

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

**CRIMINAL CASE NO. HAC 042 OF 2011**

**BETWEEN:                    STATE**

**AND:                            PONIJESE SERU**

**COUNSELS:                    Mr. S. Babitu for State**

**Mr. Inia with Ms Tarai for the Accused**

**Date of Ruling:              26 March 2013**

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**RULING**

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- [1]    The Accused above named is charged with one count of rape punishable under Section 207(1) of the Crimes Decree.
- [2]    At the trial the State Counsel called the Virtual Complainant, Medical Practitioner who examined the Complainant, the investigating officer and closed the case for the prosecution.
- [3]    The Defence Counsel moved Court under Section 231(1) of the Criminal Procedure Decree and submitted that the Prosecution had not established a prima facie case hence the Accused has no case to answer and acquittal of the Accused.

## Law

[4] Section 231(1) of the Criminal Procedure Decree states as follows:

*“When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments which the prosecution or the defence may desire to submit, the court shall record a finding of not guilty if it considers that there is no evidence that the accused person (or any one of several accused) committed the offence.”(emphasis added).*

[5] As per the above section if the Court finds there is no evidence then the Court shall find him not guilty. In **State v Semisi Wainiqolo** HAC 015 of 2004S Justice Gates (as then) said:

*“In order that section 293 of the Criminal Procedure Code be satisfied there must be available for consideration by the assessors, evidence which is to be considered as more than “no evidence” in the sense no evidence that it was the Accused who has committed the offences.”*

[6] In **Sisa Kalisoqo v State** Criminal Appeal No. 52 of 1984, the test was articulated as follows:

*“The test to be applied under section 293 of the Criminal Procedure Code is whether there is evidence in respect of each ingredient of the offence. If there is some relevant and admissible evidence, direct or circumstantial, touching on all the elements of the offence, then there is a prima facie case.”*

[7] In **Moidean v Reginam** [1976] 22 Fiji LR 206 at p.208B the Court of Appeal interpreted the Magistrate’s task to be:

***“to decide whether, or not a reasonable tribunal might convict, on the evidence so far laid before it – if so there would be a case to answer”.*** (emphasis added)

The court referred to and approved the long standing English Practice Note at [1982] 1 All E.R 448 per Lord Parcker CJ similarly cited with approval by the “Court of Appeal in **Rohit Ram Latchan v The State** (unreported) Court of Appeal Criminal App. No. AAU0015 of 1996S; 28 November 1997.

- [8] The Complainant is 34 years old lived in defacto relationship with the father of the Accused. She has 5 children aging from 16 years to 5 years.

The Complainant told Court that on the 29/1/2011 after the death of her defacto partner she stayed at home. The house comprises of 3 bedrooms, sitting room, kitchen, toilet and bathroom. The house is surrounded by other houses in very close proximity.

On the 29<sup>th</sup> January 2011 the Accused had come there and asked for the key of the house, that time she was sleeping with her kids in the living room. She went to the room, there the Accused removed her clothes and forcefully had sexual intercourse with her. She had not shouted or raised cries for help and it was not reported to anyone. On the 11<sup>th</sup> February 2011 when she was sleeping with her 5 children the Accused came in the night, pulled her sulu (wrap around skirt), removed her undergarments and had sex with her. The Complainant claims that she told this to one of her relative Tu Keva (husband’s sister). Thereafter the Complainant lodged a report with the police on the 17<sup>th</sup> February 2011.

The Complainant was subject to a medical examination and the report is marked as P1. The doctor more or less withdrew his opinion in the said report and submitted the incident may or may not have happened.

The police officer gave evidence and said he conducted the investigation and visited the scene.

[9] Considering the evidence before the Court and the submissions of the counsels I find that there is merit in the application of the defence counsel.

[10] Considering the evidence before the Court, I agree with counsel for the Accused that the prosecution had not proved a prima facie case against the Accused hence I act under section 231(1) of the Criminal Procedure Decree and acquit the Accused Ponijese Seru from further proceedings.

[11] So ordered.

S. Thurairaja  
**Judge**

**At Lautoka**  
**26 March 2013**

**Solicitors: The Office of the Director of Public Prosecution for State  
Legal Aid Commission for the Accused.**