

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**  
**CRIMINAL CASE NO. HAC 311 OF 2011S**

**STATE**

**VS**

**DHARMENDRA BAL RAM**

**Counsels** : **Ms. L. Latu for State**  
**Mr. J. Savou and Mr. M. Fesaitu for Accused**

**Hearings** : **29<sup>th</sup>, 30<sup>th</sup> and 31<sup>st</sup> July, 2013**

**Summing Up** : **1<sup>st</sup> August, 2013**

**Judgment** : **2<sup>nd</sup> August, 2013**

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**JUDGMENT**

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1. On 1<sup>st</sup> August, 2013, the three assessors returned with a unanimous verdict of not guilty on count no. 1 (rape), and not guilty on count no. 3 (sexual assault) against the accused.
2. Obviously, the three assessors had not accepted the prosecution's version of events on the "rape" and "sexual assault" allegations. It appeared, they had found that, the prosecution had not proven its case on count no. 1 and count no. 3 beyond reasonable doubt. They were not sure of the accused's guilt on those counts, thus their opinion that the accused was not guilty as charged.

3. I have reviewed the evidence called in this trial, and I have directed myself in accordance with the Summing Up I gave the assessors yesterday.
4. In my view, the assessors' verdict was not perverse. It was open to them to reach such conclusion on the evidence. I agree with their opinion, and I find the accused not guilty as charged on count no. 1 (rape) and not guilty as charged on count no. 3 (sexual assault). I accordingly acquit the accused of those charges.
5. However, section 161 of the Criminal Procedure Decree 2009 reads as follows:

**“...When a person is charged with an offence, the person may be convicted of having attempted to commit that offence, although he or she was not charged with the attempt...”**
6. On the alternative charge of “attempted rape”, Assessor No. 1 and 2 found the accused not guilty of “attempted rape”, while Assessor No. 3 found the accused guilty of “attempted rape”. In other words, the majority verdict was a not guilty on the alternative “attempted rape” charge, while the minority found the accused guilty of “attempted rape”.
7. Section 237 (1), (2) and (4) of the Criminal Procedure Decree 2009 reads as follows:

**“...(1) When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.**

**(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors...**

**(4) When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be –**

  - (a) written down; and**
  - (b) pronounced in open court...”**

8. In Ram Dulare, Chandar Bhan and Permal Naidu v Reginam [1956 – 57] Fiji Law Reports, Volume 5, page 1 and 3, the Fiji Court of Appeal said as follows:

**“...In our opinion learned counsel for the appellants is confusing the functions of the assessors with those of a Jury in a trial. In the case of the *King v Joseph* 1948, Appeal Cases 215 the Privy Council pointed out that the assessors have no power to try or to convict and their duty is to offer opinions which might help the trial Judge. The responsibility for arriving at a decision and of giving judgment in a trial by the Supreme court sitting with assessors is that of the trial Judge and the trial judge alone and in the terms of the Criminal Procedure Code, section 308, he is not bound to follow the opinion of the assessors...”**

9. Having listened to the evidence of the parties' witnesses, and after carefully observing them in the courtroom, and mindful of the parties' competing version of events, I accept the child complainant's (PW1) evidence that, the accused came to her bedroom in the early morning of 19<sup>th</sup> September, 2011. I accept her evidence that the accused tried to put his finger into her vagina, as she reportedly told Doctor Rakei Kaarira (PW3) on the same day, at 7 pm, at CWM Hospital. Please refer to D(10) of PW1's medical report, which was tendered as Prosecution Exhibit No. 2. It was often easy to discredit a child witness's evidence because of her age and understanding, especially so in this case, when she was 7 years 10 months old, at the time. However, one should ask oneself, why would such a child complain to her mother (PW2) early in the morning, against a step-uncle, she appeared to adore. She told her mother, the accused came naked to her room, early that morning.
10. It was tempting to accept the defence's position that, PW1 was fast asleep, at the material time, and that she caused injury to her vagina (see D(12)(a) and (b) of her medical report), by scratching the same. However, logic would throw these theories out the window, when PW1 immediately complained to her mother (recent complaint evidence) about her uncle (the accused), and

subsequent medical examination on that day, revealed injuries to her vagina. The effect of the medical report appeared to strengthen and in fact, solidified the child's version of events. Added to the above, was the fact that the accused, at the age of 40 years, was unmarried at the time, and was consuming liquor from 6 pm to 10.30 pm on 18<sup>th</sup> September, 2011.

11. Furthermore, the stepfather's (DW2) evidence will cause further difficulty for the defence. He said, he heard the child calling out the accused's name early Monday morning ie. on 19<sup>th</sup> September, 2011. This appeared to confirm the child's version of event in that, the accused came to her room early that morning. PW1's half-sister's (DW3) evidence was discredited, as a result of cross-examination. She said, she loved her uncle – the accused – and would do anything for him. I don't accept DW3's evidence. In my view, despite her innocence, she was not credible. She said, her father – the accused's brother – told her what to say in court. On the alternative charge of "attempted rape", I accept the evidence of PW1, PW2 and PW3, as credible witnesses. I reject DW3's evidence as not credible. I also reject the accused's denials, after considering all the evidence. On the evidence, I agree with the minority verdict of the assessors, and I find the accused guilty of attempting to rape the child complainant, by attempting to put his finger into her vagina, at the material time. I convict him accordingly of attempted rape.

**Salesi Temo**  
**JUDGE**

**Solicitor for the State** : **Office of the Director of Public Prosecutions, Suva**  
**Solicitor for Accused** : **Legal Aid Commission, Suva**