

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 348 of 2018

[CRIMINAL JURISDICTION]

STATE

V

SHIVA SHIVNESH LAL

Counsel : Ms. K. Semisi for State
Mr. L. Qetaki for Accused

Hearing on : 22 - 25 July 2019

Summing up on : 25 July 2019

[The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "SL". No newspaper report or radio broadcast of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification of the said complainant.]

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. Please remember that you should accept the directions on law that I will be giving you in this summing up and should apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine

on the facts of this case unless you agree with that opinion. You are the judges of facts.

2. As I have told you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.
3. Evidence you should assess in this case is what the witnesses said from the witness box inside this court room the admitted facts and the exhibit tendered. A few things you heard inside this court room are not evidence. This summing up is not evidence. Arguments raised by the lawyers for the prosecution and the defence during the proceedings, their questions and comments are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only if you agree with them.
4. A police statement of a witness can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of the evidence.
5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion.

You should put aside all feelings of sympathy for or prejudice against, the accused or the complainant. No such emotion should influence your decision.

6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.
7. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes when recalling past events.
8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies when you compare the evidence given by witnesses on the same issue. This is how you should deal with any inconsistency you may come across. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. In this regard, 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.

9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide.
10. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
12. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proven facts and reasonable inferences. However, you should bear in mind that the inference you draw should be the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.
13. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.

14. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
15. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offences the accused is charged with and matters that will enable you to decide whether or not the charges have been proved.
16. Please remember that you will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
17. I must explain to you as to the reason for the use of the screen when the complainant gave evidence. It was a normal procedure adopted in courts on the request of the prosecution to make a particular witness relatively more comfortable when giving his/her evidence. You must not infer that such a protection to the witness was warranted due to the accused's behaviour and should not draw any adverse inference against him on that account.
18. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offences;

COUNT ONE
Statement of Offence

Rape: contrary to section 207(1) and (2) (a) of Crimes Act of 2009.

Particulars of Offence

SHIVA SHIVNESH LAL between the 1st day of August 2018 and the 31st day of August 2018 at Nasinu in the Central Division had carnal knowledge of **SL**, without her consent.

COUNT TWO

Statement of Offence

SEXUAL ASSAULT: contrary to section 210 (1) (a) of Crimes Act of 2009.

Particulars of Offence

SHIVA SHIVNESH LAL between the 1st day of August 2018 and the 31st day of August 2018 at Nasinu in the Central Division had unlawfully and indecently assaulted **SL**, by touching her thighs and kissing her mouth.

19. In order to prove that the accused is guilty of a particular offence, the prosecution should prove all the elements of that offence beyond reasonable doubt. If you have a reasonable doubt in respect of any element of an offence, as to whether the prosecution has proved that element, then you must find the accused not guilty of that offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason.

20. To prove the offence of rape in this case, the prosecution should prove the following elements beyond reasonable doubt.
 - I. the accused;
 - II. penetrated the vagina of the complainant with his penis;
 - III. without the consent of the complainant; and
 - IV. the accused either;
 - (i) knew or believed that the complaint was not consenting; or
 - (ii) was reckless as to whether or not she was consenting.

21. The first element is concerned with the identity of the accused. The prosecution should prove beyond reasonable doubt that it was the accused who committed the offence and no one else.
22. The second element involves the penetration of the complainant's vagina with his penis. The law states that this element is complete on penetration to any extent. Therefore, it is not necessary to have evidence of full penetration or ejaculation. A slightest penetration is sufficient to satisfy this element.
23. 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.
24. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact that there was no physical resistance alone shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;
 - a) by force; or
 - b) by threat or intimidation; or
 - c) by fear of bodily harm; or
 - d) by exercise of authority.
25. Apart from proving that the complainant did not consent for the accused to insert his penis inside 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.

26. It is not difficult to understand what is meant by the sentence “the accused knew or believed”. But you may wonder as to how you could determine whether the accused was reckless. If the accused was aware of the risk that the complainant may not be consenting for him to penetrate her vagina and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant’s vagina, you may find that the accused was reckless as to whether or not the complainant was consenting. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not.
27. You should also remember that no witness can look into an accused’s mind and describe what it was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused’s state of mind. Knowledge or intention of an accused can only be inferred based on relevant proven facts and circumstances.
28. To establish the offence of sexual assault, the second count, the prosecution should prove the following elements beyond reasonable doubt;
 - a) the accused;
 - b) unlawfully assaulted the complainant; and
 - c) the said assault is indecent and sexual.
29. The first element involves the identity of the offender who committed the offence. The prosecution should prove beyond reasonable doubt that it was the accused who committed the offence.
30. Assault is the use of unlawful force. A touch constitutes an assault if it is done without a lawful excuse.
31. The word “unlawfully” simply means without lawful excuse.

32. An assault is indecent, if it has some element of indecency and a right-minded person would consider such conduct indecent. You should also ask yourself, firstly, whether you consider that indecent assault could also have been sexual because of its nature; and if the answer is 'yes', whether, in view of the circumstances and/or the purpose in relation to the force used, that using of force is in fact sexual.
33. The prosecution led the evidence of four witnesses. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does not have to prove anything. The burden of proving an accused's guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to give evidence on oath.
34. Now let us look at the evidence. Please remember that I will only refer to evidence which I consider important to explain the case and the applicable legal principles to you. If I do not refer to evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.
35. The complainant (PW1) said in her evidence that, she is 18 years old. She said that, after her mother passed away when she was 8 months old her father did not want to look after her and she lived with her aunt and uncle at Nausori for 17 years. However, because she developed bad habits; that is, drinking and smoking and because her aunt and uncle refused to send her for Saturday classes, she moved to her father's house in June 2018.
36. In August 2018 she was living with her father, step mother, step brother and real brother. She was in form 6. On Wednesday, 29/08/2018 she did not go to school because her step mother and the step brother went to Viria. They went there because her step mother was sick. That day, the accused came home around 7pm. The

accused told her to go for prayers held at her aunt's house and she went there. The prayer session concluded around 10pm and she came home around that time. She started watching a TV series. While she was watching TV, the accused came to the house around 11pm and then came to her room. The accused then rolled a 'suki' and started smoking in the verandah. After smoking, he came to the room and told her that he is feeling cold and he came under her blanket.

37. He then started touching her thighs. When she asked him what he is doing, he did not respond. She said that the accused was touching her indecently and she did not like it. Thereafter the accused played a porn movie in the TV. When she asked him why he is playing that kind of a movie, he did not respond. She then removed the CD. Thereafter, the accused told her to massage his head because he is having a headache. She placed a pillow on her lap and the accused placed his head on the pillow and she started massaging his head. The accused again started touching her thighs. She pushed him away but the accused came over her forcefully. He put his hand inside her dress and started to touch her breast. She pushed him when he was trying to forcefully grab her breast and as a result, her breast got scratched by the accused's nails. Thereafter the accused tried to kiss her. He first tried on her neck, but she kept on moving the upper part of her body.
38. Then the accused forcefully lifted her legs and removed her undergarments. At this time she tried to get out of the bed but the accused kept on pulling her to the bed. The accused forcefully lifted her legs and inserted his penis inside her vagina. She tried to push him with her legs but was not successful. The accused had sexual intercourse for few seconds. When the accused was having sexual intercourse with her, she felt pain in her vagina and also was disgusted. She said that the accused told her not to tell anyone because if she tells anyone then her life and his life will be ruined. Thereafter he left.

39. She said she did not consent for the accused to touch her or to insert his penis inside her vagina. She said she saw the accused clearly. There was light coming from the TV and also from the kitchen. When this incident happened no one else was at home.
40. After the incident, she wrote a letter to her stepbrother about the incident and gave it to the stepbrother when he came back the following Friday. She said she wrote in that letter that the accused raped her and if she does not get justice she will die. She said she was close to the stepbrother and she could share everything with him. When she gave the letter to the stepbrother he was on his way to play soccer. He took the letter and went. She said she felt relaxed after she told him that the accused raped her. After a while the stepbrother came back and then informed her stepmother and then called her father.
41. On the following Sunday while her father, stepmother and herself were at home, the accused brought a gallon of 'paracot' and wanted to drink it. But he did not actually drink it. Thereafter the accused had a fight with her uncle's son. After this incident her paternal aunt called the police. Thereafter she was taken to the police station and she gave her statement. She said she was feeling scared and was crying when she gave her statement. That was the first time for her to give a statement to the police. She was medically examined about 5 to 6 days after she went to the police station.
42. During cross-examination she agreed that her father had asked the accused to look after her and that the accused was looking after her, trying to put her in the right track. She said that the accused used to report about her bad habits to her father, but she 'did not care about it'. She agreed that she had stated in her statement to police that the incident took place on 30/08/18. When it was suggested that she had not mentioned that the accused played an inappropriate movie, she said that she was so scared and she informed the police whatever she could remember. She also agreed

that she had stated in her police statement that her stepbrother came back on Saturday. She said she is not sure about the dates. She agreed that she had to lie to people who looked after her, in order for her to go and drink and smoke.

43. During re-examination, she said the date should be either 29th or 30th and she cannot confirm the date. She said she jumbled up the dates because she was so scared.
44. You may have noted that there were certain inconsistencies in the evidence given by the complainant. The complainant in her evidence said that the incident took place on 29/08/18 but in her police statement she has stated that it was on 30/08/18. She has also stated in her police statement that the stepbrother came on Saturday and she has not mentioned about the accused playing a porn movie. She said it was the first time for her to give a police statement, she was scared and she told the police whatever she could remember. I have explained you how to deal with inconsistencies. You should follow the said directions when you deal with the aforementioned inconsistencies and any other inconsistency you may come across.
45. You would also note that the complainant had not told anyone about the incident until she told the stepbrother when he came back from Viria.
46. Experience has shown that victims of sexual offences may react in different ways to what they went through. Some, in distress or anger may complain to the first person they see. Some, due to shame, fear, shock or confusion may not complain for some time or may not complain at all. However, when there is a delay, that may give room to make-up a story, which in turn could affect the reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. So, when there is a delay in making a complaint, you should look whether there is a reasonable explanation for that delay. Always remember that your task is to decide whether

you are sure that the complainant has given you a truthful and a reliable account of her experience concerning the offence the accused is charged with.

47. The second prosecution witness was the complainant's stepbrother (PW2). He said that he went to Viria with his sister and his mother for 01 week in August 2018 because his mother was sick. He came back to Wainibuku on a Saturday from Viria. While he was on his way to play soccer, the complainant gave him a letter. It was written in the letter that the accused 'forced her in the rape'. She told him that she wants justice or otherwise she will kill herself. First he did not believe it and he went to play soccer. After he came back, he told his mother and the father and showed them the letter.
48. During cross-examination, he said that while at Wainibuku, the complainant was mingling with boys too much and she stopped that after listening to him.
49. The prosecution is relying on PW2 as a recent complaint witness. In this regard, if you believe the evidence of PW2, you should consider whether the complaint made to him by the complainant was a prompt complaint regarding the incident and whether the complainant sufficiently complained of the offences the accused is charged with. In this case the first complaint was made around 02 days after the incident.
50. You should bear in mind that a recent complaint need not specifically disclose all the ingredients of the offences and describe every detail of the incident, but should contain sufficient information with regard to the alleged conduct of the accused. However, please remember that this evidence of recent complaint is not evidence as to what actually happened between the complainant and the accused. PW2 cannot confirm whether what the complainant relayed to him is true because he was not there at the place of offence at the material time to witness what actually happened. PW2's evidence in relation to the alleged incident is based on what he understood from what

the complainant relayed to him verbally and through the letter and what he could remember about that conversation. Therefore remember that, recent complaint evidence may only assist you to decide whether the complainant is consistent and whether or not the complainant has told you the truth. In the end you are deciding whether the complainant has given a truthful account of her encounter with the accused.

51. The third prosecution witness (PW3) was the Investigating Officer. She said that the report in relation to this case was received at the police station on 02/09/18 and the complainant was medically examined on 05/09/18. She said that 02/09/18 was a Sunday and the doctor was not available on 03/09/18 and 04/09/18.
52. The fourth prosecution witness (PW4) was the doctor who examined the complainant. She said that she graduated in 1981. She had been trained in the Department of Obstetrics & Gynaecology. She had worked as a medical doctor in Philippines from 1983 to 2001 and she is working with the Ministry of Health Fiji since 2001. She is also working at the Medical Services Pacific (“MSP”) since 2012.
53. She said she examined the complainant at the MSP Clinic on 05/09/18. She tendered the medical report as PE1. During her vaginal examination, she had noted a healed hymenal laceration and a superficial abrasion below the vaginal opening. She said the healed hymenal laceration was an injury that would have occurred more than two weeks ago and the superficial abrasion would have been sustained within a 7 day period from the date of examination. She said this injury may have been caused by a force applied on that area by an erected penis. She said there is a high possibility of the erected penis hitting that area during the penile penetration of the vagina as that area where the injury appeared was very close to the vaginal opening. She said she also observed a bruise on the complainant’s left breast and a superficial abrasion

on her right breast. In her opinion, these two injuries on the breasts may have been sustained within the previous 07 days.

54. During the cross-examination she said that anything that goes through the vaginal opening including a finger can cause injuries. She said she cannot tell the exact date the injuries were sustained.
55. The fourth prosecution witness gave her medical opinion based on what she said she observed and her experience. You are not bound to accept that evidence. You will need to evaluate that evidence for its strengths and weaknesses, if any, just as you would with the evidence of any other witness. It is a matter for you to give whatever weight you consider appropriate with regard to the observations made and the opinion given by the third prosecution witness. Evaluating her evidence will therefore include a consideration of her expertise, her findings and the quality of the analysis which supports her opinion.
56. When you consider PE 1, you should also remember that what is written in D(10) is not admissible in considering whether the facts stated therein are true because that part is filled based on information received. For that reason, the contents of D(10) are blotted out.
57. The accused in his evidence denied the allegations against him. He said that on 29/08/18 he came home around 9.30pm and then he went to Krishna Ashtami. He did not see the complainant that night and he did not tell the complainant to go to 'Lotu Lotu'.
58. He said that he met the complainant on 30/08/18 around 7.00pm and he told the complainant to go to the puja. This was a Thursday. He also went to the puja but he

left there around 7.30pm because his cousin called him. He went to New Town with the cousin to sell vegetables and thereafter went to another cousin's house to drink grog. After he came home, his father sent him to check on the complainant. So he went to the house the complainant was living and called for her. Because she did not respond, he opened the door by putting his hand through a window that was open. When he switched on the light he saw the complainant inside the room. He then opened a pot with dalo curry and closed it. Thereafter he closed the door and went home. He was at home around 2.30am. He said that he lit one roll (suki) on his way.

59. He said that the whole family wanted to hit him and because of that he told them that he can drink paracot and die. He said that the complainant had made these allegations because he caught the complainant while she was smoking at the billiard shop. He said that the complainant came to stay at Wainibuku because her aunt did not like her as she was smoking, drinking and hanging out with boys. His father told him to look after her and follow her to see whether she is going to school. He said he had reported about her to the father about 5 to 6 times. He said that the complainant did not like him and she was close to the stepbrother.
60. During cross-examination he said that he is the one who asked his family to report the matter to the police.
61. The defence says that the complainant is not a credible witness. The defence says that the complainant has fabricated the allegations because the accused used to report to her father regarding her 'bad behaviour'.


62. You must remember to assess the evidence for the prosecution and the defence using the same yardstick but bearing in mind that always the prosecution should prove the case against the accused beyond reasonable doubt.
63. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case against an accused beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
64. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise in relation to each count;
- (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject his evidence. But if you disbelieve him, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether the prosecution has proved all the elements beyond reasonable doubt.

If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

65. Any re-directions?

66. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.
67. Your opinion should be whether the accused is guilty or not guilty on each count.




Vincent S. Perera
JUDGE

Solicitors;

**Office of the Director of Public Prosecutions for the State
Jiten Reddy Lawyers, Nakasi for the Accused**