

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

**CRIMINAL CASE NO: HAC 315/2012**

**BETWEEN: THE STATE**

**vs KINIVILIAME SOVALEVU**

**COUNSEL: Ms L Latu for the State  
Ms V Tamanisau for the Accused**

**Dates of Trials: 24-25/02/2014**

**Date of Summing Up: 28/02/2014**

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

**SUMMING UP**

Ladies and Gentleman 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 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. In assessing evidence of witnesses you need to consider certain tests. Examples:
  - Consistency: That is whether a witness saying the story on the same lines without variations and contradictions.

- Probability: That is whether the witness was talking about in his/her evidence is probable in the circumstances of the case.
  - 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.
9. The caution interview statement of the accused person is in evidence. What an accused says in his caution interview is evidence against him. I will direct you shortly on how you should consider that evidence.
10. The facts which are 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. The following facts are agreed between the prosecution and the defence.
- i) That the complainant in this case is T.K
  - ii) That at the time of offence, the complainant was a Class 8 student of Nabua Primary School.
  - iii) That the accused in this matter is Kiniviliame Sovalevu, also known as Chee.
  - iv) That the accused was 40 years of age when the alleged offence occurred.
  - v) That the alleged offence occurred on the 13<sup>th</sup> of July 2012 at the Muslim League Estate, Nabua.
  - vi) That at the time of the offence, the accused was flatting on the same building that the complainant and her family were residing in at Muslim League, Nabua.
  - vii) That on the 13<sup>th</sup> of July 2012, the accused was with the complainant at about 8pm at his flat having sexual intercourse.
  - viii) That the accused was interviewed under caution in the Fijian Language by D/CPL 2929 Setoki Taveta on the 11<sup>th</sup> of September, 2012.

- ix) That the accused was formally charged in the I-Taukei Language by DC 3196 Apeteriki Loco Utoniika on the 12<sup>th</sup> of September, 2012.

11. The following statements were tendered by consent.

- i) Copy of the Medical Report of T.K dated 15<sup>th</sup> August, 2012.
- ii) Copy of the Birth Certificate of T.K.
- iii) Copy of the Record of Interview of Kiliviliame Sovalevu dated 11<sup>th</sup> September, 2012.
- iv) Copy of the Charge Statement of Kiniviliame Sovalevu dated 12<sup>th</sup> September, 2012.

12. 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.

13. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotions.

14. Now let's look at the charge.

### **The First Count**

#### **Statement of Offence**

RAPE: Contrary to Section 207(1) and (2) (a) of the Crimes Decree No: 44 of 2009.

#### **Particulars of Offence**

Kiniviliame Sovalevu on the 13<sup>th</sup> July 2012 at Nabua in the Central Division had unlawful carnal knowledge of T.K, without her consent.

## **Alternative Count**

### **Statement of Offence**

DEFILEMENT OF PERSON BETWEEN 13 AND UNDER 16 YEARS OF AGE: Contrary to Section 215(1) of the Crimes Decree No. 44 of 2009.

### **Particulars of Offence**

Kiniviliame Sovalevu on the 13<sup>th</sup> July 2012 at Nabua in the Central Division had unlawful carnal knowledge of T.K, a young girl of the age of 15 years.

15. In order to prove the offence of Rape the prosecution has to prove 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 concerned, in our law, a child under the age of 13 years is incapable of giving consent. In this case victim was 15 years of age at the time of the offence and, therefore, she had the capacity under the law to consent. Therefore, the offence of rape is made out only if there was no consent from the alleged victim.
18. In order to prove the offence of Defilement of a girl between 13 and 16 years of age the prosecution has to prove following elements beyond reasonable doubt.
  1. The accused
  2. Unlawfully

3. Had sexual intercourse
  4. with the female complainant
  5. Who was or above 13 years and under 16 years.
19. “Sexual intercourse” above means the act of the accused’s penis penetrating the complainant’s vagina, and in law, the slightest penetration of the complainant’s vagina by the accused’s penis, is sufficient to constitute sexual intercourse. Also, the complainant’s consent to sexual intercourse is no defence to the offence.
20. Now let’s look at the evidence led by the prosecution in this case.
21. The first witness was the victim, T.K. According to her she is 18 years old and residing at Lautoka. Her date of birth is 10/09/1997. In the year 2012 she was residing at the Muslim League, Nabua. On 13/07/2012, her parents had gone for a funeral in the village leaving her with her Aunt. The accused who was her neighbour came to her house and gave his phone to her to watch some video clips. After some time he called her to his house which is about 5 meters away from her house. She had gone to the accused’s house and watch video clips in the mobile. The accused then came behind, put her on the floor and closed her mouth with a pillow. He then took off her skirt, lay on top of her, removed his  $\frac{3}{4}$  pants and put his private part in to her private part. She could not either shout or resist as the accused was too strong. He had performed sexual intercourse about  $\frac{1}{2}$  an hour. She felt pain in her vagina due to forceful sexual intercourse and was started bleeding in her vagina. She never consented for sex at that time.
22. She did not tell anybody about the incident until accused had told her Aunt Fane about the incident. Fane had told her mother and after interrogation, her mother had then reported the matter to the police. She was in class 08 when this incident happened. After reporting the matter to police, she was subjected to a medical examination. She identified the accused in open court.

23. In the cross examination witness admitted that she gave two statements to police. 1<sup>st</sup> one was made one month after the incident and 2<sup>nd</sup> one was made two months after 1<sup>st</sup> one. In her statement victim said that incident happened in her house and the accused closed her mouth with his hand and fondled her breast and her vagina. She further said in her statement that the accused had sex with her for about 5 minutes. She admitted that the accused had told her aunt about the incident. Until such time she had kept it secret.
24. In the re-examination witness said that she kept the incident secret due to fear of beating from her father.
25. Elesi Naicuvacuva mother of the victim gave evidence next. She has five children and the victim is her 3<sup>rd</sup> child. In the year 2012, they resided at Muslim League, Nabua. After she came to know the incident she had inquired from the victim. Victim had told her that the accused after calling the victim to his flat put a pillow over her mouth and attempted to have sex with her. She then informed this to her husband and reported the matter to the police after about one month. She identified the accused in open court.
26. Dr. Unaisi Tabua had examined the victim at Colonial War Memorial Hospital on 15/08/2012. She is a medical officer and currently reads for masters in Gynaecology. Consent for medical examination was obtained from victim's mother. In the history to doctor, victim had said that when she was at home alone in July, both parents had gone to the village, a guy by the name of Kiniviliame had asked her to come to his flat to watch movie with him. She did went but during the movie the accused started kissing her and lay her down and had sex with her-penetrating sex. Hymen remnant noted without laceration or tear. According to her sexual assault cannot be excluded. Her findings are consistent with the history given by the victim. The victim had told her that she had sexual intercourse before this incident with a different guy. The Medical Examination Form was marked as P2.
27. In the cross examination witness said that she could not find any fresh injuries as the examination was done after about one month.

28. D/Cpl 2929 Setoki Taveta was called next by the prosecution. He has 15 years experience in the Fiji Police. On 11/09/2012 he was attached to Nabua Police Station. As per the instructions he had recorded the caution interview statement of the accused. Accused admitted that he had sexual intercourse with the victim with consent. The original caution interview in I-Taukei language was marked as P3 (a) and the English translation was marked as P3 (b). He identified the accused in open court.
29. DC/3196 Apeteriki Utonika had charged the accused at Nabua Police Station on 12/09/2012. The charge statement in I-Taukei language was marked as P4 (a) and the English translation was marked as P4 (b). He identified the accused in open court.
30. State counsel marking exhibits 01-04 closed the case for the prosecution. Copies of all the exhibits are given to you.
31. Accused elected to give evidence from witness box. According to him in the year 2012 he resided at Muslim League, Nabua. He knew the victim as she was his neighbour. Accused denied raping the victim but admits that he had sexual intercourse with consent. The matter came to light after he told this to victim's Aunt Fane. She had informed this to the victim's mother. When the victim's father came to know this he had assaulted the accused. Thereafter tendered a traditional apology. In his caution interview statement he had maintained the same.
32. In the cross examination accused said that he was 40 years old in the year 2012. He is married and has two children. He admits what he said to the police is correct. He reiterates that he had sexual intercourse with the victim with consent.

### **Analysis of the Evidence**

33. Ladies and gentleman assessors, victim in her evidence takes up the position that the accused had raped her in accused's house on 13/07/2012. She had told the incident to her mother after about a month. She had kept it secret until her mother inquired about the incident. In her statement to police she contradicted her position taken at the examination chief. In the



- cross examination the victim told police that the incident had happened in her house for about five minutes. In addition to the history given doctor, she had told about her sexual involvement with another person. As assessors and judges of facts you have to consider her evidence with great caution.
34. Ladies and gentleman assessors, you heard the evidence of mother of the victim. According to her, the victim had told her that the accused after calling the victim to his flat put a pillow over her mouth and attempted to have sex with her. This evidence contradicts the evidence given by the victim. Consider this evidence with great care.
  35. Ladies and gentleman assessors, according to doctor the victim is not a virgin. Hymen remnant noted without laceration or tear. According to her sexual assault cannot be excluded. Her findings are consistent with the history given by the victim.
  36. Ladies and gentleman assessors, as I told you earlier, the caution interview statement of the accused person is in evidence. What an accused says in his caution interview is evidence against him. In this case accused did not challenge his caution interview statement. He admits consensual sexual intercourse. Hence you have to consider accused's caution interview statement as it becomes evidence in this case.
  37. Ladies and gentleman assessors, in this case accused elected to give evidence from witness box. That is his right. He has nothing to prove to you.
  38. In this case accused takes up the position that he had sexual intercourse with consent of the victim. He had taken up the same position in his caution interview statement as well. To prove his case he gave evidence.
  39. In this case the accused is charged for Rape Contrary to Section 207(1) and (2) (a) of the Crimes Decree No: 44 of 2009. Alternatively he has been charged for defilement of a girl between 13 and under 16 years of age Contrary to Section 215(1) of Crimes Decree No: 44 of 2009. I have already explained to you about the charges and its ingredients.

40. Ladies and gentleman assessors, in this case State has to prove lack of consent before you can find the accused guilty of rape. If you find there was consent and that he is thereof not guilty of rape. Then you have to consider the alternative count of defilement of a girl between 13 and under 16 years of age. If you think that the State has not proved rape charge, then you will be asked to return your opinions on whether he is guilty of defilement of a girl between 13 years and under 16 years of age.
41. 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 his 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.
42. 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.
43. Ladies and gentleman 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.
44. 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.
45. 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.

46. Any re-direction?

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

P Kumararatnam  
**JUDGE**

At Suva  
28/02/2014

