

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

**CRIMINAL CASE NO. HAC 192 OF 2018**

**BETWEEN** : **STATE**

**AND** : **SACHIN SHAVNEEL CHAND**

*Counsel* : *Ms. P. Lata for the State*  
*Mr. M. Yunus with Ms. Shafique for the Accused*

*Hearing on* : *06<sup>th</sup> & 08<sup>th</sup> of July 2020*

*Summing up on* : *09<sup>th</sup> of July 2020*

**SUMMING UP**

Lady and gentlemen assessors;

1. It is now my duty to sum up the case to you. Your opinion is much important to me and I will be considering your opinion to a great extent in preparation of my judgment. In a short while, I will direct you on the law that applies in this case. You must accept my directions on law and 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 it coincides with your own reasoning. You are the assessors of facts.

2. As the representatives of the society, your duty here is sacred. Your role is to assist this legal system to serve justice. In doing so, you are guided by two equally important principals of prudence. To wit;

i) If a person has committed an offence, he should be meted out with an adequate punishment.

In other words, if you are sure that the accused has committed the alleged offence, then it is your duty to find him guilty. If an offender goes scot-free, he'll be ridiculing this legal system. It is your duty to not to let that happen.

ii) An innocent person should never be punished.

There is a saying that it is better to let 100 offenders go free than to punish one innocent person. That is, unless you are very sure that the accused has committed the alleged offence, you should not find him guilty.

If any of the said principles are violated, it would amount to a failure of the system, thus you have failed in your duty to the society. Having reminded you of your duty let me proceed.

3. Evidence in this case is what the witnesses said from the witness box inside this court room and the admissions made. As I have stated to you in my opening address, your opinion should be based only on them. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

4. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the Counsel for the prosecution or for the defense are not evidence. A suggestion made by a counsel during the examination of a witness is not evidence unless the witness accepted

that suggestion. The arguments and comments made by counsel in their addresses are not evidence. You may take into account those questions, suggestions, arguments and comments when you evaluate the evidence only to the extent you would consider them appropriate.

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 available 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 anyone else. Your emotions should not 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 behavior when they testified and how they responded during cross-examination. Applying your day to day life experiences 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 none, a part or all 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 that we all may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes a witness may have other concerns when giving evidence. A witness may be worried that the evidence would incriminate him or reveal a safely guarded secret. Or else he/she might honestly forget things or make mistakes regarding what he/she remembers.
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 between the evidence given by different witnesses. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it isn't then you can disregard that inconsistency. 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. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you should not expect a witness to have a photographic memory or 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 the witness is a matter 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 provide 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 a few guidelines. It is up to you, how you assess the evidence and what weight you give to a witnesses' 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 proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that, that inference is the only reasonable inference to draw from the proved facts. If there more than one reasonable inference to draw, against the accused, as well in his favor, based on the same set of proved facts, then you should draw the most favorable inference to the accused.
13. As a matter of law you should remember that the burden of proof always rests on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an 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 a reasonable doubt, for you to find him guilty. That is, you must be sure of the accused person's guilt.
14. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of the offence against the accused, then you must give the benefit of that doubt to the accused and find the accused not guilty. A reasonable doubt is not a mere or an imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in detail in a short while.
15. You are not required to decide on every point the Counsels in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge is proved against the accused.

16. 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 a must.
17. Let us look at the Information. The Director of Public Prosecutions has charged the accused of a count of rape.

**COUNT 1**

***Statement of Offence***

RAPE: Contrary to section 207(1) and (2) (a) of the Crimes Act of 2009.

***Particulars of Offence***

Sachin Shavneel Chand, between the 01<sup>st</sup> day of May 2018 and 31<sup>st</sup> day of May 2018 at Nadi, in the Western Division, had carnal knowledge with Swasthika Sanjeeta Prasad, without her consent.

**COUNT 2**

***Statement of Offence***

CRIMINAL INTIMIDATION: Contrary to section 375(1)(a) (i) and (iv) of the Crimes Act of 2009.

***Particulars of Offence***

Sachin Shavneel Chand, between the 01<sup>st</sup> day of May 2018 and 31<sup>st</sup> day of May 2018 at Nadi, in the Western Division, without lawful excuse and with intent to cause alarm to Swasthika Sanjeeta Prasad, threatened her with a kitchen knife.

18. Now I will deal with the essential elements of the offence of Rape.

Section 207(1) of the Crimes Act reads as;

207. —(1) Any person who rapes another person commits an indictable offence.

Section 207 (2) (a) of the Crimes Act reads as;

(2) A person rapes another person if —

- (a) The person has carnal knowledge with or of the other person without the other person's consent;

19. Accordingly, in this case, to prove the offence of Rape as for the alleged count the prosecution must prove the following elements beyond a reasonable doubt.

- (i) The accused;
- (ii) Penetrated the vagina of Swasthika Sanjeeta Prasad with his penis
- (iii) Without the consent of Swasthika Sanjeeta Prasad; and
- (iv) Either the accused;  
knew or believed that Swasthika Sanjeeta Prasad was not consenting; or  
was reckless as to whether or not she was consenting.

20. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence. This element is not contested in this case.

21. In the second element 'carnal knowledge' means having sexual intercourse or in this case, the penetration of Swasthika Sanjeeta Prasad's vagina; with the accused's penis. The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina of Swasthika Sanjeeta Prasad with his penis, to any extent. This element too was not contested by the accused in this case.

22. 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. This is a contested element in this case.

23. 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;
- i) by force; or
  - ii) by threat or intimidation; or
  - iii) by fear of bodily harm; or
  - iv) by exercise of authority.
24. 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.
25. It is not difficult to understand what is meant by the words "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.
26. Please 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 upon relevant proven facts and circumstances.

27. If you find a reasonable doubt in respect of any of the above, you shall find the accused not guilty of the count of Rape.
28. The Court at the conclusion of the prosecution case having considered the application by the defense under section 231 (1) of the Criminal Procedure Act, held that the prosecution has failed to adduce sufficient evidence covering the elements of the 2<sup>nd</sup> count, acquitted the accused of the same. Therefore, you should only be concerned of the 1<sup>st</sup> count against the accused.

#### **Summary of Evidence**

29. The PW1, Swasthika Sanjeeta Prasad is the main witness for the prosecution. The law requires no corroboration. Therefore you can act on the evidence of a sole witness. However, my direction is that if you are to rely on a sole witnesses' evidence you must be extremely cautious of the credibility and the dependability of such evidence. Her evidence is that;
  - i) Presently she is 18 years old and is a student of Ratu Navula College.
  - ii) She is residing with her father as her mother has passed away on the 06<sup>th</sup> of May, 2018.
  - iii) The house she live-in, consists of a bedroom, living room, a kitchen and a wash room. The living room is partitioned and there is a small porch outside.
  - iv) In 2018, she was attending Votualevu College and she was in year 10. She has come to know of Sachin the accused through the facebook and has had a relationship with him for about 2 months. They have communicated through messenger app and phone calls.

- v) One night in May, 2018 she had been studying and at about 1.00am she has had a wash and a change. As soon as she came out of the wash room, she has received a call from the Accused. He has said that he is in the porch of her house and to open the door. She has got a shock thinking how he has come without informing her. Then Sachin has started to swear at her and asked her to open the door. She has opened the door and Sachin came in and sat there on a chair beside the door and has said her to just relax, he came to see her and he will go back after just seeing her.
- vi) While she was talking to him, he has stood up and kissed her. Then he has pushed her down on to the floor. He has taken a knife out of his pocket and threatened her to cooperate with him or else he will kill her. Having said that he has kneeled down and pulled up her skirt. Though she tried to stop him he has pushed her hands back. Then he has threatened her that she has to cooperate otherwise he will kill her and will arrange a Fijian man to kill her father. Then he kept the knife just by the side and having held her legs by his hips and holding both her hands has inserted his erected penis into her vagina. When she asked him to not to do it, he has asked her to keep quiet and not to shout and if she shouts he will kill her. Having had sex for quite some time, he has just got up and left her while she was laying there.
- vii) She had been in pain and could not move for some time. When she managed to get up she has gone to the wash room but has not tell anyone as Sachin has threatened that he will kill her or her dad. Her dad was at home while all this happened, sleeping in the bedroom. Sachin has had sexual intercourse with her in the living room and she states that she did not consent to it. After this incident, Sachin has left her but has called her and threatened her. She did not complain to anyone as she was threatened and was scared.
- viii) When she came to know that she is pregnant, she has informed all that happened with her to her dad. That was long time after the incident.

When her tummy started to show, she has quitted school. Long thereafter she has told her aunt and her aunt has sent her a pregnancy tester. When she tested positive for pregnancy, she has told her dad.

- ix) Her dad was really disappointed and they have gone to the police station to report the matter. That was in the month of August 2018. Then her statement was taken and sent her for a scanning to the Nadi Hospital. She has given the scan report to the police. She has not told of this to anyone at school. When she knew that she was pregnant, she has called Sachin and informed him that whatever he did, she has got pregnant now. Her relationship with Sachin has lasted for about 2 months. She has started this relationship when her mother was alive. This is the only occasion they have had a sexual contact. She identifies the Accused as Sachin. Prior to this she has met him once in town.

30. In answering the cross examination by the counsel for the accused, the witness states;

- i) Her house is by the road and there are 3 houses in that compound. One house is about 15 feet away and the other is about 40-50 feet away.
- ii) Her birthday falls on 4<sup>th</sup> of May and her mother passed away on the 6<sup>th</sup> of May 2018. She was over 16 years when the alleged incident took place.
- iii) She states that she has told her aunty of the incident. However she has not stated so to the police. Her explanation was that by the time she made the complaint to the police she had mood swings and was in a trauma and therefore she did not mention it to the police.
- iv) Her own elder sister lives in about 10-12 minutes' walk away from her place. She was married by 2018 had had 2 kids. The witness visits her about twice a week but has not told her anything as she is married and has her own problems.

- v) She admits that Sachin called and asked to meet her, but they never met and every time she refused to meet him. She further admits that Sachin ended the relationship after they have had sex.
- vi) The witness denies the suggestion that Sachin came to her house on 8 different occasions and had sex with her on 5 days.
- vii) The witness admits that before opening the door Sachin threatened her that if she doesn't open the door he will have her father assaulted by a Fijian man. Further, she states that when he said that he will see her and go back she trusted him.
- viii) When Sachin pushed her, she has fallen on the tile floor and suffered injuries. She has not told that to the police as at the time she gave the statement, she was not in her proper mind.
- ix) Sachin ended the relationship in May 2018. She became aware of her pregnancy in August 2018. She has given her statement to the police on the 13<sup>th</sup> of October 2018. It was after about 5 months from the alleged incident. It has taken so long because Sachin used to threaten her and blackmail her.
- x) Answering the cross examination further, she states that Sachin did not threaten her after the alleged incident but she assumed so. Further, when Sachin was in the porch and asked her to open the door, she refused and denied to open the door. She admits that she has not mentioned such to the police. Her explanation was she was traumatized then. It should be noted that she gave her statement nearly after 5 months of the incident and you should consider the possibility and the acceptability of her explanation that she being traumatized still.

31. In answering the re-examination by the prosecuting counsel, the witness states that;

- i) This was the first time she has had sexual intercourse in her life. She admits that this happened 2 days after having her menses.

- ii) She has not mentioned to the doctor that Sachin threatened to kill her or her father.
  - iii) She states that after the alleged incident Sachin called and disturbed her on 2-3 days. By this she contradicts her earlier evidence. Further, she states that she never called him after the alleged incident. Later again she contradicts it by stating that she called him when became aware of her pregnancy. You may consider the reliability and the acceptability of this evidence and may give it an appropriate weight.
32. The PW2 was Mr. Rajendra Prasad. He is the father of the PW1. His evidence was that;
- i) He lives with his daughter Swasthika since his wife passed away in May 2018.
  - ii) During the harvesting period, he leaves home by 4.00am and returns home by 8.00pm. During the rest of the times he goes to work at around 8.00am and returns home by around 5.00pm.
  - iii) When he come home, he takes a shower, have his dinner and goes to bed.
  - iv) He has come to know of her daughter Swasthika's pregnancy, when he came home around 10.00pm she has told him "*papa I am a very bad daughter of yours because I got pregnant*". Having said so, she has started crying.
  - v) He has asked her to stop crying, consoled her and said *we'll see what happens and we will go to the police station to see what could be done*.
  - vi) He has gone to the police station because he thought of informing the police so that they will not feel shameful in front of the public.
  - vii) When his daughter got pregnant, he has thought that she might commit suicide and to avoid that he has informed it to the police.
  - viii) When she told him that she is pregnant, he has not asked anything more from her. She has not told him how she got pregnant.

- ix) In answering the cross-examination, he states that he did not inform to the police that Swasthika has slept with Sachin and got pregnant.
33. With leading the evidence of PW1 and PW2, the prosecution closed their case. Court being satisfied that on the face of it, the prosecution has failed to adduce sufficient evidence in respect of the 2<sup>nd</sup> count allowed the *No case to answer* application submitted on behalf of the accused and acquitted him of the 2<sup>nd</sup> count. Since the prosecution has adduced sufficient evidence covering the elements of the alleged 1<sup>st</sup> count, court decided to call for a defense, acting under the virtue of section 231(2), of the Criminal Procedure Act, explaining and giving his due rights to the accused.
34. The accused having understood his rights elected to remain silent and not to call any witnesses on his behalf. That is his constitutional right and you should not draw any adverse inference from it. It should be remembered that the accused need not prove anything and proving the guilt of the accused beyond a reasonable doubt always remains with the prosecution.
35. That was a summary of the evidence given by the witnesses. Please remember that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I did not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think appropriate. As I have already explained, which evidence you would accept and which evidence you would not accept is a matter for you and you alone to decide.
36. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proven and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offences have been

proven beyond a reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.

37. The Accused has indicated his stance and it was that the sexual intercourse they had was done with the consent of Swasthika. In other words he denies committing rape. Even in case you do not accept the accused's stance as true, you should not consider it in-order to strengthen the prosecution case. The accused need not prove that he is innocent. A person may lie as sometimes as it is easier than telling the truth. Therefore even you decide to not to accept the accused's stance, you should not use it to overlook the weaknesses of the prosecution case if any.
38. With the submission of the accused's stance, one of the three situations given below would arise;
- (i) You may accept his stance and, if so, your opinion must be that the accused is 'not guilty'.
  - (ii) Without necessarily accepting his stance you may think, 'well what he says could be true'. If that is so, it means that there is a doubt in your mind and if you can reason it out in your mind, and call it a reasonable doubt, again your opinion must be 'not guilty'.
  - (iii) The third possibility is that you reject his stance. But, that itself does not make the accused guilty. Then the situation would then be that you should consider whether the prosecution has proved all the elements beyond a reasonable doubt. If the prosecution has proved all the necessary elements of the offence and also you reject the accused's stance only, you should find the accused guilty of the alleged count.
39. Any re-directions? *none*

40. Lady and Gentleman Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. When each of you have reached your separate opinion, you will come back to court and you will be asked to state your opinion.

41. Your opinion should be;

Whether the accused is guilty or not guilty of the alleged count of Rape.



**Chamath S. Morais**

**JUDGE**

*Solicitors for the State* : *Office of the Director of Public Prosecutions, Lautoka*  
*Solicitors for the Accused* : *MY LAW*