

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

**CRIMINAL CASE NO: HAC 339/2012**

**BETWEEN : THE STATE**

**AND : KAMINIELI KAITAVUA**

**COUNSEL : Mr M Vosawale for the State**  
**Mr J Savou the Accused**

**Date of Hearing : 12/03/2014**

**Date of Ruling : 13/03/2014**

**RULING**

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

[01] The prosecution closed their case on 11/03/2014. At this stage the defence counsel Pursuant to Section 231(1) of the Criminal Procedure Decree 2009 invited the court to consider whether the accused has a case to answer in respect of 2<sup>nd</sup> account, as the victim did not confirm digital penetration to support that there was penetration, being under the element of Carnal Knowledge. The accused is charged by information as follow:

**FIRST COUNT**

**Statement of Offence**

**INDECENTLY ANNOYING ANY PERSON:** Contrary to Section 213(1)(b) of the Crimes Decree No: 44 of 2009.

### **Particulars of Offence**

**KAMINIELI KAITAVUA**, on the 28<sup>th</sup> day February, 2012, at Navuniyaro Village, Naitasiri in the Eastern Division, with intent to insult the modesty of **M.T** exhibited his penis to **M.T** intending that his penis be seen by **M.T**.

### **SECOND COUNT**

#### **Statement of Offence**

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

### **Particulars of Offence**

**KAMINIELI KAITAVUA** on the 28<sup>th</sup> day of February, 2012, at Navuniyaro Village, Naitasiri, in the Eastern Division, penetrated the vagina of **M.T** with his finger, without the consent of the said **M.T**

[02] The elements of 1<sup>st</sup> count are:-

1. The accused,
2. With intend to insult the modesty of the victim,
3. Exhibited his penis to the victim.

[03] The elements of 2<sup>nd</sup> count are:-

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.

[04] The prosecution relies on direct evidence of the victim and tendered the medical report of the victim.

- [05] The test at this stage of trial is whether there is some evidence on each element of the offence. The evidence must be relevant and admissible. In **Kalisoqo v R** Criminal Appeal No: 52 of 1984, the Court of Appeal took the view that if there is some direct or circumstantial evidence on the charged offence, the judge cannot say there is no evidence on the proper construction of section 293(1) (Under old Law). This view was later confirmed by the Court of Appeal in **State v Mosese Tuisawau** Cr.App. 14/90.
- [06] In **State v Woo Chin Chae** [2000] HAC 023/99S Madam Shameem J summarized test under Section 293(1):
- “In order to come to the conclusion that there was evidence direct or circumstantial, and irrespective of its weight, credibility or its tenuous nature it must be shown that the evidence in question is relevant, admissible and is in totality inculpatory of the accused. That means that the evidence in its totality must at least touch on all the essential ingredients of the offence”*
- [07] In **State v George Shiu Raj & Shashi Shalendra Pal** [2006] AAU0081/05 Court of Appeal recently confirmed that the correct approach under 293(1) is to ask whether there is some relevant and admissible evidence on each element of the charged offence, and not whether the evidence is inherently vague or incredible.
- [08] The victim giving evidence before this court said that on 28<sup>th</sup> of February, 2012 she was at Navuniyaro Village and her father and mother had gone to the plantation. She was cooking with her aunt under her house and when her aunt went into the house, the accused stretched his hand and touched her vagina. He then told her to touch his penis. After touching her vagina the accused put his hand into his mouth. She could felt pain when he touched her vagina. When he told her to lean against the post, she ran away from the scene.
- [09] She said nothing to the doctor who examined her. The history was given to the doctor by the victim’s mother. The medical examination was done on 01/03/2012. No fresh injuries or laceration was seen in her vagina.

- [10] The victim in her evidence nowhere said the accused inserted his finger into her vagina. In fact her evidence never suggested that the accused's finger penetrated her vagina.
- [11] As per Section 129 of the Crimes Decree, 2009 no corroboration is required in sexual cases.
- [12] Considering the evidence led before this court, prosecution has not led evidence to prove that the accused penetrated the vagina of the victim with his finger.
- [13] I find the accused has no case to answer in respect of the charge of rape and therefore he is acquitted from 2<sup>nd</sup> count. But he has case to answer in respect of 1<sup>st</sup> count of Indecently Annoying Any Person Contrary to Section 213(1)(b) of the Crimes Decree No: 44 of 2009.

P Kumararatnam

**JUDGE**

At Suva

13/03/2014



