway your opinions. Emotions have no role to play in this process and do not let anger, sympathy, prejudice or any other emotion shroud the evidence presented in this court room. You only have to consider the evidence adduced in respect of each element of the offence. You must not form your opinion based on the emotions, sympathies, prejudices, speculations and morality. As I said before you only have to consider the evidence given by the witnesses in this case and nothing else to form your opinion.
6. I will give you only a summary of evidence. I will not go through every word uttered by the witnesses in this case, and if I leave out something that seems to

be important, nothing stops you from taking that into account. Because you decide the facts.

7. After this summing up, you may give your individual opinions as the representatives of the community. You may reject or accept any evidence in forming your opinion. Your opinions need not be unanimous. And you need not give reasons for your opinions.
8. Your opinions will assist me in giving my judgement. I will give the greatest weight to your opinions in my judgement. However, I am not bound to conform to your opinions.

Madam and gentleman assessors,

9. I will now mention some considerations that may assist you in evaluating evidence. As I said before you may reject the whole evidence of a witness, accept the entirety or even accept only a part of a witness's evidence and may reject the rest. You have to decide whether a witness has spoken the truth or correctly recalled the facts and narrated them.
10. You have seen the demeanour of the witnesses and how they gave evidence in court. You have seen whether they were forthright or evasive in giving evidence. But you may also bear in mind that some witnesses have good memory, some may not remember every detail and it is also likely that some may perceive the same incident differently and narrate differently. You have to use your common sense in assessing the reliability and credibility of witnesses. Remember, that many witnesses are not comfortable in giving evidence in a court room, they may act in anxiety and get distracted in this environment.
11. Generally, complainants of sexual offences react differently when they got to narrate the traumatic experience they have gone through. Some may display

obvious signs of distress, anxiety and restlessness, but some may not. Every witness has their own way of expressions when they give evidence about an experience, specially a traumatic one. 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 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.

12. Subsequent conduct of complainants of sexual offences can vary from person to person. Some, in distress, shame or anger, may complain to the first person they see. Some may not complain at once due to lack of education, social status and financial dependency. A complainant's reluctance to report an incident could be due to many reasons. It could be social stigma which follows such incidents or cultural taboos in her society. Some may not even complain at all due to the fear that it may damage family ties.

13. A late complaint does not necessarily signify a false complaint. Similarly, an immediate complaint does not necessarily demonstrate a true complaint. It is a matter for you to decide what weight should be attached to the promptness or the lateness of the complaint.

14. Another consideration may be; has the witness said something different at an earlier time or whether he or she is consistent in his or her evidence? 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.

15. In weighing the effect of such an inconsistency or discrepancy, consider whether there is a satisfactory explanation for it. For example, might it result from an innocent error such as faulty recollection; or else could there be an intentional falsehood. Be aware of such discrepancies or inconsistencies and, where you find them, carefully evaluate the testimony in the light of other evidence. Credibility concerns honesty. Reliability may be different. A witness may be honest enough but have a poor memory or otherwise be mistaken.

16. Does the evidence of a particular witness seem 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 or to an exhibit.

17. 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.

18. When you have decided the truthfulness and reliability of evidence, then you can use that credible 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. 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 common sense and wide experience which you have acquired living in this society.

19. 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.

20. According to the law the prosecution must prove its case beyond reasonable doubt. For the prosecution to discharge its burden of proving the guilt of the Accused, it is required to prove beyond reasonable doubt that he is guilty. The burden of proof remains on the prosecution throughout the trial. For this purpose, the prosecution must prove every element of the offence beyond reasonable doubt.

21. The Accused need not prove his innocence. The fact that the Accused gave evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence. The burden is on the prosecution to prove the guilt of the Accused. That means you must be satisfied that the state has proved every element of the offence beyond reasonable doubt. That doubt should be a reasonable one and if you are left with a reasonable doubt you must find the Accused not guilty. If you are not left with any such doubt and if you are sure that the prosecution proved every element of the offences you must find him guilty.

Madam and gentleman assessors,

22. We will now look at the offences that the Accused is indicted for. The Accused is indicted for the following offence;

Statement of Offence

Rape: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 44 of 2009.

Particulars of Offence

Rakesh Chand on the 3rd day of May, 2016 at Lautoka in the Western Division, had carnal knowledge of Kajal Nandita Sami, with his penis, without her consent.

23. I will first explain what matters must be taken into consideration to determine whether the offence of rape is proved by the prosecution. According to section 207(2) (a) of the Crimes Act a person rapes another person if the person has carnal knowledge with or of the other person without the other person's consent. Having carnal knowledge simply means having sexual intercourse with the use of the penis.

24. Therefore, in this case the prosecution must prove the following elements beyond reasonable doubt;

- a. the Accused;
- b. penetrated the vagina of the complainant with his penis;
- c. without the consent of the complainant; and
- d. the Accused knew or believed that the complainant was not consenting; or the Accused was reckless as to whether or not she was consenting.

25. 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.

26. The second element involves the penetration of the complainant's vagina with the penis. The law states that even the slightest penetration of the vagina is sufficient to constitute the offence of rape. Therefore, it is not necessary to have evidence of full penetration or ejaculation. The prosecution must prove beyond reasonable doubt that the Accused penetrated the vagina of the complainant with his penis to any extent.

27. The third and the fourth elements are based on the issue of consent. To prove the third element of the offence of rape, the prosecution should prove that the Accused penetrated the complainant's vagina without her consent.

28. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. For 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. Consent obtained through force, threat or intimidation, fear of bodily harm, or by use of authority is not considered as consent given freely and voluntarily. Submission without physical resistance by the complainant alone, to the act of the other person will not constitute consent.

29. The complainant must have the freedom to make the choice. It means she must not have pressured or forced to make that choice. The complainant must have mental and physical capacity to make that choice. Further, the consent given by the complainant may have been limited to a particular sexual activity and not for another sexual activity. Also, the consent can be withdrawn at any time. It is an ongoing state of mind its revocable once given. Consent of a person for sexual intercourse cannot be assumed.

30. In addition to proving that the complainant did not consent to the Accused to insert his penis into her vagina, the prosecution should also prove that, either the Accused knew or believed that the complainant was not consenting; or the Accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.

31. The Accused was reckless, if the Accused realised there was a risk that she was not consenting and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the vagina, you may find that the Accused was reckless as to whether or not the complainant was consenting. In other words, 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 it beyond any reasonable doubt.

32. If you believe that the prosecution proved all the elements of the offence you may find the Accused guilty to that offence. Likewise, if you believe that the

prosecution failed to prove all the elements of the offence you must find the Accused not guilty to the offence of rape.

Madam and gentleman assessors,

33. Now I will refresh your memory and give a brief outline of the evidence adduced in this case. However, you should consider the entirety of the evidence adduced in this case when forming your opinions. The prosecution called three witnesses to prove the case against the Accused.

34. The first prosecution witness was the complainant in this case. Kajal Nandita Sami gave evidence that now she is married to one Ajnesh Nand since January this year. Now she has two children. In 2016 she had been in a de facto relationship with Ashneel Ashish Chand, who was the second prosecution witness in this case. She said that she was in that relationship with Ashneel Ashish Chand for about 2 ½ years. The complainant has a son with Ashneel Ashish Chand, who is now 4 years. The complainant was living with Ashneel in Samabula, Suva.

35. According to her evidence the Accused was a good friend of Ashneel. She used to call the Accused, uncle out of respect. She said that the Accused used to visit them when she was in Suva. She identified the Accused as Rakesh.

36. Kajal Nandita Sami gave evidence that on 03 May 2016 she came to Lautoka from her parent's place in Rakiraki by 9.30 am bus. According to her evidence she had been separated from Ashneel at that time and she had come to hand over some documents as she had applied for child custody and maintenance.

37. Ashneel had come with Rakesh, the Accused to pick her up and they had gone for shopping. After that they had gone to the Accused's house in Kashmir, Lautoka. The complainant said that the Accused's wife was not at home and only an old man was at his place. According to Kajal's evidence, the Accused and Ashneel had started drinking Rum and Cola and she had started cooking. She said that around 5.30 pm the Accused's son had come home and Ashneel

and the Accused's son had gone to bring a rental vehicle for them to go and see Ashneel's parents. She said that although she also wanted to go with them by the time she went and changed her clothes Ashneel had already left with the Accused's son. By that time the old man had gone to sleep, and the complainant was browsing through her Facebook while sitting on a sofa.

38. The complainant said that the Accused came beside her. She said that the Accused touched her stomach and pressed her breasts under her clothes. She had told him not to do it as it was painful. The Accused had gone and sat on the rug. The complainant had then gone to open the grill door. The Accused had then grabbed her and had pushed her to sit back in the sofa. The complainant said the Accused grabbed her hands and forced her to drink Rum and Cola. She showed the court how he forced her to drink by squeezing her mouth from sides.

39. The complainant said then the Accused pulled her hand and took her to a room. She said that she braced herself against the wall with her hands to resist him from pulling her to the room. However, she said that the Accused pushed her to the room and quickly turned off the lights and locked the door. She said that the Accused pushed her on the bed and put her hands under her body. She said that the Accused tried to kiss her, and she tried to turn around. She said he could not kiss her.

40. Kajal Nandita Sami further gave evidence that the Accused came on top of her and was pressing her stomach and her breasts. She said she was crying and she could not say anything as he put one hand on top of her mouth to stop shouting. She said that she was wearing a black pants , tights and a panty. She gave evidence that the Accused pulled them down and started licking her vagina. She said it was painful and she was crying. She said that she could not shout or call for help as one of his hands was on her mouth.

41. The complainant said that then she heard a vehicle coming. When the Accused went to check that she had tried to pull up her pants and the panty as it was

still up to her knee level. She said she could not pull them up as the Accused had come back and pulled them again. She said that she could not go out as she was afraid, and the doors were locked. The complainant said the Accused put his penis into her vagina. She said it was really painful. She said that her hands were behind her back and the Accused was closing her mouth with one hand. She said that the Accused took the penis out and put it inside again.

42. As per the complainant's evidence she had heard a vehicle approaching. The Accused had quickly worn his shorts and had gone to check. She said that she heard Ashneel's voice and the Accused had thrown her clothes on top of her. She said that the Accused told her to wear the clothes. The complainant said that Ashneel came to the room after that and she had grabbed him and had started crying. She said that she told Ashneel about what happened.

43. The complainant said that the Accused suggested to go and watch a movie after that. She said then Ashneel had told the Accused to go and change his clothes. She said when the Accused went inside to change she left the Accused's house with Ashneel to go to the Police Station. She said that Ashneel gave a statement and she was taken to the hospital. She had given the statement on the following day.

44. During cross examination the complainant said that she went to her parents as Ashneel was seeing another woman at that time. She said that she had been separated for about one month before she took the maintenance and custody case against Ashneel. She admitted that she came to Lautoka to give the custody and maintenance applications to Ashneel. But she said that she did not give the applications to him. When she was asked for the reason she said, "no answer". However, she denied that the reason for not giving the applications was falling in love with Ashneel again.

45. Under cross examination she admitted that she was supposed to go back to Rakiraki on the same day as she left her son at home. She also said that Ashneel forced her to stay back by telling her that he had called her father and sought

permission for her to stay the night. She later said that he actually did not force her and only requested her to stay. She admitted that she felt good to meet Ashneel after a month as he was her de facto and her child's father.

46. She admitted that she had sexual intercourse with Ashneel for about half an hour when they came to the Accused's house. She was asked as to why she did not tell that in the examination in chief. She said that it was not asked from her. It was suggested to her that the only person that she had sexual intercourse that day with was Ashneel. The complainant said that she had sexual intercourse with Ashneel around 10 am or 11 am. She said that the alleged incident with the Accused happened around 6 or 6.30 pm. She also admitted that she had a shower after having sexual intercourse with Ashneel.

47. The complainant said that she cannot remember whether the doctor who examined her was a male or a female. She admitted that Ashneel was there when the medical examination was done. During cross examination the complainant said it was Ashneel who told the incident to the doctor as she was not in a proper state of mind. She said that she was feeling depressed for what the Accused did to her.

48. It was suggested to the complainant that she made up a story against the Accused as she was supposed to go back to Rakiraki on the same day after handing over the documents to Ashneel. The complainant denied that she made up a story.

49. The second prosecution witness, Ashneel Ashish Chand gave evidence that he is now married to one Kritika Prasad since 2017. He said that in 2016 he was in a relationship with the complainant. He said that he has a son with the complainant. According to the witness he had been working as a bus conductor during 2016 and he came to now the Accused while working for the same bus company. The witness also said that during that time he was living in Samabula, Suva. He said that on 2 May 2016 he came to Lautoka with the Accused. He said that the complainant was staying in Rakiraki with her parents

at that time and he went to pick the complainant from Lautoka bus stand as she was coming to meet him.

50. The witness said that after picking up the complainant the Accused borrowed \$ 200 from him to do shopping. After doing the shopping they had gone to the Accused's house. The witness gave evidence that he drank Rum and Cola with the Accused till about 6 pm. He said when the Accused's son came home he went with the Accused's son to look for a rental vehicle. He said he came back after about 2 hours.

51. According to the evidence given by Ashneel, the grill door had been closed from inside and the main door had been open. The Accused's son had opened the grill door as he knew how to open it. The witness said that the Accused came running to the sitting room from a room and was trying to stop him from going inside to look for the complainant. However, the witness had gone straight to the room and had found the complainant pulling her pants up. He said the complainant started crying and she had told him that the Accused slept with her forcefully.

52. The witness said that the Accused was trying to stop them from leaving his house and he had suggested to the witness to go for a late-night movie. The witness said that then he told the Accused to go and change the clothes. He said when the Accused went in to get dressed up he has left the Accused's house with the complainant to go to the police station.

53. The witness also said that when he was at the hospital with the complainant the Accused came looking for them and he reported it to the police.

54. During the cross examination the witness denied that he was separated from the complainant at that time due to an affair with another woman. He said that the complainant was with her parents in Rakiraki for about one week when the alleged incident occurred. He denied that he had any knowledge about a maintenance case at that time. He denied that the complainant came to give any documents to him.

55. Under cross examination the witness admitted that he had sexual intercourse with the complainant at the Accused's place in the day time. He said it was mid-day that he had sexual intercourse with the complainant. When the witness was questioned whether he said to the police that he had sexual intercourse with the complainant, the witness said "well, I think I did say. But it is not in the statement and even we went to the hospital to do the medical I also told the doctor too." Further the witness denied that it was him who did the talking with the doctor when the complainant was examined.

56. At this point I must explain to you what a recent complaint is. The complainant's de facto partner, Ashneel said that the complainant told him about the alleged incident soon after he came to the Accused's house. In cases of sexual offences, the evidence given by a witness of what he or she was told by a complainant is generally considered as recent complaint evidence. The evidence of recent complaint is not adduced to corroborate the details of the alleged incidents by the Accused, nor it is evidence of facts complained of. It only goes to the consistency of the conduct of the complainant with her evidence given at the trial. It is not evidence that proves what has happened between the Accused and the complainant. But it only enhances the credibility of the complainant and you can use it to decide whether the complainant gave credible evidence.

57. Further it should be noted that recent complaint evidence is not hearsay evidence. Generally, witnesses are only allowed to give evidence on what they saw, heard or felt by their physical senses only. They are not allowed to speak of a story told by a third person who is not called as a witness. Such evidence is called hearsay evidence. However, evidence of recent complaint is not hearsay. Therefore, evidence of recent complaint is considered as admissible evidence.

58. The last prosecution witness was Dr Agnes Dunn. She confirmed that she did the medical examination of the complainant on 03 May 2016 at about 10.24 pm. She said that Ashneel Chand was also present when the medical examination was done. She has explained the following medical findings by her;

- i. Blood stained panty – fresh
- ii. Laceration on right labia majora with no active bleeding

59. She explained the injury on the complainant as a fresh cut on the lips of the vagina. She also said that acute injury is an injury which has happened within less than 4 hours. She also said that a blunt object could have caused such injury, including a penis to anything else which is blunt. While expressing her opinion she said that such injury could have been caused by forceful sexual intercourse.

60. Under cross examination the medical officer denied that it was the complainant's husband who related the history to her. She said that she cannot recall Ashneel telling her that he had sexual intercourse with the complainant during the same day. However, she said that the complainant did not tell her that she had sexual intercourse with Ashneel. She said she is sure about that as she has not recorded it.

61. The medical officer said under cross examination that when she recorded fresh blood stains on the panty what she meant was it could be 6-8 hours prior to the examination. She said if it is 12 hours then they will call it as prolonged one.

62. That was the case for the prosecution.

63. After the closure of the prosecution case the Accused was explained his rights. You must bear in mind that although those options were given, still the burden is on the prosecution to prove the guilt of the Accused and he need not prove his innocence. The Accused decided to give evidence and no other witnesses were called.

64. The Accused gave evidence that on 3 May 2016 he went with Ashneel to Lautoka City to pick up the complainant. He said that the complainant arrived around 11.15 to 11.30 am. He said after that doing some shopping they went back to his house. He denied the allegations against him. He said that the complainant was lying.

65. During cross examination the Accused admitted that he was good friends with Ashneel. He admitted that he borrowed \$200 from Ashneel to do shopping. He admitted all events which happened until Ashneel and his son went to look for a rental vehicle. The Accused denied all the allegations relating to the charge against him. He admitted that after Ashneel returned home the complainant and Ashneel left his house. The Accused denied that he is lying to court to save himself.

Madam and gentleman assessors,

66. It should be noted that in our law no corroboration is needed to prove a sexual offence. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters. In other words, the prosecution can solely rely on the evidence of the complainant only without any supporting evidence whatsoever in sexual offences. It is for you to decide how credible and consistent is the evidence of the complainant.

67. 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 not reliable then you must find the Accused not guilty. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether the prosecution has proved the elements of the offence of rape beyond reasonable doubt with that truthful and reliable evidence.

68. It is important that you must apply the same considerations which you applied in assessing truthfulness and reliability on the prosecution evidence, also when you are assessing the evidence of the Accused. You must consider the consistency of his evidence and must also consider the probability of his version. If you find the evidence of the Accused is truthful and reliable, then you must find the Accused not guilty.

69. If you neither believe the evidence adduced by the Accused nor disbelieve his 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.

70. However, I must caution you that even if you reject the evidence of the Accused as not truthful and reliable that does not mean the prosecution case is automatically proved. The prosecution has to prove its case independently of the evidence of Accused.

71. The prosecution case was that the Accused penetrated the vagina of the complainant without her consent.

72. The Accused denied the allegation. As per the line of cross examination of the medical officer it appears that the defence is suggesting that the injury to her labia majora could have occurred when the complainant had sexual intercourse with Ashneel. The complainant's evidence was that it was painful only when the Accused inserted his penis into her vagina. It is up to you to decide what weight should be attached to the evidence given by the witnesses and how probable the evidence given by the witnesses. In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.

73. As it was said before, it is the duty of the prosecution to prove the elements of the offence against the Accused. The Accused need not prove his innocence.

74. I have now given you the directions of law and summarized the evidence adduced in this case. Before I conclude my summing up let me remind you some points again.

75. If you believe that the prosecution has proved beyond reasonable doubt all the elements of rape, you may find the Accused guilty to the offence of rape.

76. If not, you must find the Accused not guilty.

77. If you have a reasonable doubt, then you must find the Accused not guilty to the offence of rape.

78. You may now retire and consider your opinions.

79. Before you do so, may I ask the counsel of both parties whether you wish to request any redirections?

80. When you are ready with your opinions, the Court will reconvene for you to inform your opinions to court.



Rangajeeva Wimalasena
Acting Judge

Solicitors

Solicitors for the State : Office of the Director of Public Prosecutions

Solicitors for the Accused: Mr Tunidau