

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No: HAC031 OF 2012

BETWEEN : **THE STATE**

AND : **MOHAMMED IBRAHIM**

BEFORE : **HON. MR. JUSTICE PAUL MADIGAN**

Counsel : Ms P. Lo for the State
Mr. P. Lomaloma for the accused

Dates of trial : 20 to 2 May 2013
Date of Summing up : 24 May 2013

SUMMING UP

[1] Ladies and gentleman assessors

The time has come now for me to sum up the case to you and to direct you on the law involved so that you can apply those directions to the facts as you find them.

[2] I remind you that I am the Judge of the Law and you must accept what I tell you about the law. You in turn are the Judges of the facts and you and only you can decide where the truth lies in this case. If I express any particular view of the facts in this summing up then you will ignore it unless of course it agrees with your view of that fact.

[3] Counsel have addressed you on the facts but once again you need not adopt their views of the facts unless you agree with them. You will

take into account all of the evidence both oral and documentary. You can accept some of what a witness says and reject the rest. You can accept all of what he or she says and you can reject all. As judges of the facts you are masters of what to accept from the evidence.

- [4] You must judge this case solely on the evidence that you heard in this court room. There will be no more evidence, you are not to speculate on what evidence there might have been or should have been. You judge the case solely on what you have heard and seen here.
- [5] The court room is no place for sympathy or prejudice. You must judge this case solely on the evidence produced in this Court and nothing else and you must use that evidence to apply it to the principles of law that I direct you on in this summing up as they apply to the crimes of attempted murder and rape that the accused faces and to nothing else.
- [6] I am not bound by your opinions but I will give them full weight when I decide the final judgment of the Court.
- [7] It is most important that I remind you of what I said to you when you were being sworn in. The burden of proving the case against this accused is on the Prosecution and how do they do that? By making you sure of it. Nothing less will do. This is what is sometimes called proof beyond reasonable doubt. If you have any doubt then that must be given to the accused and you will find him not guilty - that doubt must be a reasonable one however, not just some fanciful doubt. The accused does not have to prove anything to you. If however you are sure that the accused raped Salote and then tried to kill her, then you will find him guilty. If you are not sure, you will find him not guilty.
- [8] In our law attempted murder is committed when the accused:

- 1) had the intention to kill the victim; and
- 2) with that intention he did something which was more than mere preparation to killing her.

[9] There is no evidence of what was in "Moon's" mind that evening and people don't usually write down what they are intending to do, so you must discern his intention from the circumstances established by the evidence. Of course it is a matter for you, but if you believe Salote, then his pushing her off the bridge when her hands and legs were securely tied with rope would be a very strong indication of his intention to kill her and the tying her up with the rope could certainly be seen as an act more than preparatory in his intention to kill. Having said that, Ladies and Gentleman, it is not for me to say or for you to agree with me, it is entirely your decision on the facts as you find them.

[10] Rape in Fiji can be committed in several different ways but for the purposes of our case it is committed when a man penetrates the vagina of a woman without that woman's consent.

[11] I must direct you Ladies and Gentlemen to look at these two counts separately. Just because you might think he is guilty of one of the charges does not necessarily mean he is guilty of the other; the evidence on each is different and you will approach them differently.

[12] Salote has told us that when they were in the parked truck at Wailevu Tiri, he impatiently took her clothes off and on the back seat he, and I quote from Salote, "put his penis into my vagina." She said that she didn't want him to touch her and she told him she didn't like it but he didn't want to listen. So if you believe Salote and he penetrated her without her consent then you will find him guilty. It matters not that they had sex before on many occasions; it matters not that they had a commercial arrangement; it matters not that they were both expecting

to perform a sexual act that evening; if on this particular occasion he did it when she was unwilling and he knew that, then it is rape.

[13] It is my duty Ladies and Gentlemen to canvass the evidence with you again. I realise that the facts are your province but it is only fair that I summarise the evidence given for both the Prosecution and the Defence.

[14] The main witness for the Prosecution was of course, Salote. She told us that she had met the accused, whom she calls "Moon" in 2011 when she worked in the Countdown Supermarket here in Labasa. He used to drive a truck bringing goods to the shop. On Friday 13 April 2012, they talked on the phone and Moon said he was coming to Labasa the next day. She told him that she wanted to go to Suva on the Sunday and she needed \$1,000. He said he would get the money and she was to wait for him at Tuatua on the main road. He picked her up and he drove them in the truck to Wailevu Tiri. He was acting normal, talking and joking. Salote said she knew that she was expected to have sex with him; they having had sex many times before in return for whatever she asked from him. When he parked the truck at Wailevu he forcefully took off all her clothes. She said that she told him she was not consenting; that was not the way she wanted sex, but he didn't listen. He forced her to lie down in the back seat and he put his penis into her vagina. She was helpless because he was a man and he was short-tempered. They went back to the front seat and ate food that he had bought. She drank one small bottle of juice and felt sleepy. She fell asleep and on waking up he gave her a large bottle of juice to drink - "the taste was a bit different" - and he gave her a cigarette to smoke. She then fell asleep again. When she woke up she was naked and her hands had been tied with rope. It was strongly tied and it was painful. She asked him why he had done this but he didn't say anything. He moved the truck away from where they had parked and she tried to sit up and look around but he pushed her down. They

drove through town and all the way up to Nagigi Bridge and parked the truck on the bridge. He got out and forced her to get out, helping her to stand outside the truck. She pushed him and he slapped her. He tied the rope tight around her legs - he punched her and pushed her, she lay down on the bridge and he then pushed her into the river.

[15] In the river she struggled and was able to loosen the rope from her feet and make her way to the bank of the river. She got out and followed the road back towards town. She was naked and on walking she was able to get the rope off her hands and use two pieces of cloth he had used to tie her to cover her breasts and genitals. She went to a farm house and knocked on the door. The owner helped by calling the Police to come. They did come and they took her to Labasa Police Station. She was medically examined and made a statement.

[16] In cross-examination, Salote agreed that for the three months from September 2011 until December 2011 she had received various deposits into her bank account from the accused, totalling nearly \$3,000. In return for these sums she was expected to make herself available to him on a Saturday night for sex. She had another boyfriend at the time. She disagreed with most of the defence case that was put to her, while insisting that she didn't agree to having sex with the accused on the back seat when they did although she did give him four love bites after being forced by him to do so. When they were nearing Wailevu that evening her mother called telling her that the family was going to a funeral in Suva. Arrangements were made then on the phone for the accused to help them to load their luggage in his truck on Sunday in Savusavu. She denied that any financial assistance was offered.

[17] Salote denied that there was an argument over the accused's former wife in Nadi and that she got angry when he told her he was thinking

of going back to her. She denied asking for \$1,000 as a "separation fee".

[18] She claimed that there was enough room between the railings at the bridge for her body to be pushed off and still claimed that the accused pushed her off the bridge at Nagigi. She did agree that she had on a couple of previous occasions run away from him and hidden herself.

[19] Now Ladies and Gentleman; I have to direct you that matters put to a witness and denied are not evidence. It is only if a witness agrees to a proposition put to him or her by counsel that the matter becomes evidence.

[20] The other witnesses called by the prosecution were witnesses who confirmed Salote's story, such as the Nagigi man she woke up to get clothes at 3am on the 15th April, and Police witnesses who told us about the investigation and produced documents and photographs. Although the photographs were placed before you in a very unsatisfactory manner by the State, the Defence do not object to you seeing them all and they are all therefore evidence for you to consider in your deliberations. If you wish you may discard some or all of the photographs if you think that they have not been validly put before you.

[21] After the evidence of Salote, the evidence of the Doctor who examined her at Labasa Hospital is probably the next most important evidence in the prosecution case. You have seen the medical report and you have seen and heard the Doctor describe multiple injuries on the body of Salote after she had been brought in after the alleged incident, injuries which he said to be very recent. He said that there were no signs of sexual abuse to her genital area but that the multiple marks on her back could be consistent with forceful sexual intercourse or with very vigorous consensual intercourse and he further said that the

bruises and lacerations around her ankles and legs could be consistent with the history she related of being tied with ropes in those areas.

[22] The State completed their case by calling two witnesses to give us scientific evidence relating to the exhibits. Miliana Cokanavula examined the remains of juice found in the Frubu bottles found in the truck. Remember the State says that there were three bottles of juice and the Defence claims that there was but one from which they both drank - it is a matter for you. Anyway Miliana said that after testing the juice against a control sample bought randomly from a store she was not able to discern any additives to the juice. She did go on to say however, that if the juice had at some time contained chlorophyll - a commonly used sleep-inducing agent - she would not be able to detect it because it evaporates and dissipates quickly from liquid, especially in a plastic bottle. The second Government scientist took vaginal swabs from Salote and said that testing of these swabs did not show the presence of any spermatozoa. You might think Ladies and Gentleman that the evidence of these two doesn't help us at all. With reference to the swabs - the testing itself was unnecessary in that the accused has never disputed that there was an act of sexual intercourse in his vehicle on the night of the 14th April.

[23] Well Ladies and Gentleman that was the end of the Prosecution case which gave you a lot of evidence to think about. You heard me explain to the accused what his rights are in defence; how he could say nothing and later tell the Court that the State had not proved the case against him to the required standard. Or he could give evidence and be cross-examined by the State. He chose to do the latter, to give evidence from the witness box.

[24] Now I have to direct you members of the panel that the fact that he gave evidence does not relieve the burden on the State to prove to you

so that you are sure that he is guilty of these crimes. "Moon" could have just sat back and said that the State hadn't proved their case to the requisite standard. So the fact that he gave evidence is to be looked at in this way: if you believe that he and Salote had fully consensual sex and that later she ran away from the truck or you think that might have happened, then you will find him not guilty of these charges. Remember to look at the charges separately - you might find one of the charges proved but the other not. If you think Moon is not telling the truth in his evidence that does not make him guilty. You still have to be sure on the evidence of the State that he is guilty, irrespective of what he says in his evidence.

- [25] So let us look at what he says: he first met Salote in late 2010 when he was driving for Consort and she was working in the supermarket. They struck up a relationship which quickly became a commercial relationship in which he paid her money for sex every time he passed through Labasa on his delivery trips. He would deposit money into her account or sometimes give her small amounts of cash or a recharge card.
- [26] He met her mother once in Tuatua but he had already met the mother before Vunikura in 2000 when he was driving for a logging company. He used to give the mother money too.
- [27] On the weekend of 13/14 April, he and Salote had agreed to meet by the road at Tuatua - he picked her up and he drove to a place they had used before up the Wailevu Tiri Road where it was isolated and far from the main Road. He had bought chicken, chips, juice and cigarettes. He parked and they had a dispute whether to eat or have sex first - he said that he "won" that dispute and as he wished they were to have sex first. He made a bed in the back of the truck cabin and they had consensual sex. She undressed herself and he never forced her to do anything. After sex they washed, dressed and ate the

food. They drank from one bottle of juice - he lit a cigarette for her and gave her a \$6 recharge card. While they were eating Salote's Mum called and said that Salote's grandfather had died in Suva. Salote told Moon, he says, that her Mum and her husband and 2 others wanted to go to Suva but needed \$1,000 and help with the luggage. He said that he didn't have the money but offered to help them with the luggage if they could be at Savusavu jetty on Sunday where he would load the luggage and pay their boat fares. He reminded Salote that only the week before he had given her \$650 and so he didn't have \$1,000 this week. He told her to call Mum back and give her his offer: she did and he tells us that he could hear how happy Mum sounded on the other end of the phone. He then said that he had met the mother in Tuatua once when the mother asked him to marry Salote.

[28] Back in the truck they finished the food and a dispute arose over the \$1,000. Salote got angry and started banging the dashboard and pushing him about. He mentioned the possibility of going back to his wife which seemed to make things even worse. He tried to calm her down by kissing her and touching her breasts. Salote, angry, pushed him very hard and he was worried about the vehicle so he took a piece of soft cloth and tied it loosely around her wrists to restrain her.

[29] He then started up the truck to drive back towards town. He stopped at the train line junction about 1km from the Tuatua junction. He talked to her and kissed her to calm her down. They talked about where they should go now - Salote didn't want to go home - so they agreed to go to the "village". When they got near Nagigi she said she wanted to relieve herself. He said it was too open there and he found a secluded place so that they could both relieve themselves. They went in separate directions to "pee" and when he went back to the truck she wasn't there and she never came back. He called out to her for 10 to 15 minutes; took out a torch to look for her and waited for about 90 minutes to 2 hours. She never returned but he wasn't surprised

because she had done this to him twice before; that is to say running away and hiding, he says on both occasions when she thought they were going to be discovered. He left the scene and drove back to the Consort yard and slept the night. The next morning the Police came and took him back to the Police Station for enquiries. One of the Police Officers was a man called Toni who was a friend of his from years before in his logging days at Vunikura and who lived near Salote's family.

- [30] The accused called two witnesses as is his entitlement. The first was the young lady from Mr. Lomaloma's office who had taken measurements at the Nagigi Bridge two days before the trial started. You might think that her evidence didn't help us at all but it is a matter for you. It was established in cross-examination that she had no idea what the conditions of the river and bridge were on the 14/15 April 2012.
- [31] The professional diver told us of the great difficulty a tied-up person would have in surviving immersion in a flowing river but he did admit in cross-examination that it would not be impossible.
- [32] Well Ladies and Gentlemen; that was the end of the evidence and the last event of the trial was the site visit we all made to the Nagigi Bridge. I wish to say nothing about the site - you were taken there as an aid for you to put the evidence, including the photographs, into perspective.
- [33] You will very shortly retire to consider your opinions on the evidence, opinions which you will deliver to me individually on each count. It is far better if the three of you can be agreed on your opinions but that is not strictly necessary.

[34] To summarise your tasks in law, I remind you that if you believe Salote that the accused forced her to have sex when she didn't want to then that is rape. It matters not that they had had sex before and that they both expected that sex would happen that evening: a person is entitled to say no at any time despite their sexual relationship and if the assailant persists, then in law it is rape.

[35] As to the attempted murder allegation, you must find on the evidence that the accused intended to kill Salote and that he did things that were more than mere preparation to effect that intention.

[36] You may take as long as you like to consider your opinions but when you are ready please let a member of my staff know and I will reconvene the Court. However just before you retire I am going to ask Counsel if there is anything they wish me to change or add to this summing up.

[37] Counsel?

Paul K. Madigan
JUDGE

At Labasa
24 May 2013