

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

**Crim. Case No: HAC 56 of 2019**

**STATE**

**vs.**

**SHIU CHAND**

**Counsel:** Mr. S. Sharma for the State  
Mr. SP. Gosaiy for Accused

**Date of Hearing:** 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> February 2020

**Date of Closing Submission:** 14<sup>th</sup> February 2020

**Date of Summing Up:** 18<sup>th</sup> February 2020

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**SUMMING UP**

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1. The hearing of this case has now reached its conclusion. I have to sum up the case for you. As I explained to you before the commencement of the hearing, we have different functions. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you to the law that applies to this action. You must accept the law from me and apply all the directions I give you on the matters of law.
2. Your function is to determine the facts of the case based on the evidence. That involves deciding what evidence you accept or refuse. You will then apply the law, as I now explain it to you, to the facts as you find them to be, and in that way, arrive at your opinion.
3. I may comment on the facts if I think it will assist you when considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment

I make about the facts. Hence, it is entirely upon you to accept or disregard any comment I make about the facts of this case unless it coincides with your own independent opinion.

4. You must reach your opinion on evidence and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box and the documents tendered as exhibits. This summing up, statements, arguments, questions, and comments made by the counsel of the parties are not evidence. The purpose of the opening address is to outline the nature of evidence. Therefore, the opening address of the prosecution is not evidence. The closing addresses of the counsel of the prosecution and the defence do not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
5. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony put before you in this courtroom during this trial. Ensure that no external influence plays a part in your deliberation. You are allowed to talk, discuss, and deliberate facts of this case only among yourselves. However, each one of you must reach your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that your opinion does not bound me, but I assure you that I will give the highest possible weight on your opinions when I make my judgment.
6. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused, witnesses, or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately, deciding the facts solely upon the whole of the evidence. You have to determine the legal culpability as set down by law and not the emotional or moral culpability of the action.

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

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

### **Information and elements of the offences**

10. The prosecution has charged the accused with two counts of Rape, contrary to Section 207 (1) (2) (b) of the Crimes Act, one count of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act, one count of Sexual Assault contrary to Section 210 (1) (a) of the Crimes Act, and two counts of Assault Causing Actual Bodily Harm contrary to Section 275 of the Crimes Act.
11. The main elements of the first offence of Rape are that:
  - i) The Accused.
  - ii) Penetrated the vagina of the complainant with his tongue.

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

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

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

13. The main elements of the third count of Rape are that:

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

#### **Admitted Fact**

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

### Separate Consideration

15. The accused is charged with six separate counts. You have to consider them separately. If you find the accused guilty of one count that does not automatically make the accused guilty of the other remaining counts. Likewise, if you find the accused not guilty of one count, that does not make him not guilty of other counts. You have to give separate consideration to each of these six counts.

### Accused

16. The prosecution has to prove beyond a reasonable doubt that the accused committed these offences to the complainant. The accused had admitted in the admitted facts he was at the house of Arinesh on the evening of the 17th of January 2019. He had been drinking beer with the complainant and other family members. Hence, the identity of the accused is not a disputed issue between the prosecution and the defence.

### Penetration

17. Evidence of slightest penetration of the vagina with the tongue and/or fingers and/or penis of the accused is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

### Consent

18. Let me now draw your attention to the issue of consent. Consent is a state of mind that can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of Rape, the complainant consents if she had the freedom and capacity to make a choice and express that choice freely and voluntarily. A consent obtained through fear, by threat, by the exercise of authority, by use of force or by intimidation, could not be considered as a consent given freely and voluntarily. A submission without physical resistance by the complainant to an act of another person shall not alone constitute consent.

19. The complainant must have the freedom to make a choice. It means that she must not be pressured or forced to make that choice. Moreover, the complainant must have a mental and physical capacity to make that choice freely. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given. It should not be an optional choice. The consent of a person should not be assumed.
20. If you are satisfied, that the complainant had not given her consent, you are then required to consider the last element of the offence, that is whether the accused honestly believed or knew or reckless that the complainant was freely consenting for these alleged sexual acts. I must advise you that belief in consent is not the same thing as hope or expectation that the complainant was consenting. You must consider whether the accused knew either that the complainant was not in a condition or a position to make a choice freely and voluntarily, or the complainant had made no choice to agree to the sexual act. If you conclude that the accused believed or knew that the complainant was consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that were prevailed at the time of the alleged incident.

### Sexual Assaults

21. The main elements of the offence of Sexual Assault are that:
  - i) The accused,
  - ii) Unlawfully and Indecently,
  - iii) Assault the Complainant.
22. The word "unlawfully" simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act as indecent. You have to consider whether the accused had indecently sucked the breast of the complainant without any lawful excuse.

23. The main elements of the fifth and sixth counts of Assault Causing Actual Bodily Harm are that:

- i) The accused,
- ii) Assault the complainant,
- iii) Caused bodily harm.

24. In this case, you have to determine whether the accused slapped and punched the complainant, causing her bodily harm. Any bodily pain caused by any form of assault is sufficient to constitute the element of bodily harm.

#### **Evidence of Corroboration**

25. You must bear in mind that offences of sexual nature do not need the evidence of corroboration. It means that if you are satisfied with the evidence given by the complainant and accept it as reliable, credible, and truthful, you are not required to look for any other evidence to support the account given by the complainant.

26. One or more of you may have assumptions as to what constitutes rape, what kind of person may be the victim of rape, what kind of person may be the rapist, or what a person who is being or has been raped will do or say. Though such assumptions are natural in ordinary life, you must leave behind such assumptions as there is no stereotype of circumstances for a rape, a rapist, or a victim of rape.

27. Offences of this nature can take place in any circumstance between any kind of person, who acts in a variety of ways. You must approach the case dispassionately, putting aside any view as to what you might or might not have expected to hear, and make your judgment strictly on the evidence that you have heard.

28. You have to assess the evidence to determine whether the accused has actually committed these crimes to the complainant. You must be mindful not to bring in to the assessment of the evidence any preconceived views as to how a victim of rape in a trial such as this should react to the experience that the victim had gone through. Every person has his or her way of coping with such an incident. Some may display apparent signs of distress, and others may not. Demeanours of the complainant in the court while giving evidence is not necessarily a clue to the truth of the complainant's account.

### **Evidence of the Prosecution**

29. Let me now remind you of the evidence presented by the prosecution during the hearing. The prosecution called five witnesses, including the complainant to give evidence. I will now summarize the evidence of the prosecution.
30. The first witness of the prosecution is Swastika Devi. On the 17th of January 2019, she had travelled to Suva from Ba with her husband and the daughter. Her husband had dropped her and the daughter at her sister's place. Her husband then went to attend some of his business in Suva. In the afternoon, she had gone to the bottom flat where her cousin Arinesh was living. Swastika prepared dinner with Arinesh's wife, Veeni. While they were making the food, Swastika and Veeni had consumed two to three cans of Rum & Cola. Arinesh was drinking beer with a friend in the sitting room. The friend is Shiu Chand, the accused. Around 6.30, Swastika's husband came and joined the drinking duo. Swastika's sister Pritika and her husband Vinesh joined them later. Swastika and Veeni, too, joined the drinking group in the sitting room after they finished the cooking. They all were sitting in the living room and drank beer. They used a small glass to drink beer. It was the first time Swastika met the accused. During the drinking session, she argued with the accused, but her husband told her to stop it. Pritika went back to her flat at upstairs after a while. She did not drink beer.
31. Vinesh got drunk and started to talk loud. Pritika then came down and took Vinesh back to upstairs. Swastika also went after them as Vinesh gets aggressive when he got drunk. He started to assault Pritika. Swastika then went down to the bottom flat to bring her husband



as she wanted to save her sister from the assault. However, she found that her husband was about to have his food. When she asked her husband to go upstairs and stop Vinesh hitting her sister, he refused to do so. Swastika got angry and told her husband that he can flirt with Veeni, but cannot help her to save her sister. She then pushed the dinner plate of her husband. The dinner plate fell. Her husband then pushed her away. Swastika fell and hit herself on a chair.

32. Swastika felt upset and walked out of the house, crying. She had forgotten to take her mobile phone when she walked out of the house. Swastika met the accused when she walked out of the house. He asked her what's wrong, but she did not reply to him. When she was walking down the road about five to ten minutes, the accused came in his car. He asked her to get into his car, and he will drop her back home. She did not want to get into his car, but he insisted that he will drop her back home. Swastika then got in his vehicle and seated on the front passenger seat. The accused told her that he would take her for a drive and then drop her back home. He asked her whether she would like to have more beer, which she refused. However, the accused stopped his car near a shop and called a boy who was sitting there. He asked the boy to go and get him some beer. When the boy brought beer, Swastika noticed a police vehicle had parked beside their car. She wanted to get off the car and go to the police car. She thought she could spend the night at the police station. When Swastika opened the door of the vehicle, the accused got hold of her hand and stopped her. He was angry and said that she was going to get him into trouble with the police as he was drunk and driving the car. The accused slapped her several times on her left side chin. He then drove the vehicle. Swastika asked him to drop her at the nearest police station. The accused refused it. Instead, the accused said he could take her to his home, and she could spend the night there. Accused's mother was also at home. He suggested to her that she can sleep on the bed while he could sleep on the couch.
33. When the accused reached home, he parked his car at the gate. Instead of going home, he started to drink beer. He forced Swastika to drink as well. She drank a few glasses; otherwise, she thought he would slap her again. Swastika figured it would be safe if she could go to his

home as his mother also there. Since the accused did not show any interest in taking her home, Swastika said that she needs to visit the toilet.

34. A lady opened the door of the house. Swastika straight away went to the toilet. When she came out, she found the accused was standing outside. He then took her to the bedroom. Once they entered the bedroom, he closed and locked the door. The accused said that he would finish the beer and then go and sleep on the couch. While he was drinking beer, he forced her to drink as well. Hence, Swastika also drank a few glasses of beer. Swastika then went to sleep. The accused also came from her behind and lay down beside her. He then tried to put his face on her and said, let's have sex, and no one will know about it. He tried to come on top of her, which she refused. She used her hands and legs and pushed him away. She used all her strength to push him away. The accused got angry and started to punch on her face and head. They were painful for her. She began to cry and shout for help, calling the mother of the accused. The mother of the accused came and knocked on the door. When the accused opened the door, she asked him why he is hitting the girl. Swastika had pleaded her to save her and let her go. Once the mother left, the accused closed the door again. He was furious and asked Swastika why did she call his mother and made him feel ashamed in front of her. He started to punch her again.
35. In a while, the accused said that he would drop Swastika back home. They then went to the car. She got in the car and seated on the front passenger seat. The accused then told her to go to the back seat. The accused told her to go through the front seats and not to open the door. She managed to go to the back seat through the two front seats. Once she was seated on the backseat, the accused also came to the back seat. She then realized the accused wanted to have sex with her again. Swastika said that only she wanted to go home and was tired and hurt. She had no strength to fight back with him as she did in the bedroom. No one had assaulted her like this before. Swastika thought the best way to get back home was to let the accused to do whatever he wanted and finish it as early as possible.
36. The accused asked her to lie down on the back seat. Half of her body leaned against the door, and the rest was on the seat. The accused then came on top of her and started to kiss her lips.

She did not kiss him back. He pulled her top and the bra and started to kiss and touch her breasts. She felt scared and disgusted. She was crying but did not resist or do anything, and stayed still. The accused then removed her shorts and undergarment, spread her legs. She let him to remove them. He inserted his fingers into her vagina. Afterward, he started to lick her vagina with his tongue. He first licked on the vagina, and then his tongue went into the vagina. You heard Swastika was telling that she did not consent or agree with the accused for him to kiss her breast, put his fingers into her vagina, and then lick her vagina with his tongue.

37. After that, the accused removed his pants and inserted the vagina of the complainant with his penis. Swastika did not do anything and stayed still. She wanted the accused to finish this soon and then go home. The accused ejaculated inside her vagina. He then dressed up and went back to the driver's seat. Swastika also dressed up her underwear and shorts. The accused then told her to come back to the front seat. They then drove back to her sister's home. On their way, the accused apologized to the complainant. He said that he couldn't control himself, and that's why he did this to her. The accused then said that he will drop her a little further from her sister's house. The complainant felt suspicious of whether the accused was trying to take her somewhere else and not to drop at her sister's place. When the vehicle was approaching her sister's home, she opened the door and jumped out of the car. She fell on the road and injured her knees. It was almost the daybreak, and outside was getting lighter.
38. Swastika went to her sister's place and called her sister. Her husband was sleeping at the downstairs flat. When the sister asked her what happened to her, Swastika said it was Shiu. The sister then asked her whether Shiu Chand raped her, for which Swastika said yes. The sister went down and informed her husband. The sister then told Swastika to rest for a while as she looked tired and exhausted. She slept for about one and a half hours. Her husband comforted her. They then went to the police station and reported this matter. Swastika did not get any wash and went to the police as the way she returned home.

39. After making her statement, the complainant went for a medical examination. She told the doctor everything that happened to her and showed her whole body. The doctor then checked her and made a note of them.
40. During the cross-examination, the complainant said that though she did not make any resistance or fight, she did not consent to the accused to penetrate her vagina with his fingers, tongue, and penis. She thought the accused would take her back home when he asked her to go to the back seat. However, she realized that it was not his plan when he also came to the back seat. She then found the accused wanted to have sex with her. Swastika said that she fought hard with the accused using her full strength when he tried to come on top of her in the bedroom. In the car, she had no such power and was weak after receiving punches on her face and head. All those punching and slaps were too much for her. She thought the only way of getting back home was to let the accused to do what he wanted. That was the reason she did not fight back and resist when the accused sexually assaulted and raped her in the car.
41. You may recall the learned counsel for the defence asked the complainant that she had stated in her statement made to the police that the accused slapped on the right side of her chin. During her evidence, she said it was on the left side of her chin. Swastika had explained everything to the police officer when she made the statement. However, she was tired, exhausted, and disturbed when she made the statement to the police.
42. The accused did not make any sexual advances towards the complainant in the car. She realized that he wanted to have sex with her in the bedroom. Swastika had no trust in the boy who brought beer. That's the reason she did not ask for any help from him. Moreover, the accused slapped her after he brought the beer and also after the police vehicle left.
43. The complainant said that she entered the house of the accused on her own free will. She thought that she would be safe as his mother was in the house. Moreover, she got in the car of the accused when they came out of the house because she thought that he would drop her

back home. When she enters the house, she did not ask help from the mother of the accused. The accused was standing next to her when his mother opened the door of the house.

44. You may recall the complainant explained the surrounding of the house as she observed. There were a few houses, but they were on the other side of the road. Swastika said that she was not comfortable with the decision of the accused when he also laid down beside her.
45. The second witness of the prosecution is Pritika Devi. She is the elder sister of the complainant. She came home from her work around 7.30 p.m. on the 17th of January 2019. She then went to her cousin's place. Her sister, sister's husband, the cousin, the cousin's wife, and Pritika's husband were there. The accused was also with them. It was the first time Pritika met the accused. They all were drinking beer. Pritika did not drink but was sitting with the crowd for about two hours. She then went upstairs to sleep. In her sleep, she heard her husband was talking aloud and was angry with something. She went down to the cousin's flat and took him back. The husband was angry. Swastika also followed her to the upstairs. The husband assaulted her as he was angry. Pritika did not see Swastika as her husband assaulted her. In a while, the landlady came and asked her husband to leave the premises. When her husband left the house, she went down to the cousin's place and found Swastika was missing. She learned that Swastika had fought with her husband and walked out of the house. Pritika tried to call Swastika on her mobile phone, but she had not taken it with her. Pritika then took Swastika's daughter and went back to her flat. She thought Swastika would come back after she cools down with her anger.
46. In the early morning, before 6 a.m. Swastika came back straight to Pritika. Pritika found her sister was crying, had a swollen face, bruises marks on her arms, and blood were dripping out from her legs, arms, and knees. It was the first time Pritika saw her sister in such a condition. She asked the sister who did this. Swastika said Shiu. Pritika then asked her whether Shiu Chand raped her, for which Swastika said yes.
47. Pritika made her sister sit down and went to the cousin's place to get her husband. Swastika's husband also came up to her flat. They let Swastika rest for a while as she looked weak and

tired. Swastika rested not less than two hours. They then went to the police station to report the matter, Swastika did not freshen up before going to the police station.

48. The third witness of the prosecution is Salveen Lal. He is the husband of the complainant. Salveen came to Suva on the 17th of January 2019 as he had to attend a few work-related matters. He came with his family. He dropped his wife and daughter at his wife's sister's place and went to attend his affairs. Salveen came back to his sister in law's place around 6 p.m. and then joined with his wife's cousin, who lives at the downstairs and one of his cousin's friend, Shiu Chand to drink beer. Swastika, Veeni, Pritika Devi, and her husband later joined the drinking party. He talked with the accused and exchanged their mobile phone numbers. The drinking party ended with a commotion. The husband of Pritika got drunk and became aggressive. Pritika had to come down and take him up. He was angry. Swastika also went up with them. Salveen then went to have his dinner. When he served food on his plate, Swastika came down, requesting him to go up and save her sister as her husband was going to assault her. Salveen refused to go out, and an argument developed between Salveen and Swastika over it. Swastika pushed the dinner plate, and it fell. Salveen then pushed her away. Swastika fell. When she got up, Salveen expected her to come and fight back. However, she got up and walked out of the home.
49. It is a normal thing in their marriage to walk away by one person when they argued. He thought she would go out and come back when she is settled. However, he found Swastika had gone out of the compound. The accused then said that he will go in his car and look for her. Salveen cannot go in his car as he was drunk. He just walked around and looked for her, but couldn't find her. Swastika had left her mobile phone home.
50. Salveen called the accused twice to check if he had found her. However, the accused said he did not find her and was going to his home. Salveen then fell off to sleep at his cousin's place. In the morning, Pritika came and informed him that Swastika is back. He went up and found her in a horrible condition. Her face was swollen, the hair was untidy, had injuries on her knee, and her blood was dripping. Swastika told him that the accused raped her. Pritika and Salveen then let Swastika rest for a while as she was weak and tired. While she was

resting, Salveen made a call to the accused and inquired about what he had done to Swastika. He told the accused that they would report the matter to the police. After a while, Salveen received a call from the accused, requesting him not to report the matter to the police. The accused said they could discuss and settle the matter. After that call, the accused tried several times to call Salveen, but he did not answer to them.

51. During the cross-examination, Salveen said that he was worried when he could not find his wife in the early hours of the 18th of January 2019, but still had a trust that she would return home. That was the reason; he did not contact the police.
52. The fourth witness of the prosecution is Arinesh Kumar. He is the cousin of the complainant. Arinesh and the accused are friends as he had once worked with the accused. Arinesh met the accused at Nabua on the 17th of January 2019. He wanted to drink beer with Arinesh, but Arinesh was still on his duty. They then arranged to meet at Arinesh's place in the evening. On the morning of the 18th of January 2019, the accused called Arinesh on his mobile phone, requesting him to talk to his sister and settle the matter. Arinesh said that he could not do that.
53. The last witness is Doctor Alanieta. The prosecution tendered a copy of Doctor Alanieta's Curriculum Vitae (CV), containing her qualifications and experiences as the evidence of the prosecution. She explains in her evidence the findings that she made during the medical examination of the complainant. The medical examination took place at the CWM hospital on the 18th of January 2019.
54. You have heard the doctor explained the injuries and the medical findings that she found in the complainant during the medical examination. She said the injuries were most likely less than twelve hours.

### **Right to Remain Silent**

55. After the prosecution case, the court explained the rights of the accused in his defence. The accused opted not to give evidence on oath and exercised his right to remain silent. The accused does not have to give evidence. You must not assume he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing. It does nothing to establish his guilt.
56. I have summarized the evidence presented during this hearing. However, I might have missed some. It is not because they are not important. You have heard every item of evidence and recall yourselves on all of them. What I did only was to draw your attention to the main issues of evidence and help you in remembering yourselves of the evidence.

### **Analysis and Directions**

57. The prosecution alleges the accused had picked the complainant in his car in the early morning of the 18th of January 2019. He then took her to his house. On his way, he had slapped the complainant on her chin. He had assaulted her by punching on her face and head. He had tried to have sexual intercourse with her but failed. He then took her to the car and forced her to lean on the back seat. The accused kissed her lips and breast. Subsequently, he had forcefully penetrated the vagina of the complainant with his finger and then tongue. Afterward, the accused penetrated the vagina of the complainant with his penis without her consent.
58. The accused exercised his right to remain silent. During the cross-examination of the witnesses of the prosecution, especially the complainant, the defence tries to establish the account given by the complainant is not reliable, credible, and probable.
59. The prosecution presented its evidence in the forms of direct evidence, documentary evidence, and expert evidence.



### Direct Evidence

60. In some instances, you may find that some facts can be proved by direct evidence. For example, if there is reliable evidence from a witness who actually saw or felt the accused was committing the offence; or if there is a video recording of such an incident that plainly demonstrates his guilt; or if there is reliable evidence of the accused himself having admitted it, these would all be good examples of direct evidence against the accused.

### Documentary Evidence

61. The evidence presented in the form of documents is considered as documentary evidence. In this case, the prosecution tendered the medical examination report and the Curriculum Vitae (CV) of the Doctor Alanieta as documentary evidence.

### Expert Evidence

62. It is the general rule that witnesses could not give his or her opinion in evidence. A witness could give evidence on what he or she has seen, heard, or felt by his or her physical sense. However, the exception is that the evidence of expert witnesses. Expert witnesses are those who are learned and experts in a particular subject or field with relevant experience. Such witnesses are allowed to give evidence of their opinion.
63. In this case, you have heard the evidence of Dr. Alanieta. She is a medical doctor and gave her professional opinion and finding of the medical examination of the complainant.
64. Expert evidence provides you with scientific and professional information and opinion, which is within the witness' expertise, but which is likely to be outside your experience and knowledge. You should see the evidence of experts in its proper perspective. The Expert evidence assists you to understand the certain physical and medical condition of the complainant.

### **Evaluation of Evidence**

65. To determine the guilty of the accused of these offences, you have to evaluate the evidence. First, you need to determine the reliability and credibility of the evidence given by the prosecution.

### **Reliability of Evidence**

66. You have to satisfy that you could rely on the evidence as true, reliable, and credible evidence. To do that, you have to convince yourself that evidence is free from mistakes, errors, and inaccuracies. If you find the evidence is free from such mistakes, errors, and inaccuracies, you can consider the evidence as reliable evidence.

### **Credibility of Evidence**

67. The assessment of the credibility of evidence focuses on the lies or inaccurate facts that are intentional and motivated attempts to deceive. The credibility of the evidence depends on the individual who gives evidence, his motivations, his relationship to, and the reaction to the particular situation.
68. Evaluation of the reliability and credibility of evidence will assist you in determining what evidence you may accept and what part of the evidence you may refuse. In doing that, you may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.
69. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear, and feel what the witness is talking about in the evidence. You should then find whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Besides, you have to consider the consistency of

the witness, not only with his or her evidence but also with other evidence presented in the case.

70. You have to consider the demeanour of the witnesses, how they react to being cross-examined, and re-examined and were they evasive. That will help you to decide the credibility of the witness and the evidence. You have to keep in your mind that some witnesses are not used to giving evidence in court and may find the different environment in the courthouse distracting.
71. Moreover, you must bear in mind that a witness may tell the truth about one matter and lie about another; he or she may be accurate in saying one thing and not accurate in another thing.

#### **Evaluation of Evidence of Prosecution**

72. As I explained to you, you have to determine whether the evidence given by the complainant is reliable. In doing that, you must carefully consider whether the evidence of the complainant is free from mistakes, inaccuracies, and errors. If you find such or have reasonable doubt of the existence of such mistakes, inaccuracies, and errors, then you can proceed to determine whether such unreliability of evidence has affected the whole or part of the evidence given by the complainant.
73. Likewise, you have to determine the credibility of the evidence of the complainant. In doing that, you have to determine whether the complainant lied, intentionally provided inaccurate facts or intentionally provided facts to deceive. To determine the credibility of the evidence of the complainant, you have to consider the whole of the evidence presented by the prosecution.
74. If you find such or have reasonable doubt of the existence of such lies, intentionally provided inaccurate facts or intended attempts of deceive, you could then proceed to determine

whether such evidence has affected the whole or part of the evidence given by the complainant.

### **Inconsistency and Omissions**

75. You have heard that the learned counsel for the accused cross examined the complainant about the inconsistent nature of the evidence she gave in the court with the statement she made to the police during the investigation. The complainant said the accused slapped her on the left side of her chin when she tried to go to the police vehicle. However, the statement she made to the police states the accused slapped on her right side of the chin.
76. You can consider such inconsistencies and contradictions when you determine the credibility and reliability of the evidence given by the witnesses. However, you have to be mindful that the previously made statements are not evidence of the truth of its contents. The evidence is what a witness testified in the court.
77. 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. A victim of sexual assault may find it difficult to gather every detail immediately after the incident. She or he may struggle to gather herself or himself after encountering a traumatic ordeal of sexual assault. Therefore, you have to be mindful of these practical limitations and conditions when you consider these inconsistencies and omissions.
78. In respect of the inconsistency between the evidence presented in the court and the previously made statement, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is substantial, you will next need to consider whether there is an acceptable explanation for it. If there is a satisfactory explanation for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then you have to decide as to what extent that influences your judgment of the reliability of such witness.

### **Potential Delay**

79. You had heard the complainant took a rest before she went to the police to report the matter. You may recall that the learned counsel for the defence suggested to you to consider the delay in reporting this matter to the police.
80. It is a matter for you to consider and resolve. You have to decide whether it was a delay. If so, then you have to determine whether it was a substantial delay. Then you can proceed to determine whether such a delay would affect the reliability and credibility of the evidence of the complainant.
81. However, it would be wrong to assume that every person who has been the victim of a sexual assault will report it as soon as possible. The experience of the courts is that victims of sexual offences can react to the trauma that they have faced in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response. A late complaint does not necessarily signify a false complaint; likewise, an immediate complaint does not necessarily demonstrate a true complaint.

### **Final Directions**

82. Madam and Gentlemen, I now take your attention to the final directions of the summing up.

### **Count One**

83. Upon consideration of the whole of the evidence adduced during the hearing, if you are satisfied that the prosecution has proven beyond a reasonable doubt that the accused has committed the offence of Rape as charged under count one, you can find the accused guilty of the said offence of Rape.

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

### **Count Two**

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

### **Count Three**

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

### **Count Four**

89. If you are satisfied that the prosecution has proven beyond a reasonable doubt that the accused has committed the offence of Sexual Assault as charged under count four, you can find the accused guilty of the said offence of Sexual Assault.

90. If you are not satisfied or have doubt whether the prosecution has proven beyond a reasonable doubt that the accused has committed the offence of Sexual Assault as charged under count four, you must find the accused not guilty of the said count of Sexual Assault.

#### **Count Five**

91. If you are satisfied that the prosecution has proven beyond a reasonable doubt that the accused has committed the offence of Assault Causing Actual Bodily Harm as charged under count five, you can find the accused guilty of the said offence.
92. If you are not satisfied or have doubt whether the prosecution has proven beyond a reasonable doubt that the accused has committed the offence of Assault Causing Actual Bodily Harm as charged under count five, you must find the accused not guilty of the said count of Assault Causing Actual Bodily Harm.

#### **Count Six**

93. If you are satisfied that the prosecution has proven beyond a reasonable doubt that the accused has committed the offence of Assault Causing Actual Bodily Harm as charged under count six, you can find the accused guilty of the said offence of Assault Causing Actual Bodily Harm.
94. If you are not satisfied or have doubt whether the prosecution has proven beyond a reasonable doubt that the accused has committed the offence of Assault Causing Actual Bodily Harm as charged under count six, you must find the accused not guilty of the said count of Assault Causing Actual Bodily Harm.


#### **Conclusion**

95. Madam and Gentlemen assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for

your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.

96. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



  
R.D.R.T. Rajasinghe  
Judge

**At Suva**

18<sup>th</sup> February 2020

**Solicitors**

Office of the Director of Public Prosecutions for the State,  
Jitendra Reddy Lawyers for the Defence.