

**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 for the Accused

**Dates of Trial:** 10-14/03/2014

**Date of Summing Up:** 17/03/2014

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

**SUMMING UP**

Madam and Gentlemen Assessors,

[01] 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.

[02] 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.

- [03] 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.
- [04] 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.
- [05] 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.
- [06] 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.
- [07] 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.
- [08] 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.

[09] 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. Copies of agreed facts are given to you.

The following facts are agreed between the parties:

- a. It is agreed that M.T (hereinafter referred to as the complainant) of Navuniyaro Village, Naitasiri is the complainant in this matter.
- b. It is agreed that Kaminieli Kaitavua (hereinafter referred to as the accused) is the defendant in this matter.
- c. It is agreed that the complainant is the niece of the accused.
- d. It is agreed that the accused was caution interviewed on the 2<sup>nd</sup> of March 2012 at about 0731 hours at Vunidawa Police Station.
- e. It is agreed that the accused was formally charged on 11<sup>th</sup> of August 2012, at 1441 hours at Vunidawa Police Station.

The Following Documents To Tender By Consent:

- f. Accused's caution interview on the 2<sup>nd</sup> March 2012.
- g. Accused's charge statement dated 11<sup>th</sup> August 2012.
- h. Complainant's medical report dated 1<sup>st</sup> March 2012.

[10] 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.

[11] 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.

[12] Now let's look at the charges.

## 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**.

[13] After the closing of prosecution case, the defence made an application under Section 231(1) Criminal Procedure Decree 2009, invited this court to consider whether the accused has a case to answer in respect of 2<sup>nd</sup> count. After considering the prosecution evidence and both counsels' submissions, this court has delivered a ruling on 13/03/2014 in respect of 2<sup>nd</sup> count. Madam and Gentlemen Assessors, now, you have to consider whether the accused is guilty or not guilty in respect of 1<sup>st</sup> count only.

[14] I now remind you of the prosecution and defence cases. In doing this it would be tedious and impractical for me to go through the evidence of every witness in detail and repeat every submission made by the counsel. I will summarize the salient features. If I do not mention a particular witness, or a particular piece of

evidence that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case.

- [15] Now let's look at the evidence led by the prosecution in this case.
- [16] 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. She told this to her father when he returned from the plantation.
- [17] In the cross examination victim said that accused was in the village on 28/02/2012. He did not go to the plantation on that day. She admits that her family live in the house belonging to the accused since 1994. Victim denied that she made a similar allegation against two persons in the village before this incident. Victim denied that she looked at the accused having shower.
- [18] According to Naomi Saurara, mother of the victim, she has six children. As the victim became weak and an Epileptic patient, she has stopped going to school without completing Class 04. From then she stayed at home. On 28/02/2012, when she returned from the plantation, the victim told her that the accused had touched and sucked her breast licked her tongue and touched her vagina. He then pulled her hand to touch his penis. She then informed this to her husband who then reported the matter to the police.
- [19] In the cross examination witness said that she cannot see anything happening under the house even from the footpath. The victim was left under the care of her aunt. She said that she only knows that the accused left the village in the early hours of the day. According to her police officers took her statement and the victim's statement separately. She admitted giving the history to the doctor. When the accused returned to the village he was rewarded with a post of Village Headman (Turaga ni Mataqali). She admitted that victim made similar allegations against Nova and Temisi but were not reported. This had happened 10 years ago.

- [20] According to Dr. (Mrs) Vandana Krishna, victim said nothing to the doctor when she 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. She further said that the patient is a known Epileptic and has low IQ. According to her opinion low IQ people can speak.
- [21] That is the end of the prosecution case. Defence was called and explained the rights of the accused. After understanding his rights he elected to give evidence from witness box and called witnesses.
- [22] The accused is a retired Government Servant. He worked in the Lands Department until his retirement. After building a house in Navuniyaro Village, he had given the house to the victim's family to stay in. On 28/02/2012, the accused had gone to a land owned by the church to plant dalo. He came back at 1.00 pm and saw his wife and the victim were cooking under the house. He too went under the house and his wife had told him that lunch was ready. When he went to have a bath, he had seen the victim sitting on the tin window and looking at him. He wore a sulu when he had his bath. After lunch, he had slept and went out for fishing. He denied the charge and said that he does not know why the victim's making such an allegation against him. He denied the allegation in his caution interview statement as well.
- [23] In the cross examination accused denied the charge and said that he never called the victim on 28/02/2012. According to the accused the bathing place is open without a door. He reiterated that the victim was looking at him when he had his bath. He denied that he exposed his private part to the victim.
- [24] Salanieta Kaitavua, wife of the accused corroborated what accused said to the court. According to her nothing happened on that day as claimed by the victim. No complaint received from the victim.
- [25] According to Temisi Tuinacova, one day he can't re-call the day, while he was resting at the victim's house after weeding in the plantation, he had felt someone touching his body. When he opened his eyes, he had seen the victim touching his body. This had happened when the victim's parents were

not at home. He is related to the victim's family as his father and the victim's father are brothers.

[26] Sulueti Nabule had seen the victim sitting beside Temisi when she entered the victim's house. After seeing her, the victim took off her hand from Temisi's body.

[27] That is the end of defence case.

### **Analysis of the Evidence**

[28] Madam and Gentlemen Assessors, as I told you at the beginning now your duty is find the accused guilty or not guilty only against 1<sup>st</sup> court. Victim said to this court that on 28/02/2012, the accused touched her vagina and made her to touch his penis. She denied that she is making a false allegation against the accused. Though she was examined by a doctor she did not tell anything to her. The history was given by her mother as the victim is a low IQ person. As Assessors and Judges of facts you have to consider her evidence very carefully.

[29] Madam and Gentlemen Assessors, you heard the evidence of Naomi, mother of the victim. According to her victim had said that accused had touched and sucked her breast, licked her tongue and touched her vagina. He then pulled her hand to touch his penis. As Assessors and Judges of facts you have to consider her evidence very carefully.

[30] Madam and Gentlemen Assessors, the doctor gave evidence and submitted her report. Victim had not said anything to her during the examination. The mother of the victim had given all information about the victim to the doctor.

[31] Madam and Gentlemen Assessors, in this case the accused person opted to give evidence from witness box and called witnesses. That is his right. But he has nothing to prove to you.

[32] Accused in his evidence denied the charge. The accused said that the victim was looking at him when he was having his bath. His wife said nothing happened on 28/02/2012 as claimed by the victim. The victim was left under her care when her parents went to the plantation. Temisi told this court that

the victim was touching his body when he was resting in the victim's house. Madam and Gentlemen Assessors, please consider this evidence very carefully.

- [33] Madam and Gentlemen Assessors, you have heard all the prosecution and defence 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.
- [34] 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.
- [35] Madam and Gentlemen 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.
- [36] 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.
- [37] 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.



[38] Any re-directions

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

P Kumararatnam  
**JUDGE**

At Suva  
17/03/ 2014

