

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 155 OF 2013

BETWEEN : STATE

AND : VISHAL KRISHNA

Counsel : Ms. J. Fatiaki for State
Ms. Volau for the Accused

Date of Hearing : 16th - 17th of August 2016

Date of Closing Submissions : 17th of August 2016

Date of Summing Up : 23rd of August 2016

SUMMING UP

1. The name of the victim is suppressed.
2. It is my duty to sum up the case to you. 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.
3. You are to determine the facts of the case based on the evidence adduced during the course of the hearing. 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.

4. I may comment on the facts if I think it will assist you when considering the facts. However you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard my comments on the facts unless it coincides with your own independent opinion. I say so because you are the sole judges of the facts.
5. You all have been chosen from the community and represent a pool of common sense, knowledge and experience of the conduct of human beings in our community. Accordingly, you are required to use your experience, common sense and knowledge of the community and the conduct of human in your deliberation of facts of this case.
6. You must reach your opinion only on evidence. Evidence is what the witnesses said from the witness box, documents and other materials received as exhibits and agreed fact. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The opening address of the learned counsel of the prosecution is not evidence. The purpose of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. The closing addresses of the counsel of the prosecution and the accused 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 testimonies, agreed facts and

the exhibits put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation.

8. 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 your opinion will assist me in reaching my judgment.
9. Moreover, 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.
10. Matters which will concern you are the credibility of the witnesses, and the reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. 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. You can accept part of a witness's evidence and reject other parts. 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.

11. 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 then should 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.
12. It is your duty as judges of facts to consider the demeanor of the witnesses, how they react to being cross examined and re-examined, where they evasive, in order to decide the credibility of the witness and the evidence.

Burden of Proof and Standard of Proof

13. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until his is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused is guilty for the offences.
14. 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. Accordingly, the burden of proof rest on the prosecution throughout the trial and it never shifts to the accused. In other words there is no burden on the accused to prove his innocence, as his innocence is presumed by law.
15. 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

16. The accused is being charged with one count of Indecent Assault, two counts of rape and one count of sexual assault. The particulars of the offences are before you. Therefore, I do not wish to reproduce them.
17. The prosecution alleges that the accused has committed these four offences on the victim between 1st day of April 2012 and 1st day of May 2013. In respect of the first count, the prosecution alleges that the accused touched the breast of the victim while she was revising her notes in her bed room. In respect of the second and third count, it has been alleged that that accused came behind the victim while she was cleaning the bed room of her aunty and pushed her on to the bed. He then unbuttoned her top and lifted her skirt. The accused then indecently rubbed his penis on her vagina. He then inserted his penis into the vagina of the victim without her consent. In respect of the fourth count, the prosecution alleges that the accused came to the victim while she was sleeping in her room in the night and inserted his finger into her vagina without her consent.
18. The accused in his evidence denies all these allegations and states that he never done such things to the victim.

19. I now draw your attention to the main elements of the four offences as charged in the information.
20. The main elements of the offence of Indecent Assault are that;
 - i) The Accused,
 - ii) Unlawfully and Indecently Assault,
 - iii) The victim,
21. The prosecution and the defence have agreed that the victim was fourteen years old at the time of these alleged offences took place. Accordingly, the consent of the victim to the indecent act is not a defence for the accused.
22. Assault means any form of hostile or adverse act done towards the victim. If such hostile or adverse act was done on the victim without any lawful reasons and accompanied by any form of socially unacceptable conduct, then the accused has committed an offence of Indecent Assault. Indecent means unbecoming, immodest and obscene.
23. The main element of the offence of rape charged under the second count are that;
 - i) The Accused,
 - ii) Penetrated into the vagina of the victim with his penis,
 - iii) The victim did not consent to the accused to penetrate into her vagina with his penis,

iv) The Accused knew the complainant was not consenting for him to insert his penis in that manner.

24. I will explain the elements of this offence in detail in a while.

25. I now take your attention to the main elements of the offence of Sexual Assault, the third count charged in the information. Sexual Assault is an aggravated form of indecent assault.

i) The accused,

ii) Unlawfully and indecently assault the victim, or,

iii) Procures the victim, without her consent -

a. to commit an act of gross indecency,

b. to witness an act of gross indecency by the accused or any other person,

26. In this instant case, the prosecution alleges that the accused rubbed his penis on the vagina of the victim. Accordingly, you have to consider whether the prosecution satisfied you beyond reasonable doubt that the accused unlawfully and indecently touched any part of the body of the victim with any part of his genitalia.

27. The main element of the fourth count of rape as charged in the information are that;

i) The accused,

ii) Penetrated the complainant's vagina with his finger,

iii) Without the consent of the complainant, and

iv) The accused knew the complainant was not consenting for him to penetrate in that manner.

28. I kindly request you to draw your attention to the agreed fact, 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 fact by the prosecution beyond reasonable doubt.

29. The prosecution and the defence have agreed that the accused and the victim are related as uncle and niece. The accused is the elder brother of the victim's father. They lived in the same house during the period material to this matter. The accused completely denies this allegation. Hence, it is the onus of the prosecution to prove beyond reasonable doubt that it was the accused who committed these crimes as charged in the information.

30. The prosecution has charged the accused with four counts. As judges of facts, you are required to consider each and every counts separately. If you found the accused is guilty of one count, that does not automatically make him guilty for the remaining counts.

31. I now draw your attention to the element of penetration. Evidence of slightest penetration of the penis of the accused and/ or his finger in to the vagina of the victim is sufficient to prove the element of penetration. Hence, it is not necessarily required to adduce the evidence of full penetration.

32. Let me now draw your attention to the issue of consent. It is your duty to decide whether the prosecution has proven beyond reasonable doubt that the victim did not give her consent to the accused to insert his penis and/ or his finger into her vagina as charged in the second and fourth counts.
33. Consent is a state of mind which can take many forms from willing enthusiasm to reluctant agreement. In respect of the offence of rape, the victim consents only, if she had the freedom and capacity to voluntarily make a choice and express that choice freely. A consent obtained through fear or by threat or by exercise of authority or 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 victim to an act of another person shall not alone constitute consent.
34. The victim must have the freedom to make the choice. It means that she must not be being pressured or forced to make that choice. Moreover, the victim must have a mental and physical capacity to make that choice freely. The consent perhaps may be limited to some sort of sexual or intimate activities but not for another form of sexual activity. The consent can be withdrawn at any time. The consent is an ongoing state of mind and is not irrevocable once given.
35. If you are satisfied, that the accused had inserted his penis into the vagina of the victim and she had not given her consent, you are then required to consider the last element of the offence, that is whether the accused honestly believed that the victim was freely consenting for this alleged sexual intercourse. I must advise you that belief in consent is not the same thing as a hope or expectation that the victim was consenting. You must consider whether the accused knew either that the victim was not in a condition or a position to make a choice freely and

voluntarily, or the victim had made no choice to agree to sexual intercourse. If you conclude that the accused believed that the victim was consenting, you must then consider whether such belief of the accused was reasonable under the circumstances that was prevailed at the time of the alleged incident took place.

36. You must bear in mind that offences of sexual nature do not need the evidence of collaboration. It means that if you are satisfied with the evidence given by the victim and accepts it as reliable and truthful, you are not required to look for any other evidence to support the account given by the victim.
37. 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 or a rapist or a victim of rape.
38. 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.
39. It is your duty as judges of facts to assess the evidence in order to determine whether the victim gave her consent to the accused for this alleged sexual intercourse. 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. Demeanor of the victim in the court while giving evidence is not necessarily a clue to the truth of the victim's account.

40. Let me now remind you the evidence presented by the prosecution and the defence during the course of the hearing.

Evidence of the Prosecution

41. The first witness of the prosecution is AA. She is the victim of this case. She is now living with her aunty, uncle Russell who is the partner of her aunty and her two cousins. She is attending at Votualevu College and in the year 13.
42. In the year of 2012, she was living with her uncle Vishal Krishna the accused of this case, her aunty and two cousins at Cuvu, Naidovi. She was fourteen years old at that time. Her mother has passed away. Father was living with her stepmother. They all were living in one house, that was partitioned into two units. One unit was occupied by her uncle and his family, and other unit was occupied by her father. She was initially living with her father. However, her aunty asked her to live with them as her step-mother was ill treating her. Her aunty helped her. The victim was scared of the accused as he used to hit her at times. The accused was working as a security officer and used to work at night. He was normally at home during the day time.
43. One night in the month of April 2012, the accused came and kissed her lips when she was in her bed room. Having kissed her lips, the accused told her that it was

a mistake and apologised for it. Few months after that incident of kissing her lips, the accused came to her room while she was revising her notes and started to touch her breast and body. She could not recall the exact date of this incident. The accused was smiling while he touched her body and breast.

44. The next such incident took place while she was cleaning the bed room of her aunty. She heard the accused telling her cousin sister to take her brother to the sea and catch some crabs. Her aunty was not at home and has gone somewhere on that day. He then came from her behind and touched her breast. He was wearing only a towel. He then pushed her to the bed and unbuttoned her top. Then lifted her shirt and took off his towel. He held her hands with one of his hands and started to rub his penis on her vagina. In a while he inserted his penis into her vagina. He did it for about five to ten minutes. He then ejaculated on her body and went away. The victim then got up and went to the wash room. She could not recall the exact date of this incident. However, she stated that it was a Saturday.
45. The victim did not tell her aunty about this incident on that day. The accused had told her that her aunty does not like her and has an affair with another man. So telling her about this has no use as she would not be interested in this matter. The victim did not tell her father about this as well. She did not tell anyone because they were never stood for her in her life. Hence, she has thought that they will never stand for her for this issue as well. She used to resist to the accused whenever he tried to touch her breast and body.
46. The fourth such incident took place while she was sleeping in her bed room. She could not recall the exact date of this incident as well. She was sleeping on her

bed and her cousin sister and the grandmother were sleeping on another bed on the other side of the room. The distances between the beds were about three meters. She felt that someone was on her bed. She then turned and opened her eye and saw it was the accused. He had put his hand inside her undergarments. She felt his finger was inside her vagina. She got up and told him to go. At the same time grandmother cleared her throat. The accused then left. She did not tell the grandmother as she has never spoken with her.

47. The fifth such incident took place while she was sleeping with her aunty and cousins on the floor at the lounge of the house. In that night, the accused was drunk. They watch a movie and then decided to sleep on the floor. While everyone was asleep, the accused came on top of her. He forced her to have sex with him. When she started to resist, he punched on her hands. Her aunty heard the sound of accused punching the victim. She got up and put the light on. The accused then went away towards the kitchen. When he was asleep, her aunty called her and asked her what has actually happened. Initially she was reluctant to tell anything to her aunty. Aunty told her that she will help her and requested her to tell what happened. The victim then told her aunty what the accused had been doing to her. Her aunty cried and hugged her.
48. The environment of the house changed after she related all of these incidents to her aunty. The accused and her aunty started to fight. She stayed at their house for about one or two weeks. Her Aunty then wanted to take the victim with her because she felt the house was not safe. At that time, her father came and took her to his house. While staying at her father's house, she heard that the accused and her father was talking about a police complaint made by her aunty. The victim told her father that she also wanted to go to police. However, her father

told her to stay at home and think about the reputation of the family. A lady police officer then came to meet her. She met the police officer with her father at one restaurant. The officer wanted to record her statement regarding the report made by her aunty about what has happened to her. The victim could not tell the police officer what exactly happened to her because her father was with her. Therefore, she told the police officer that it was a misunderstanding and nothing had happened.

49. Subsequent to this incident, her aunty came back to Cuvu. Aunty told her that she wanted to help and get justice to the victim. Aunty promised her that she will stand for her. The victim then agreed to go and give a statement to the police. The victim then left with her aunty and came to Drasa. Her aunty first arranged her schooling and then took her to the Lautoka Police Station. The officer at the Lautoka Police Station advised her to go and record her statement at the Sigatoka Police Station. They accordingly went to Sigatoka Police Station and made her statement.
50. During the cross examination the victim explained the settings of her house, specially the settings of the bed rooms and kitchen. She used one bed room with her cousin sister. Her cousin brother used to sleep with Aunty as he was still small at that time. She did not know where her aunty was when the accused came and touched her breast and body. She did not tell her father or aunty about it because she thought that they would not believe her. She wanted to tell her teacher at the school. However, she thought that if she tells the teacher, they will start to interrogate her and get her family involved. So she thought let it go. The nearest police post from her house is at about 10 to 15 minutes' walk. The victim stated that she was just thirteen then and had no support from anyone for her to

go to police and report this incident. She further said that if she does so, everyone will think that she was lying and she would become the bad person. She thought that telling someone would be no used because no one was there for her when her step mother ill-treated her. The victim did not want let anyone know about this incident, because then problems will arise in the house and she will be eventually blamed for it. She thought of the family of her aunty. Moreover, the victim in her evidence stated that she presumed that her grandmother saw the accused came to her while she was sleeping in the room and inserted his finger into her vagina, but she pretended that she did not see anything and only cleared her throat.

51. The victim said that the accused did not threaten her that he will kill her if she informed anyone else. The victim said that the statement made to the police that extent is not correct. The victim further said that the incident of sexual intercourse took place sometimes after the month of April. She has told the police officer who recorded her statement about it, but it has been written down as it happened in the month of April. She has told the police about all those incidents that she stated in her evidence, but the three of such incidents have not been recorded in her statement. She has no idea why it was not recorded by the police.
52. The victim in her evidence denied that the accused saw her aunty kissing her. She further said that what people talking about her aunty is false and she did not like it as she is the one who stood for her and support her in her life.
53. The second witness of the prosecution is Amrita Vandana Naidu. She is the wife of the accused. She is now living with her partner. His name is Russell. In the

year 2012 and 2013, she was living with the accused, her two children and the victim at Cuvu.

54. Amrita in her evidence stated that one night in February, that was before her birthday on 24th of February, she saw the accused was on top of the victim and punching on her shoulder. Amrita said that the accused was drunk on that day. Because of that she decided to sleep on the floor at lounge area and told the accused to sleep in the room. She arranged the floor for them to sleep. She was sleeping next to her two children and the victim was sleeping at the far end of the lounge near the TV stand. Amrita heard a sound of someone's movement and then turned around to look for it. She then saw the accused was on top of the victim and was punching her shoulder. She got up and put the light on in the room. The accused then got up and ran away to the bed room. Amrita then called the victim and asked her why the accused was punching her. At first, the victim did not tell anything. Amrita then demanded her to tell. The victim then told her that the accused tried to have sex with her. Amrita told the victim not to cry and tell her everything. The victim then told her what the accused had been doing to her over the times. Amrita kissed and hugged the victim and told her not to worry and she will work out something. She then looked for the accused and found him sleeping on the floor on the kitchen.
55. On the next day she confronted the accused about this allegation, but he denied it. The accused then went to work. When he returned from work, they both went to meet one of their friends Subramani Reddy. She told Mr. Reddy about this allegation. Mr. Reddy asked the accused about it. The accused admitted it and said it was a mistake. Mr. Reddy punched the accused on his face and kicked on his back. When they returned home, things got worse and she felt insecure. She

called Mr. Reddy to come. When he came, she took her two kids and left with him. The father of the victim came and took her to his place. On her way to Mr. Reddy's place, she went to the police station and reported this matter.

56. Amrita came back to Cuvu sometimes later and met the victim. She told the victim to come with her and she will try to give her justice. They then left Cuvu and went to Drasa. Amrita first made arrangement to put the children to school including the victim. She then took the victim to Lautoka police station to report the matter. From there, they were referred to Sigatoka Police Station.
57. During the cross examination Amrita said that she reported the police what she heard from the victim and what she saw on that night. When she was questioned about the dates of the incident and the statement she made to the police, Amrita said that she is confused with the date but what she saw is true and correct. That incident took place in 2013.
58. Amrita said there was sufficient light coming from the tube light at the veranda for her to see what the accused did to the victim in that night.
59. The third witness of the prosecution is Dr. Neelam Pillay she has conducted the medical examination on the victim on the 15th of July 2013 at the Sigatoka Hospital. Dr. Pillay explained the medical findings that she found during the medical examination. According to the vaginal examination the hymen of the victim was not intact. It can be caused by any blunt trauma.
60. At the conclusion of the prosecution case, the accused person was explained about his rights in defence. The accused person opted to give evidence on oaths.

However, he advised the court that he does not wish to call any other witnesses for his defence.

61. The accused in his evidence denies all of these allegations. He explained his family background and his present status in his life. He was living at Cuvu with his family in the year 2012 and 2013. He stated that he neither kissed the lips nor touched the breast or the body of the victim at any time. He further said that he did not rub his penis on her vagina and inserted it into her vagina at any time. He further said that he did not insert his finger into the vagina of the victim at any time. He said that he saw Amrita was kissing the victim and sucking her breast at her bed room. Amrita saw that the accused saw it. The accused alleges that was the reasons behind this allegation made against him.
62. I have summarised the evidence presented during the cause of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence and reminded yourselves of all of them. What I did only to draw your attention to the main items of evidence and help you in reminding yourselves of the evidence.

Analysis

63. You may recall that the victim in her evidence stated that the accused came and kissed her on her lip while she was at her bed room. Moreover, she stated that the accused came on top of her and forced her to have sex with him while she was sleeping on the floor with her aunty and cousins. He then punched on her shoulder when she refused him. The aunty of the victim also saw the accused was on top of her, punching on the shoulders of the victim. These two incidents

do not relate to any of the counts as charged in the information. Such evidence is known as evidence of uncharged incidents. The accused has not being charged for kissing the victim, forcing her to have sexual intercourse or punching her. However, such evidence can be considered in order to determine the propensity of the behaviors of the accused towards the victim. Such evidence assist you in determining the guilt of the accused.

64. The victim gave evidence behind a screen. The giving of evidence in this way is perfectly normal. It is designed to enable the witness to feel more at ease when giving evidence. It is not intended to prejudice the evidence by the witness. The fact that the witness gave evidence in this manner must not be considered against the accused.
65. You saw the victim giving evidence in court. A young person as of the victim may not have the same standards of logic and consistency as of an adult person. Her understanding may be different from experience of an adult person for a number of reasons, such as the age, limited experience and immaturity. Life viewed through the eyes and mind of a young adolescent person may seem very different from life viewed by an adult. You must bear those considerations in your mind when you consider the evidence given by the victim.
66. The learned counsel for the defence further proposed you that the lateness of the victim in reporting this matter to her aunt, makes the eventual complaint she made less reliable and credible. 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 will report it as soon as possible. The experience of the courts has shown that victims of sexual offences can react to the trauma in

different ways. Some, in distress or anger, may complain to the nearest person they see. Others, who react with shame, fear, shock or confusion, do not complain or go to authority for some time. It takes a while for self confidence to reassert itself. A late complaint does not necessarily constitute a false complaint, likewise an immediate complaint does not necessarily constitute a true complaint. It is matter for you to determine whether the lateness of the complaint affects the credibility and reliability of evidence given by the victim. In order to do that, you need to consider what the victim said about her experience and her reaction to it.

67. The victim was fourteen years old at the time of these alleged incidents took place. She stated the accused was providing her needs as she moved to live with them. She respected him and scared of him. The accused also in his evidence stated the victim respected him. The victim in her evidence explained the reasons for not reporting the matter to her aunty or any other relatives. Moreover, she explained the reasons for not reporting this to her teachers at the school. Her mother has passed away and her step- mother has ill-treated her. She only had her aunty and the accused to look after and support her at that time.
68. You have heard the evidence of Amrita Vandana. She is the aunty of the victim. She saw the accused was on top of the victim. The victim then told her about what the accused had been doing to her. However, what Amrita stated in her evidence about what she heard from the victim are not evidence as to what actually happened between the victim and the accused. She was not present and witnessed what happened between the victim and the accused. The content of the evidence of Amrita will only assists you in order to determine the credibility

and reliability of the evidence given by the victim. It is not independent evidence of what happened between the victim and the accused.

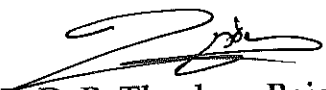
69. The learned counsel for the defence cross examined the victim and Amrita about the inconsistent nature of their respective statements made to the police and their evidence given in court. Three of the incidents that the victim alleged in her evidence has not been recorded in her statement. They are the kissing of her lips by the accused, the touching of her breast by the accused while she was revising her notes in her bed room and the incident that he came on top of her and forced her to have sex while she was sleeping on the floor at the lounge. The victim in her evidence stated that she told the police everything, but they have not recorded them in the statement. Amrita has stated in her statement made to the police that the incident of accused coming on top of the victim was taken place sometimes in April last year. She made her police statement on the 15th of July 2013. Amrita in her evidence stated that she was confused with the time, but that incident actually took place.
70. I now explain you the purpose of considering the previously made statement of a witness with his or her evidence given in court. You are allowed to take into consideration about the inconsistencies and the omissions in such a statement when you consider whether the witness is believable and credible as a witness. However, the statement itself is not evidence of the truth of its contents. The evidence is what the witness testified in court on oath.
71. It is obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. Moreover, as I explained above, the victims of rape react differently

to the trauma and the experience they have gone through, specially in revealing those incidents to another person. Sometimes they are unable to recall every minute detail soon after the incident due to the traumatic impact or the experience they undergo *et cetra*. Sometimes, with the passage of time they would be able to resurrect their memory and recall some details of those traumatic experiences.

72. If there is an inconsistency, 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 significant, you will next need to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.
73. You heard the evidence presented by the accused, where he denied these all allegations. If you accepted the version of the accused as reliable and credible, or consider it as reasonably true, although you are not convinced that it is true, then the case of the prosecution fails. You must then acquit the accused.
74. If you neither believe nor disbelieve the version of the accused, yet, it creates a reasonable doubt in your mind about the prosecution case. You must then acquit the accused from this charge.
75. Even if you reject the version of the accused that does not mean that the prosecution has established that the accused is guilty for this offence. Still you

have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the accused has committed each of these counts as charged in the information.

76. Upon consideration of all evidence, if you are satisfied that each of the counts or some of the counts are proved beyond reasonable doubt, you can find the accused is guilty for each of the counts or for the counts that you find as proved beyond reasonable doubt. If you are satisfied that each of the counts or some of the counts are not proved beyond reasonable doubt, then you must find the accused not guilty for each of the counts or some of the counts as you find.
77. 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 on the charge against the accused. You will be asked individually for your opinion and are not required to give reasons for your opinion. Once you have reached your opinion, you may please inform the clerks, so that the court could be reconvened.
78. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?


R. D. R. Thushara Rajasinghe
Judge

At Lautoka
23rd of August 2016



Solicitors : Office of the Director of Public Prosecutions
Office of Legal Aid Commission