

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

CRIMINAL CASE NO: HAC 319 of 2011

BETWEEN: THE STATE

AND

AISAKE NAULUMOSI

**COUNSEL: Ms L Latu and Ms R Uce for the State
Ms N Nawasaitoga and Mr P Tawake for the
Accused**

Dates of Trial: 11-13/11/2013

Date of Summing Up: 15/11/2013

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

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 opinions. 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 judgment.
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. In assessing evidence of witnesses you need to consider certain tests. Examples:
 1. Consistency: That is whether a witness saying the story on the same lines without variations and contradictions.
 2. Probability: That is whether the witness was talking about in his/her evidence is probable in the circumstances of the case.
 3. Belatedness: That is whether there is delay in making a prompt complaint to someone or to an authority or to police on the available opportunity about the incident.
 4. Spontaneity: That is whether a witness has behaved in a natural or rational way in the circumstances that he/she is talking about.
9. 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.
10. The following facts are agreed between prosecution and the accused:
 1. WT (the victim) resides at Muslim League in Nabua.
 2. Aisake Naulumosi was born on 16th September 1969 and is the step father of the complainant.
 3. The complainant was born on 18th August 1996 who is originally from Nasoki in Moala, Lau and moved to Suva in December 2005.
 4. From December 2005 till December 2007 the complainant and her family were living in Kinoya at one of the Accused's elder brother's house.
 5. The complainant was medically examined by Dr. Silipa Naiqiso on 20th September 2011.
 6. The accused was interviewed under caution on 23rd September, 2011 and was formally charged on 29th September 2011.

11. 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.
12. 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.
13. Now let's look at the charges.

FIRST COUNT

Statement of Offence

RAPE: Contrary to Section 149 and 150 of the Penal Code, Cap.17

Particulars of Offence

AISAKE NAULUMOSI between the 1st of January 2003 and the 31st day of December 2003 at Nasoki Village, Moala, Lau in the Eastern Division, had unlawful carnal knowledge of WT without her consent.

SECOND COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to Section 154(1) of the Penal Code, Cap.17.

Particulars of Offence

AISAKE NAULUMOSI between 1st day of January 2005 to the 31st day of December 2007 at Kinoya, in the Central Division, unlawfully and indecently assaulted WT.

THIRD COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212(1) of the Crimes Decree No: 44 of 2009.

Particulars of Offence

AISAKE NAULUMOSI between 1st day of January 2011 to the 18th September 2011 at Nabua in the Central Division, unlawfully and indecently assaulted WT.

14. In this case the accused is charged under two different laws. The first and second counts are charged under repealed Penal Code Cap.17. The third count is under Crimes Decree No: 44 of 2009. The reason for that is that between 2009 and 2010 the Criminal Law in Fiji has been changed. The offence remains the same but the legal section referred to in the charges are different.
15. In order to prove the charge of Rape the prosecution has to prove the following elements beyond reasonable doubt.
 1. The accused had carnal knowledge of the complainant,
 2. Without her consent,
 3. He knew or believed that that she was not consenting or didn't care if she was not consenting.
16. Carnal knowledge is the penetration of vagina or anus by the penis. It is not necessary for the prosecution to prove that there was ejaculation, or even that there was full penetration.
17. As far as the element of consent is concern, in our law, a child under the age of 13 years is incapable of giving consent. In this case victim was 6 years old in the year 2003. The victim did not have the capacity under the law to consent. Therefore, consent is immaterial. (1st Count)

18. In order to prove the offence of Indecent Assault the prosecution has to prove following elements beyond reasonable doubt.
- (i) The accused
 - (ii) Unlawfully, and
 - (iii) Indecently
 - (iv) Assaulted
 - (v) The female complainant.

The State must prove that it was this accused who assaulted WT, in a sexual manner, without her consent.

19. Victim was 8 years old in the year 2005 and was 10 years old in the year 2007. She was 14 years old in the year 2011. As per Section 154(2) of the Penal Code, Cap 17 and Section 212(2) of Crimes Decree 2009, "It is no defence to a charge for an Indecent Assault on a boy or a girl under the age of 16 years to prove that he or she consented to the act of indecency". Therefore, consent is immaterial.(2nd and 3rd Counts)
20. Now let's look at the evidence led by the prosecution in this case.
21. The first witness was the victim, WT. According to her in the year 2003 she was in Class 1 and was residing at Nasoki. One day in the year 2003 her mother went to Suva leaving her and her brother under the care of the accused. Accused is her step father. After her mother's departure to Suva, she was sleeping in the hospital. The accused carried her home and took off her clothes inside the room. After taking off the clothes he inserted his penis into her vagina. She did not agree as it was very painful. Nobody was in the bedroom when the accused raped her. Due to fear and tender age, she did not divulge this incident to anybody including her mother.
22. Between 2005-2007 her family moved to Kinoya and stayed with the accused elder brother's family. In the year 2007 she was in Class 5 and was 10 years old. During that period a Kati (fund raising) was organized in the house. The accused, her mother and other members gathered to drink grog outside the house. While she was studying in the room accused came to the

room, locked the door and started to touch her breast and her vagina. Due to fear she did not shout and remained calm. After touching her body he left the room.

23. In the year 2008 they moved to Nabua and settled down at Nabua Muslim League. She was schooling at Nabua Primary School and was in Class 6 in the year 2011. One day, in the year 2011 the accused once again touched her breast and her vagina forcibly. Due to fear she did not tell anybody. She never gave her consent to the accused.
24. In the year 2011 she lodged her first complaint to her class teacher Ms Sigalevu. The teacher then informed this to the school Head Teacher who then called the police. She gave her statement to police and underwent a medical examination. Her date of birth is 18/08/1996. She identified the accused in open court.
25. In the cross examination victim corroborated what she said in her examination in chief. WT admitted that she did not tell police that the accused came to hospital and carried her to home while she was sleeping. She admitted that she did not divulge these incidents to anybody. She finally said that it was the accused who sexually abused her.
26. In the re-examination WT said that she did not divulge these incidents due to fear of the accused and her mother.
27. Savaira Sigalevu was the class teacher of grade 7-8 at Nabua Primary School in the year 2011. On 19/09/2011 WT informed her that her step father had raped her at the veranda of Suva Muslim School. She said to her when she was in class 3 her step father carried her from the place where she was sleeping and raped her. WT could not control her tears when she told this to the witness. She immediately took her to Head Master Seni Vela who then informed the police.
28. In the cross examination witness said that she believed the victim.
29. Seni Vela the Head Master of Nabua Primary School corroborated what Savaira Sigalevu stated above. After confirming further from the victim he then informed the police immediately.

30. In the cross examination witness said that the victim had told him that her step father uses his hands to touch her private parts when her mother goes out of the house.
31. Dr. James Fong was called to give evidence of the medical report prepared by Dr Silipa Naiqiso who has gone abroad. He is the Head of the Department of Obstetrics and Gynaecology Unit of Colonial War Memorial Hospital (CWMH), Suva. He had given evidence on a number of times in court. The victim WT was produced by a woman police constable. Her mother Elina Baleisuva had given her consent for the medical check up. According to the history given by the victim she had been subjected to sexual abuse by her step father thrice. First time when she was at class 1 her step father was intoxicated and kissed her entire body touching her genital area. Also had penile penetration into her vagina. She was too scared to cry for help. Second time when she was in Class 3 he touched her breast but she managed to cry out for help. Last year he touched her breast but her Aunt heard her cry out for help. She denied consensual sexual relationship with the accused.
32. According to medical findings hymen not seen in its entirety. No mucosal laceration or recent trauma to the hymen.
33. According professional opinion of the doctor who prepared the report is that the victim's hymen not seen in its entirety. Penetration incident was 5 years ago and therefore acute trauma to vagina cannot be seen this late. Finding would suggest previous penetration of vagina. According to his professional opinion that the findings in the report are consistent with the history given by the victim.
34. In the cross examination witness said that there is a possibility of hymeneal damage due to possible sexual act or due to active sports.
35. That is the end of prosecution case.
36. When the defence was called and explained the rights of the accused he elected to give evidence from witness box and called two witnesses.

37. Accused in his evidence said the he is 44 years old and married. He has 01 child and victim is his step daughter. He denied the charges. He had started defacto relationship with victim's mother since 1998. He had looked after all the children as his children. He admits that his wife went to Suva in the year 2003. In the absence of her he looked after all the children including the victim. He denies the charges and says that he never raped or sexually assaulted the victim at any time between the years 2003-2011. He don't know why the victim is making this accusation.
38. In the cross examination witness said that he loved all the children very much and he never done anything to the victim.
39. Elina Baleisuva is the defacto wife of the accused. According to her victim is her child from her first marriage. The accused looked after the victim as his own child. Victim never complained to her any sexual assault by the accused.
40. In the cross examination witness said that she can't believe her daughter. She was looked after very well by the accused and provided every need to her children without any discrimination.
41. Fone Sasala is the daughter of accused's elder brother who lives in Kinoya. During the stay in Kinoya, the accused treated the victim as his own daughter. During Kati which was held in the year 2005, the accused and his wife drank with her family till in the morning. She did not see any suspicious movement of the accused.
42. In the cross examination witness said that she can't believe the victim as the accused was outside on the day of the Kati. He stayed with them until the morning.
43. That is the end of Defence case.

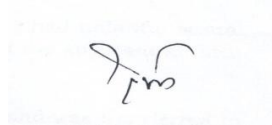
Analysis of the Evidence

44. Ladies and Gentleman of assessors, in this case the victim gave evidence first. She was 6 years old when her step father had sexual intercourse with her. Due to fear and her tender age she did not divulge this to anybody up to year 2011. Even she did not tell her mother as she thought her mother would beat her up if she tells this to her. She admitted that she could not tell police that her step father carried her from the hospital. She finally told this to her class teacher who then informed the head teacher of the school. As assessors and judges of facts you have to consider her evidence with great caution. The inability of the victim to remember the dates are not crucial to the proving of the charges against the accused.
45. Ladies and Gentleman of assessors, you heard the evidence of class teacher of the victim. She told this court when victim told this to her, the victim could not control her tears. Due to her prompt action the matter was conveyed to police immediately through the head teacher of the school.
46. Dr. James Fong was called to give evidence of the medical report prepared by Dr Silipa Naiqiso who has gone abroad. He is the Head of the Department of Obstetrics and Gynaecology Unit of Colonial War Memorial Hospital (CWMH), Suva. According to the history given by the victim she had been subjected to sexual abuse by her step father thrice. Finding would suggest previous penetration of vagina. You have to consider this documentary evidence very carefully.
47. Ladies and gentleman of assessors, in this case accused elected to give evidence from witness box and called witnesses. That is his right. He has nothing to prove to you. But he gave evidence. Accused took up the position that he never abused the victim and therefore denied charges. He said that he looked after the victim as his own daughter. This was confirmed by accused's wife (victim's mother) and daughter of accused's elder brother. You have to consider defence's evidence carefully.

48. In this case the accused is charged for Rape (one count) contrary to sections 149 and 150 of the Penal Code, Cap 17 , Indecent Assault (one count) under Section 154 of the Penal Code, Cap 17 Indecent Assault (one count) under Section 212(1) Crimes Decree No: 44 of 2009. I have already explained to you about the charges and its ingredients.
49. 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. Use the tests mentioned above to assess the evidence of witnesses.
50. 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.
51. 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.
52. 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.
53. 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.

54. Any re-directions?

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



P Kumararatnam

JUDGE

At Suva
15/11/2013

