

would be desirable if you could agree on the final opinion. As the presiding judge of this case, though I am not bound by your opinions in delivering the final judgment of the court, I assure you, that your opinions will carry a great weight with me when I deliver my judgment.

- (ii) In my Summing Up I will direct you on the relevant areas of law which apply to this particular instance. You must accept that legal position and act upon that. Facts, as you heard and saw in this court room, are entirely within your domain. You are the masters of the facts or judges of the facts of this case. It is your duty to determine what exactly happened on 6th of November 2010, based on the facts of the case. The alleged victim says that she did not consent to the sexual act performed by the accused, though he is her legally married husband. This allegation can be identified as a 'marital rape'. The accused says that the alleged sexual act was done with the full consent and the instigation of his wife. Therefore, you have to decide at the end of the day, whose version you are going to accept and believe.
- (iii) In reaching to your final opinion, you have to rely on the evidence you saw and heard, from the witness box and the documentary evidence tendered in court, and nothing else. You should simply disregard what you saw or heard from the printed or electronic media regarding this case before or during the trial. At the same time, any views or opinions expressed by your friends, family members, relatives or anybody should face the same fate. It is you who have to draw your own conclusions based on the evidence in this case.
- (iv) The learned counsel for the prosecution and defence, while making their closing submissions highlighted certain facts and tried to formulate their opinions according to their own case theories. You need not to accept either of those versions unless you agree with those. Same principle applies to me as well. If I express any opinion or appear to do so regarding any facts, do not follow it, simply because it came out of the Judge. It is solely your task to form your own opinions. In my summing up I might not touch all the areas or evidence which you think to be important. Please feel free to give due consideration to all the evidence you see fit, though I mention it or not.
- (v) You have to decide the credibility and truthfulness of each and every witness. In doing so, you can rely not only what you heard, but what

you saw as well. The way witnesses offered evidence from the witness box, how they face the cross-examination of the opposing counsel, for instance, were they firm or evasive on their stand, can be helpful in determining their demeanour and in turn to judge their credibility as well. This case is solely depended on the testimonies of the complainant and the accused. In short, it is a matter of whom you are going to believe.

- (vi) I would like to emphasis that madam assessors and gentleman assessor, you were chosen to be judges of the facts of this trial as you represent a cross section of the pulse of the society. Your common sense and the experience in day to day life must come into operation when you deliberate this case. That common sense and the life experience have to be utilized in deciding or assessing the truthfulness or honesty of witnesses. In that task, you have the liberty to accept the whole version of a testimony of a witness or a portion of that testimony and reject the rest. You can refuse to accept even the whole testimony of a witness.
- (vii) You will recall the way the complainant offered evidence from the witness box with tears falling. This might have led the learned prosecutor to tell you that the complainant had the courage to come forward to make this allegation against her own husband whilst lot of others in the same condition bear the pressures within the marriage life for the sake of family and children. The learned defence counsel said that the accused being a 'husband' is in a 'nightmare' from the day he got a shock of his life with the news of him raped his own wife. These assertions should not make you prejudiced or sympathetic towards any party. Your opinion must be based only on the evidence you heard and saw during the trial.

1. **THE BURDEN OF PROOF**

- (i) The accused is presumed to be innocent until proven guilty. Even though the accused is charged with 'Rape', his innocence is presumed until otherwise decides by this court. The burden in proving that the accused is not innocent or guilty as charged rests on the prosecution throughout the trial. That burden never shifts. The accused need not prove anything either to show his innocence or otherwise.
- (ii) The prosecution must discharge their burden by proving the charge against the accused beyond reasonable doubt. That is for you to be 'sure' of the guilt of the accused. If you have any reasonable doubt

over the guilt of the accused after analyzing the evidence, the benefit of such a doubt should be awarded to the accused. Nevertheless, a 'doubt' must be reasonable or substantial and stemmed out of the evidence. A mere trivial or imaginary doubt won't create a reasonable doubt.

2. **THE INFORMATION**

- (i) The Director of Public Prosecutions, on behalf of the State has charged the accused for the following count of Rape.

Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

ANARE BOILA on the 6th day of November, 2010, at Waiwatu Settlement, Serea, Naitasiri in the Central Division penetrated the vagina of U.L. with his penis, without the consent of the said U.L.

3. **ELEMENTS OF THE OFFENCE**

- (i) The charge against the accused is based on Section 207 (1) (2) (a) of the Crimes Decree 2009. For the prosecution to bring home this charge successfully, they have to prove the following elements in the charge.
- The accused, (Anare Boila in this instance)
 - Penetrated the vagina of U.L. with his penis,
 - without her consent.
- (ii) The term 'carnal knowledge' is used in the same context of 'sexual intercourse' and the moment prosecution proves beyond reasonable doubt or the accused agrees that penis of him penetrated the complainant's vagina, may it be a slightest of penetrations, the element of 'carnal knowledge' is proved. Penetration is not a contested

issue in this instance. Defence admits that there was a penetrated sexual intercourse with the complainant wife.

- (iii) The most essential element in this case is the 'consent' of the complainant to have sexual intercourse with the accused. 'Consent' must be freely and voluntarily given by a person, (Ms. U.L. in this case) with the necessary mental capacity, to have the alleged sexual intercourse. As a matter of law I am directing you that the 'consent' is not freely and voluntarily given if it is obtained by exercise of the authority of the accused. In such a situation, 'consent' is not proper or legitimate in the eyes of law, though it is visible on the face of it. Ms. U.L. being an elderly lady, is capable of giving consent to have sexual intercourse as there is no evidence to say that she did not possess the requisite mental capacity to consent. As a matter of law I am directing you that the absence of injuries or remarks for physical resistance on the complainant does not necessarily mean that she 'consented' to the 'sexual act'.
- (iv) As a matter of law, I am directing you that there is no need to look for any corroboration of the complainant's evidence for an accused to be convicted on a charge of 'Rape'. If the evidence of the complainant is so convincing that you can place your reliance beyond reasonable doubt, you can solely act upon it even in the absence of any corroborative evidence.

4. **AGREED FACTS**

- (i) The following facts are been agreed between the prosecution and the defence at the beginning of this trial. Thus, the prosecution is relieved from proving those facts. You madam assessors and gentleman assessor, can positively assume that the prosecution has proved those facts beyond reasonable doubt.
- The accused Anare Boila is from Waiwatu Settlement in Serea, Naitasiri.
 - The victim U.L. is originally from Waiwatu Settlement.
 - The accused and the victim are husband and wife and resided in the same house during the alleged rape by the accused on the 6th of November 2010.

- The victim was medically examined by Doctor Epi Tamanitoakula on the 29th of November 2010 at Vunidawa Hospital.
- The accused was caution interviewed on the 2nd of December 2010.
- The accused was formally charged on the 2nd of December 2010.
- The following documents are tendered by consent:
 - [a] Medical Report of U.L.
 - [b] Caution Interview Statement of Anare Boila.
 - [c] Charge statement of Anare Boila.

2. **CASE OF THE PROSECUTION**

- (i) Prosecution called 4 witnesses to prove their case. Ms. U.L. the alleged victim offered evidence first. She has been legally married to the accused for the last 18 years and having an adopted daughter of 13 years. She recalled 6th of November 2010 and said that she returned from the hospital on that day after taking treatments to a 'boil' in her back. The accused wanted to have sex even though she was in pain and just returned from the hospital. Ms. U.L. said that she had to give up herself to the accused and satisfy him with all her pains for the sake of their family and especially, daughter. She said that she simply did what he wanted. At last, according to Ms. U.L., she had reported this incident to Nausori Police Station on 26th of November 2010 as she could not bear the pressure anymore. She admitted that though she told the police as to what happened to her on that particular night, she was shocked to see a charge of 'Rape' against her husband.
- (ii) Sergeant Major Seru Moce was the 2nd prosecution witness. He was at Nausori Police Headquarters in November 2010. He confirmed that Ms. U.L. came to the police station and spoke to him. Her grievance, according to SM/Seru was that she is been ill treated by her husband for several times. She had told him that her husband had sexual intercourse with her even at times she was not well. SM/Seru said that Ms. U.L. was crying when narrated her story to him.

- (iii) Doctor Epi Tamanitoakula, who had examined Ms. U.L, the alleged victim, testified next. According to the history narrated to him by Ms. U.L., she was raped by her husband on 6th of November 2010. Doctor's initial impression on the alleged victim negates any distress or psychological trauma. His professional opinion is that there was no indication or evidence of trauma as there were no physical injuries noted externally or in the vaginal vault/orifice. Dr. Epi tendered the Medical Examination form of Ms. U.L. as Prosecution Exhibit No. 1.
- (iv) Anyway, the doctor told that it is very difficult to observe signs of forced penetration after 2-3 weeks of the alleged incident. The witness recalled that Ms. U.L. came to the hospital to get medication for an 'abscess' on her left buttock on 8th of November 2010. She had been discharged on 11th of November 2010 as she was advised to get herself admitted to the hospital over her pains when she was examined on 8th.
- (v) Detective Sergeant 2254 Alipate Rayasi was the interviewing officer of the accused. DS/Alipate confirmed that he gave all the rights to the accused before the recording of the cautioned interview. With the consent of the defence, he tendered the original and the English translation of the cautioned interview to court marked as Prosecution Exhibit No. 2 (a) and Exhibit No. 2 (b).

3. **THE DEFENCE CASE**

- (i) The accused does not deny the alleged sexual intercourse with his wife, but, claims it was done with her full 'consent' and it was on 11th November 2010 and not on 6th as the prosecution claims. It was suggested to the complainant that before the alleged sexual intercourse the accused asked her about her 'boil' and she replied that 'you are not going to have sex with my boil'. The complainant answered positively to the same. Moving a step further, the complainant admitted in cross-examination that she went to the accused and 'consented' to have sex.
- (ii) Mr. Boila, giving evidence from the witness box said that in fact it was the complainant who initiated the 'sexual intercourse' on 11th of November 2010 and she was a willing participant whenever they had sex throughout their marriage. According to the accused the complainant had reported him 7 times prior to this incident over family disputes. He said though he admitted all the previous

allegations, he is not in a position to admit this as he never raped her wife. Finally the accused told that the complainant told him that she will put him behind bars one day.

4. **ANALYSIS**

- (i) Madam assessors and gentleman assessor, you know by now that there is no dispute over the alleged 'sexual intercourse' which laid the basis for the case. The 'issue' to find an answer is whether the complainant 'consented' to have the 'sexual intercourse' in issue or not. That is what you have to decide after analyzing all the available evidence led before you.
- (ii) The prosecution says that the complainant had to surrender herself to the accused's authority as he was the sole bread winner of the family. Their argument is that, though it might be visible on the face of it that she 'consented' to have sex, it is not a genuine 'consent' as the complainant was subjected to accused's authority and she was, in a way, threatened and intimidated to perform 'sex' in this instance.
- (iii) On the other hand, the accused says that he never had forceful sex with his wife and even in this instance, whatever happened had happened with her full 'consent'. The accused re-produced what the complainant agreed in cross-examination and said even though he asked about her 'boil' before having sex, it was she who told that he is not going to have sex with her boil. You now have to decide whose version that you are going to accept and believe, the complainant's or accused's.
- (iv) You would recall that there are two conflicting versions over the date of the alleged incident. According to the charge, it was 6th November 2010. The complainant also referred to the same date and specified that it was the day that she was 'discharged' from the hospital. The history given to the doctor by the complainant also denotes 6th of November 2010 as the date she was 'raped'. In cross examination, Ms. U.L. clearly referred to the date that she returned from the hospital as the date of incident. It was highlighted by the defence through the complainant herself and the doctor that she was discharged from the hospital on 11th of November 2010. Thus, the defence deny any sexual activity on 6th of November 2010. The accused in his testimony admitted that it was 11th of November after the complainant returned home from the hospital. He said that he

was nearly caught up with a heart attack when the police told him that he is been charged for 'rape' and, he was not in a proper state of mind when admitted the 'date' suggested by the interviewing police officer to be 6th November 2010.

- (v) In this backdrop, it would be helpful for you to recall the doctor's evidence. He said that on 11th of November 2010, when the complainant was discharged from the hospital, she was stable without any pains as her 'abscess' was already drained and cleaned. Further, he told that when he examined the abscess of the complainant on 8th of November 2010, she never told him anything regarding a 'rape' occurred on 6th of November 2010. Nevertheless, the prosecution insists and maintain their stance that the alleged 'rape' occurred on 6th of November 2010 as it stipulates in the charge. It is now left to you madam assessors and gentleman assessor to decide whose claim is to be accepted and relied upon.

- (vi) The defence pointed out that the alleged complaint was delayed for over 3 weeks. The learned defence counsel said that the 'report' was an "after thought" of the complainant as she was not as 'soft' as one could imagine after having reported the accused for several times prior to this incident over family issues. The complainant told that she had to go to Nausori police station as she had no faith in Vunidawa Police officers and she comes to the town only to sell their products. Now, madam assessors and gentleman assessor, you have to pick one of these explanations, whether the allegation was belated as it was fabricated with an "after thought" of the complainant or she had a genuine reason for such a belatedness.

5. **SUMMARY**

- (i) Please recall that the accused need not to prove anything to show his innocence. You might not agree with the explanation offered by the accused. That does not necessarily mean the accused is guilty as charged. The burden of proving the guilt of the accused beyond reasonable doubt still lies on the prosecution. The evidence adduced by the prosecution to prove their case must be appealing to your conscience to be sure of the guilt of the accused.

- (ii) I have directed to you at the very beginning that you have to approach the case in an open mind. That is because the accused is presumed to be innocent until proven his guilt. If you are satisfied that the

prosecution has proven the guilt of the accused to your fullest satisfaction or for you to be sure, you must return with an opinion of 'guilty'. If you are not sure of the guilt of the accused, it must be an opinion of 'not guilty'.

- (iii) Your possible opinions in this instance are 'GUILTY or 'NOT GUILTY' to the charge of Rape.
- (iv) You may now retire to deliberate your opinions. When you are ready with the opinions, I will reconvene the court and ask your individual opinion.
- (v) Any re-directions or additions to what I said in my summing up Ms. Vavadakua and Mr. Savou?

Janaka Bandara
Judge

At Suva

Office of the Director of Prosecution for State

Office of the Legal Aid Commission for the Accused