

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

**Crim. Case No: HAC 287 of 2017**

**STATE**

**v.**

**NEMANI MUSUDOLE**

**Counsel:** Ms. U. Tamanikaiyaroi and Ms. L. Bogitini for State  
Mr. F. Vosarogo for Respondent

**Date of Summing Up:** 28<sup>th</sup> February 2018

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**SUMMING UP**

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1. The name of the Complainant is suppressed. She is referred to as "AB".
2. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. You will then retire to consider your respective opinions.
3. Our functions are different. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
4. You are to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

5. 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 it unless it coincides with your own independent opinion.
6. 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 purposes of the opening address by the learned counsel for the prosecution is not evidence, it is to outline the nature of evidence intended to be put before you. The closing addresses of the counsel of the prosecution and the defence are 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.
7. 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 the course of this trial. Ensure that no external influence plays a part in your deliberation. As judges of facts you are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own conclusion or form 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 I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I form and deliver my judgment.
8. 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 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. It is your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

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

9. 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 is guilty for the offence.
10. 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.
11. The standard of proof in criminal trial is "proof beyond 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 reasonable doubt. If you found 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 favour of the accused person.

### **Information and the Elements of the Offences**

12. The accused is charged with one count of Rape, contrary to Section 207 (1) (2) (b) and (3) of the Crimes Act and two counts of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act. The particulars of the offences are before you. Therefore, I do not wish to reproduce them in my summing up.
13. At the conclusion of the prosecution's case, the third count was dismissed and the accused was acquitted from it. Therefore, you are only required to consider the first count of Rape and second count of Sexual Assault as stated in the information.

### **First Count**

14. Section 207 (1) and (2) (b) and (3) of the Crimes Act states that:

*A person rapes another person if—*

- b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or*
- c) .....*
- iv) for this section, a child under the age of 13 years is incapable of giving consent.*

15. Accordingly the main elements of this offence of Rape are that:

- i) The Accused,
- ii) Penetrate the anus of the Complainant with his finger.

16. The Complainant was five years old at the time of this offence took place. The defence has not disputed the age of the Complainant. Hence, she is incapable of giving consent to any form of penetration as described in Section 207 (1) (a) and (b) of the Crimes Act.

#### **Agreed Facts**

17. I now take your attention to the agreed facts. They are the facts that the Prosecution and the Defence agreed on without any dispute. Hence, you are allowed to consider the agreed facts as proven facts beyond reasonable doubt by the Prosecution.

#### **Penetration**

18. Let me allow to explain you the element of penetration. Evidence of slightest penetration of the finger of the accused into the anus of the Complainant is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

#### **Alternative Counts**

19. If you find the accused did not penetrate the anus of the Complainant with his finger as charged, you are then allowed to consider a lesser alternative count of "Attempt to

Commit Rape, though it is not formally charged in the information. The main elements of the offence of "Attempt to Commit Rape" are that:

- i) The accused,
  - ii) Attempt to penetrate the anus of the Complainant with his finger.
20. In respect of the element of Attempt, you have to consider two things. First is that whether he intended to penetrate the anus of the Complainant with his finger. The second is that, with that intention, whether he did something which was more than mere preparation for committing that offence. It is for you to decide whether what he did was more than mere preparation.
21. Accordingly, you have to be satisfied that the accused had an intention to penetrate the anus of the Complainant with his finger and with that intention he touched the backside of the Complainant.
22. If you find that the accused is neither guilty for the offence of Rape nor the offence of Attempt to Commit Rape, you are still allowed to consider another alternative count, that is Sexual Assault though it is not formally charged in the information. The main elements of the offence of Sexual Assault are that:
- i) The accused,
  - ii) Unlawfully and Indecently,
  - iii) Assault the victim.
23. The word "unlawfully" simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act as indecent. It is your duty as Assessors to consider and decide whether the act of touching of the backside of the Complainant by the accused with his finger is an indecent act, making it a sexual assault.

### Second Count

24. I now take your attention to the second count; that is Sexual Assault. The main elements of the offence of Sexual Assault are that:

- i) The accused,
- ii) Unlawfully and Indecently,
- iii) Assault the Complainant.

25. The word "unlawfully" simply means without lawful excuse. An act is an indecent act if right-minded persons would consider the act as indecent. It is your duty as Assessors to consider and decide whether the accused had indecently licked the vagina of the Complainant with his tongue, without any lawful excuse.

### Separate Consideration of Each Counts

26. The accused is charged with two separate counts. One count of Rape and one count of Sexual Assault. It is your duty to consider each of these two counts separately. If you find the accused guilty for one count that does not automatically make him guilty for the remaining count for which he is charged with.

### Evidence of Corroboration

27. 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 and truthful; you are not required to look for any other evidence to support the account given by the Complainant.

28. 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, it is important that you must leave behind such assumptions as there is no stereotype of circumstances for a rape, a rapist or a victim of rape.

29. Offences of this nature can take place in any circumstance between any kinds of persons, who act 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 from the witnesses and the exhibits during the course of the hearing.
30. It is your duty as judges of facts to assess the evidence in order to determine whether the prosecution has proven the charges beyond reasonable doubt. In doing that, you must be mindful that 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 own way of coping with such incident. Some may display obvious 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 Prosecution**

31. Let me now remind you the evidence presented by the prosecution during the course of the hearing.
32. The Complainant in her evidence said that Nemani, the accused took her inside the toilet when her mother gone to the shop to buy diapers for her father. Her father was awake and sitting inside the bedroom. The accused then made her sit down and licked her vagina with his tongue. She said that he licked outside the vagina. However, she later said that he licked inside her vagina. The accused then touched her backside with his fingers. She used the word that he touched her "bum". According to the evidence given by the Complainant, the accused had touched inside her "bum". She felt sour when he put his finger.
33. The mother of the Complainant, in her evidence said that she found the Complainant was missing when she came back from the shop. She had called her several times. While she was standing beside the door of the kitchen, she saw the accused was coming out of the toilet. He came through the main entrance of the toilet. The toilet and the

bathroom are located inside the house. The extension of the toilet was still not completed; therefore, it was covered with tarpaulin. The mother had asked the accused whether he saw the Complainant. The accused had replied, saying that the Complainant was at the back of the toilet, near the mango tree. At the same time, the mother saw the Complainant was coming out of the toilet through the tarpaulin. When the Complainant saw her mother, she cried and ran towards the direction of the shop. The mother went and brought her back home. The Complainant looked like lost and shocked.

34. The doctor in her evidence explained the specific medical findings that she found during the medical examination of the Complainant. She has found bruises on both sides of *labia minora*. According to the medical opinion given by the Doctor, such bruises could not have caused by the touching of tongue. The Doctor further explained that such wound that she noticed around *labia minora* could have caused if a finger entered into the anus of a small child as of the complainant. At such a small age, the distance between the *labia minora* and the anus is very close. Therefore, an injury that applies on anus can also reach to the *labia minora*.
35. Moreover, the Doctor has noted bruises at 12 o'clock angel, close to perineum. Such bruises could have caused by an erected penis or a finger. According to her evidence, such wound could last for seven days before it heals. She further said that the bruises that she noticed in the Complainant would have occurred anytime between 10<sup>th</sup> to 14<sup>th</sup> of September 2017.
36. You may recall the evidence given by DC Aceni Toga, He has conducted the caution interview of the accused. DC Toga in his evidence explained the manner he recorded the interview of the accused. It was recorded in the computer. The record was later printed out and given to the accused to sign. At the question 63 of the interview, the accused was given an opportunity to read the record of the interview. The accused had declined it, saying that he had already read it while it was being typed. The accused had further stated in the caution interview, that he does not want to make any alteration or deletion to the record.



37. After the conclusion of the caution interview, the accused was escorted back to the cell, where he was locked up. DC Toga said that he locked the accused in the cell for the safety reasons. After that he had attained to compiling the docket of this case. He then obtained the printout of the record of the caution interview and gave it the accused to sign while he was locked up in the cell. The caution interview was concluded at 2:55 p.m. However, the printed copies of the record of the interview were given to the accused to sign after three hours of the conclusion of the recording of the interview. The accused had signed it without reading it.

### **Evidence of the Defence**

38. At the conclusion of the prosecution's case, the accused was explained about his rights in defence. The accused opted not to give evidence.
39. The accused does not have to give evidence. You must not assume that 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.

### **Analysis**

40. The prosecution adduced evidence in the forms of direct, circumstantial, documentary and expert evidence.

### **Direct and Circumstantial Evidence**

41. Ladies and gentleman assessors, let me now explain you the direct and circumstantial evidence.
42. 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.

43. On the other hand, it is often the case that direct evidence of all the elements of a crime are not available, and the prosecution relies upon circumstantial evidence to prove certain elements. In this case, the Complainant only said that the accused touched inside her back with his finger. She used the word "bum" in order to explain the backside of her body. She further said that the accused licked her "pipi" with his tongue. You may recall that she demonstrated it, pointing out her hand in between her thighs.
44. The mother of the Complainant, in her evidence said that the Complainant used the word of "bum" in order to refer the anus, and uses the word of "pipi" to refer her vagina. Moreover, the mother has seen the Complainant was coming out of the toilet, through the backside of the tarpaulin, just after the accused came out of the same toilet through the normal entrance. The Complainant ran towards the direction of the shop, when she saw her mother. The Complainant was crying and looked shocked.
45. Meanwhile, Doctor in her evidence explained that she noticed bruises on the both side of *labia minora* and also at 12 o'clock angle close to perineum. Such bruises could have caused by an erected penis or a finger. According to her evidence, such wound could last for seven days before it heals. The Doctor further explained that such wound that she noticed around *labia minora* could have caused if a finger entered into the anus of a small child as of the complainant. At such a small age, the distance between the *labia minora* and the anus is very close. Therefore, an injury that applies on anus can also reach to the *labia minora*.
46. The prosecution relies upon the evidence given by the Complainant, Doctor Elvira and the mother of the Complainant in order to establish the element of penetration in to the anus by the accused with his finger. That simply means that the prosecution is relying upon evidence of various circumstances related to the crime and the accused, which the prosecution says, when taken together will lead to the sure conclusion that it was the accused who committed this crime.

47. Circumstantial evidence can be powerful evidence, indeed, it can be as powerful as, or even more powerful than, direct evidence, but it is important that you examine it with care, as with all evidence, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt, or whether on the other hand it reveals any other circumstances which are or may be of sufficient to cast doubt upon or destroy the prosecution case.
48. Finally, you should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them.

### Documentary Evidence

49. The evidence presented in the form of documents is considered as documentary evidence. In this case, the prosecution tendered two documentary evidence, they are the record of the caution interview given by the accused and the medical report prepared by Doctor Elvira upon the examination of the Complainant.

### Expert Evidence

50. It is the general rule that witnesses are normally not allowed to give opinion and only allow to give evidence on what they have seen, heard, or felt by their 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.
51. In this case you have heard the evidence of Dr Elvira Ongbit. She is a medical doctor and gave her professional opinion about the injuries sustained by the Complainant.
52. Expert evidence is permitted in a criminal trial to provide 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. It is by no means unusual for

evidence of this nature to be called; and it is important that you should see it in its proper perspective, which is that it is before you as part of the evidence as a whole to assist you with regard to the injuries, the physical and medical condition of the Complainant subsequent to this alleged offence.

53. With regard to these particular aspects of the evidence you are not experts; and it would be quite wrong for you as assessors to attempt to and/or to come to any conclusions on those issues on the basis of your own observations or experiences. However you are entitled to come to a conclusion based on the whole of the evidence which you have heard, and that of course includes the expert evidence. You should bear in mind that, having carefully considered, if you do not accept the evidence of the expert, you do not have to act upon it.

#### **Presentation of the Evidence of the Child Complainant**

54. You have seen that the Complainant gave evidence from a special room via Skype. She was accompanied by one of the court staffs, who assisted her in giving evidence. Giving of evidence in this way is perfectly normal in cases like this. It is designed to enable the witness to feel more at ease when giving evidence. It is not intended to prejudge the evidence which the witness gives. The fact that the evidence has been given in that manner, must not in any way be considered by you as prejudicial to the accused.

#### **Evaluation of Evidence**

55. Ladies and Gentleman assessors, I now kindly request you to draw your attention to the directions on evaluation of evidence. It is your duty to determine this case based on the evidence. In doing that, you are required to evaluate the evidence in order to determine the credibility, reliability and truthfulness of them. That will assist you to determine 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.

56. Moreover, you must bear in your 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.
57. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking in the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with his or her own evidence but also with other evidence presented in the case.
58. It is your duty to consider the demeanour of the witnesses, how they react to being cross examined and re-examined and were they evasive, in order to decide the credibility of the witness and the evidence.

#### **Evidence of the Child Complainant**

59. The most important part of your task is to judge whether the child witness has told the truth, and has given a reliable account of the events that she was describing. Some of you will have children and grandchildren who are of a similar age to the complainant. If so, I think you will recognize the sense of the advice I am going to offer you about your judgment of the evidence of the child complainant, but remember that I am speaking only about an approach to consider the evidence. Still the evaluation of the evidence is your responsibility. You do not have to accept my advice and if you do not agree with it you should reject it.
60. Children do not have the same life experience as adults. They do not have the same standards of logic and consistency, and their understanding may be severely limited for a number of reasons, such as their age and immaturity. Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult. Children may not fully understand what it is that they are describing, and they may not have the words to describe it. They may, however, have come to realize that what they are describing is, by adult standards, bad or, in their perception, naughty. They may be

embarrassed about it, and about using words they think are naughty, and therefore find it difficult to speak.

61. Experience has shown a number of things. A child may not fully understand the significance of activity which is sexual and that may be reflected in the way they remember it or describe it. A child's perception of the passage of time is very likely to be different from that of an adult. A child's memory can fade even in the short term. When recounting events later, even a fairly short time later, a child's recall of when and in what order events occurred may not be accurate. She may well not be able to speak of the context in which those events occurred. A child may have particular difficulty dealing with conceptual questions such as how she felt some time ago, or why she did or did not take a particular course of action.
62. Remember how you normally talk to children of this age. You should bear those difficulties in mind when you consider the answers given by the child complainant. All decisions about the evidence are for you to make.

### **Delay in Reporting**

63. You may recall that the learned counsel for the Defence suggested to you to consider the two days of delay in reporting this matter to the police could make less likely that the complaint made against the accused was true. It is a matter for you to consider and resolve. However, it would be wrong to assume that every person who has been the victim of a sexual assault or close family member of such a victim, will report it as soon as possible. The experience of the courts is that victims of sexual offences and their relatives 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.

### Caution Interview of the Accused

64. I now draw your attention to the caution interview of the accused, which is tendered by the prosecution as prosecution exhibit one.
65. The prosecution presented in evidence the record of the caution interview of the accused. The prosecution contends that the accused in fact made an admission that he licked the vagina of the Complainant with his tongue. Moreover, the accused has denied that he penetrated the vagina of the Complainant with his finger. In question number 43, 44 and 45 of the caution interview the accused has admitted that he licked the vagina of the Complainant. The Prosecution further presented evidence to establish that those admissions of the accused have been recorded in the caution interview accurately and truly. The prosecution says the accused was treated well and he gave those answers in the caution interview freely and voluntarily. The Interviewing Officer in his evidence said that he recorded those answers in the caution interview. According to the evidence given by the Interviewing Officer, the accused was given an opportunity to read the record of the interview. However, the accused had declined it, saying that he had already read it while it was being typed.
66. Meanwhile the learned counsel for the defence proposed you to consider the time difference between the conclusion of the caution interview and the signing of the printed copy of the caution interview. He further submitted that the accused was never given an opportunity to read the printed record of the caution interview before he put his signature. Therefore, the learned counsel suggested you to put a less or no weight in the confession made by the accused in the caution interview.
67. In order to determine whether you can safely rely upon the admissions made by the accused in the caution interview, you must decide two issues.
68. Firstly, did the accused in fact make this caution interview? Having considered the evidence presented during the course of the hearing, if you are not satisfied or not sure of that the accused has actually made this caution interview, you must ignore the admission made in the caution interview.

69. Secondly, if you are satisfied, that the accused has made this caution interview, then it is for you to decide whether the contents of the caution interview are truthful, and what weight you give them as evidence. It is for you to decide whether you consider the whole of the caution interview or part of it or none of it as truthful and credible. You must consider all other evidence adduced during the course of the hearing in deciding the truthfulness and the reliability of the confessions and its acceptability.

### Final Directions

70. Ladies and gentleman, I now take your attention to the final directions of the summing up.
71. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged, you can find the accused guilty for the said offence of Rape.
72. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Rape as charged, you must find the accused is not guilty for the said count of Rape.
73. If you find him not guilty for the offence of Rape, you are then allowed to consider the alternative count of Attempt to Commit Rape. If you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Attempt to Commit Rape, you can find him guilty of the alternative count of Attempt to Commit Rape.
74. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Attempt to Commit Rape, you must find the accused is not guilty for the said count of Attempt to Commit Rape.



75. If you find him not guilty for the offence of Rape and Attempt to Commit Rape, you are then allowed to consider the second alternative count of Sexual Assault. If you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault, you can find him guilty of the second alternative count of Sexual Assault.
76. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault, you must find the accused is not guilty for the count of Sexual Assault.
77. Likewise, in respect of the second count, if you are satisfied that the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault as charged, you can find the accused guilty for the said offence of Sexual Assault.
78. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the accused has committed the offence of Sexual Assault as charged, you must find the accused is not guilty for the said count of Sexual Assault.

### **Conclusion**

79. Madam and Gentleman 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.

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



  
R.D.R.T. Rajasinghe  
Judge

At Suva  
28<sup>th</sup> February 2018

Solicitors  
Office of the Director of Public Prosecutions for the State  
Mamlakha lawyers for Defence.