

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

**CRIMINAL CASE NO: HAC 054/2012**

**BETWEEN:** THE STATE

**AND:** TIMOCI ALUSENI

**COUNSEL:** Ms. P. Low for the State  
Ms. M. Lemaki and Mr. R. Tagivakatini for the Accused

**Dates of Trial:** 31/07-01/08/2013

**Date of Summing Up:** 02/08/2013

[Name of the victim is suppressed. She will be referred to as JPP]

**SUMMING UP**

Ladies and Gentleman of Assessors,

1. It is now my duty to sum up this case to you. I will direct on matters of law which you must accept and act upon. On matters of facts however, which

witnesses to accept as reliable, which version of the evidence to accept, these are matters for you to decide for yourselves. So if I express my opinion to you about facts of the case or if I appear to do so it is a matter for you whether you accept what I say, or form your own opinion. In other words you are the judges of facts. All matters of facts are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.

2. You have to decide what facts are proved and what inferences drawn from those facts. You then apply law as I explain it to you and form your individual opinion as to whether the accused is guilty or not guilty.
3. Prosecution and defence made their submissions to you about the facts of this case. That is their duty. But it is a matter for you to decide which version of the facts to accept or reject.
4. You will not be asked to give reasons for your opinions but merely your opinions of yourself and your opinion need not be unanimous but it would be desirable if you agree on them. Your opinions are not binding on me but I can tell you that they carry great weight with me when I deliver my judgement.
5. On the question of proof, I must direct you as a matter of law that the onus of burden of proof lies on the prosecution throughout the trial and never shifts. There is no obligation on the accused person to prove his innocence. Under our criminal justice system accused person is presumed to be innocent until he is proved guilty. This is the golden rule.
6. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused's guilt before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt then you must express an opinion that he is not guilty.
7. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence that who saw the incident or felt the offence being committed. The other kind of evidence is circumstantial evidence that you put one or more circumstances together and draw certain

irresistible inferences. Evidence presented in the form of a document is called Documentary evidence.

8. The facts which agreed between the prosecution and the defence are called agreed facts. You may accept those facts as if they had been led from witnesses from witness box.

- (i) JPP (hereinafter known as the victim) was born on 02<sup>nd</sup> February 2007 as per the birth certificate registration number 545118.
- (ii) The victim was 5 years of age and a kindergarten student in 2012.
- (iii) In 2012, the victim resides with her parents at Vunikoka Settlement Savusavu in a Government Quarters.
- (iv) Timoci Aluseni (hereinafter known as the accused person) is 45 years of age in 2012.
- (v) The accused person is originally from Lau but resides in Samabula, Suva.
- (vi) In the month of September 2012, the accused person was residing in Vunikoka Settlement Savusavu, a labourer for Ram Construction Company in renovating the Government Quarters at the said settlement.
- (vii) On 14<sup>th</sup> September 2012, both victim and the accused person were at Vunikoka Settlement Savusavu and met whilst being there on that day.
- (viii) The victim and the accused person are strangers to each other.
- (ix) On 14<sup>th</sup> September 2012, a report was lodged against the accused person by the victim's family to the Savusavu Police Station.
- (x) On 16<sup>th</sup> September 2012 the accused person was interviewed under caution at the Savusavu Police Station.

- (xi) On 16<sup>th</sup> September 2012 the accused person was charged for the offence of Rape at the Savusavu Police Station.
  - (xii) The victim was medically examined at the Savusavu Hospital on 14<sup>th</sup> September 2012.
  - (xiii) The admissibility of following documents is not in dispute between the Prosecution and the Defence:
    - The birth certificate of the victim registration number 545118.
9. Your decisions must be solely and exclusively upon the evidence, which you have heard in this court and upon nothing else. You must disregard anything you have heard about this case outside of this court room.
10. Your duty is to find the facts based on the evidence apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotions.
11. Now let's look at the charge.

## **FIRST COUNT**

### ***Statement of Offence***

**RAPE:** Contrary to section 207(1) and 207(2) (b) of the Crimes Decree No: 44 of 2009.

### ***Particular of Offence***

**TIMOCI ALUSENI** on the 14<sup>th</sup> day of September 2012, at Savusavu, in the Northern Division, penetrated the vagina of JPP with his finger without JPP's consent.

12. In Fiji law, the offence of Rape is committed when the vagina is penetrated either by the penis or by the finger of the accused. Hence in this case the prosecution has to prove:
  1. It was the accused
  2. Who had sexual intercourse with the victim or that he sexually abused the victim by invading her with his finger,
  3. Penetrated the vulva or vagina of the victim to some extent, by inserting a finger,
  4. Without her consent.
13. As far as the element of consent is concern, in our law, a child is under the age of 13 years is incapable of giving consent. In this case victim was 5 years old at the time of the offence. Hence consent is immaterial in this case.
14. Now let's look at the evidence led by the prosecution in this case.
15. The victim is now 6 years old a class 01 student. She is residing with her parents. She is only child in the family. On 14<sup>th</sup> September 2012 her father brought her back home from the school. Her mother has gone for work. After changing her clothes she went out for playing and climbed on a so-sop tree. While on the tree a man came and called her down. When she came down he told her to sit on the ground stretching her legs. Then he put one of his finger into her Muli. (According to her Muli is her vagina.)She felt very bad and pain at that time. Thereafter she went for a bath. She had seen her father talking to that man. After that she had told the incident to her parents and gone to police with her mother and father in the night. From there she had gone to a hospital and her Muli (vagina) was checked there. Thereafter they had gone to police once again and went home. She identified the accused in open court. Also identified her clothes in open court. She had given the description of the accused person to the police.
16. In the cross examination victim said that she can remember lots of men around her house. According to her father did not see accused poking his finger into her Muli(vagina). Nobody told her to tell police or to court that the accused poked his finger in to her Muli(vagina). She reiterated that the

accused did something to her. She denied that the accused said only “Hi” to her.

17. In the re-examination victim said that the accused put his hand inside her Muli (vagina).
18. According to Loyod Clay Pickering father of the victim he had brought the victim back home on 14/09/2012. At that time nobody was at home as his wife had gone for work. After coming home the victim had gone out for playing near so-sop tree. She was singing at that time. When he could not hear her singing he came out of the house and saw a man facing towards him seated in front of her daughter. At that time victim was sitting on the ground and her legs were stretched. The distance between him and the victim was about 4 meters. He had seen the man’s hand was under victim skirt. When he went near the man walked away but he punched him. He identified the man at that time. On that day he had seen that man twice and before he had seen him several times as he comes to repair the next door. After hearing from his daughter what the accused done to her, he went to the next door and complaint to the foreman of the construction. He apologised to him. Then incident was conveyed to his wife who then rang the police. Two police officers including a woman police officer came. They went to police, hospital and came back home. He identified the accused in open court.
19. In the cross examination witness said that he did not see what accused done inside his daughter’s skirt. He denied that he making false allegation against the accused.
20. Dr. Neelam a MBBS doctor with about three years experience examined the victim on 14/09/2012. She performed the examination at Savusavu Hospital at about 7.00pm. Victim did not come out with the history. Hence she obtained the history from her mother. According to the history the victim had been sexually assaulted by a middle aged Fijian boy who come for renovation of the house. Father of the victim had seen the man’s hand was between the legs of the victim. According to her specific findings the perineum is slightly inflamed and labia minora is inflamed too. Hymen is partially intact. Age of the injury is less than 24 hours and is fresh.

21. According to her conclusion the injury found on the victim's vagina indicating that penetration has taken place. Victim's Medical Report was marked as Exhibit No: 03.
22. In the cross examination witness said she is qualified to carry out medico legal examinations. The injury found in the vagina of victim is more towards 10-11 clock position. She admitted that injury found on victim's vagina could happen due to rubbing, scratching and regular washing. She also admitted that inflammation could occur due to poor hygienic condition. She finally said this type of injury could be caused by any object other than a finger.
23. WPC Maria Fane is the investigating officer in this case. After receiving the report she had gone to victim's house and took her to Savusavu Police Station and produced for a medical examination on 14/09/2012. She had seen the accused who was arrested in this case and she identified him in open court.
24. According to her investigation no other persons present at the time of committing the offence.
25. That is the end of prosecution case. Defence was called and explained the rights of the accused. After understanding his rights he elected to give evidence from witness box.
26. According to the accused he was doing house repair works at Vunikoka Settlement on 14/09/2012. Victim was living in the same compound where they were engaged in renovation work. On 14/09/2012 he had gone to another house to bring a rake. On his return he had seen victim was climbing the so-sop tree. As victim called him he stopped there. At that time her father came pulled her hand and warned him not to come to their compound. At that time victim was laughing. He denied the charge.
27. In the cross examination accused admitted that he was there when victim was climbing so-sop tree. He denied poking victim's vagina at that time. He said that he never ran from the compound.
28. That is end of defence case.

### **Analysis of the Evidence**

29. Ladies and Gentleman of assessors, in this case the victim gave evidence first. According to her accused had poked his finger into her vagina which was painful. She told this to her parents on the same day. She identified the accused in open court. As assessors and judges of facts you have to consider her evidence very carefully.
30. Ladies and Gentleman of assessors, you heard the evidence of victim's father. He had seen accused taking his hand from victim's skirt. He too identified the accused correctly as he had seen the accused several times in the vicinity of his house as he did renovation work in the neighbouring house in the same compound.
31. Ladies and Gentleman of assessors, the doctor gave evidence and explained the injury. She had examined the victim's vagina. She gave evidence as an expert.
32. Accused denied the charge. He only accept that he was there at the relevant time. But he only talked to victim as she called him. Being a member of house renovation team he was there during that period. As Assessors and Judges of facts you have to consider this evidence very carefully.
33. Ladies and Gentleman of assessors, in this case accused opted to give evidence from witness box. That is his right. But he has nothing to prove to you.
34. In this case the accused is charged for rape contrary to section 207(1) and 207(2) (a) of the Crimes Decree No: 44 of 2009. I have already explained to you about the charges and its ingredients.
35. Ladies and Gentleman of assessors as per section 129 of the Criminal Procedure Decree 2009 no corroboration shall be required in sexual offence cases.
36. You have heard all the prosecution witnesses. You have observed them giving evidence in the court. You have observed their demeanour in the court. Considering my direction on the law, your life experiences and common sense, you should be able to decide which witness's evidence, or



part of their evidence you consider reliable, and therefore to accept, and which witness's evidence, you consider unreliable and therefore to reject.

37. You must also carefully consider the accused's position as stated above. Please remember, even if you reject the version of the accused that does not mean that the prosecution had established the case against the accused. You must be satisfied that the prosecution has established the case beyond reasonable doubt against the accused.
38. Ladies and Gentleman of assessors, remember, it is for the prosecution to prove the accused's guilt beyond reasonable doubt. It is not for the accused to prove his innocence. The burden of proof lies on the prosecution to prove the accused's guilt beyond reasonable doubt, and that burden stays with them throughout the trial.
39. Once again, I remind, that your duty is to find the facts based on the evidence, apply the law to those facts and come to a correct finding. Do not get carried away by emotions.
40. This is all I have to say to you. You may now retire to deliberate. The clerks will advise me when you have reached your individual decisions, and we will reconvene the court.
41. Any re-directions

I thank you for your patient hearing to my summing-up.

P Kumararatnam  
**JUDGE**

At Labasa  
02 August 2013



