

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 051/2012

BETWEEN: **THE STATE**

AND: **JOSEFA CAKAU**

COUNSEL: **Mr L Fotofili for the State**
 Ms L Raisua for the Accused

Dates of Trial: **17-19/03/2014**

Date of Summing Up: **20/03/2014**

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

SUMMING UP

Ladies and Gentleman 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 judgement.
- [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 the 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] 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.
- [10] 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.
- [11] Now let's look at the charge.

FIRST COUNT

Statement of Offence

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

Particular of Offence

JOSEFA CAKAU on the 09th day of January 2012, at Moti Street, Samabula, in the Central Division, penetrated the vagina of **M.T** with his finger without her consent.

- [12] In Fiji law, the offence of Rape is committed when the vagina is penetrated either by the penis or by the finger of the accused. Hence in this case the prosecution has to prove:
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.
- [13] 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 22 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.

[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 **M.T** was 22 years at the time of the incident. In the year 2012 she resided at Moti Street, Samabula. After she broke off her relationship with her boy friend Eramasi, she developed a friendship with the accused. On 09/01/2012, she had called the accused to come to her house at Moti Street to do a massage. She asked the accused to come between 9-10pm. She had the friendship with the accused for about one year before the incident. On 09/01/2012, the accused came to her house at about 10.00pm. After chatting for about 15 minutes, the accused massaged her back for about 20 minutes. After massage, both walked up to the roundabout and sat on the side of the footpath and started talking. While they were talking, the accused kissed her lips suddenly which she never expected. Although she resisted, the accused then put his right hand into her pants and inserted his long finger into her vagina. This happened while both were seated on the footpath. When accused inserted his finger she felt hurt and she told him to stop. When accused did not stop, she pulled the hand out. At that time the accused was emotional and she could feel that he likes her. When she asked him whether he likes her, the accused told her that he was just playing around. Accused then ask her to forgive him. She forgave him. On the following day, she phoned Samabula Police Station and lodged her complaint. She identified the accused in open court.

[17] In the cross examination the victim said that she knew the accused for a long time and she had contact with him. She had gone to the accused's work place and also met him on the road. In the month of November, 2011, she met the

accused and spent some time with him. During that meeting she had kissed the accused at the bus stop. On 09/01/2012, though, he could have massaged her in the house but was taken outside of the house. She admitted when accused kissed her first, she too kissed him and started to touch each other. She admitted that she touched accused pelvic region. At this point accused inserted his finger in to her vagina. She further admitted, that she asked the accused whether he wants her. But accused had told her that he was playing around. She had told police that accused told her he would consider later. The victim finally said that she would not have reported the matter to police if the accused said that he really wanted her and have feelings for her.

- [18] In the re-examination victim said that she touched accused penis when both touched each other's body. She reiterated that she reported the matter to police as accused said that he was just playing around her.
- [19] WPC Moala Volauca is the interviewing and investigating officer in this case. She had recorded the accused's caution interview statement on 30/01/2012. According to her the accused answered the questions voluntarily. When the allegation was put to him, the accused admitted the charge in his caution interview statement. She identified the accused in open court.
- [20] As per the witness the allegation put to accused was "on Monday night 09/01/2012, at about 10.00pm as she walked you out on the road to drop you, during your chat you touched her breast, private part and also kissed her in which she did not like and as you stated that you were only playing". Witness admitted that the accused was not put of the allegation that he inserted his finger into her vagina.
- [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.
- [22] According to the accused he knew the victim through his cousin, who was her boy friend. After she broke off the affair, victim used to call him since 2011. In the year 2012, on a Monday the victim called him and requested to do a massage. He went to her place late as he had to attend a church programme. He went there and massaged her for about half an hour outside the house. After that both left home and sat for a talk on the side of the

footpath. While both enjoying talking the accused kissed her as boyfriend and girlfriend. The victim had kissed him too. According to the accused this is not the first time that the victim had kissed him. She had kissed him in the month of November, 2011. Thereafter both touched each other and he had touched her breast and her private part. She too touched his body and his penis. Both touched each other's private part about 10 minutes. Thereafter victim said to stop. But he did not stop as both still hugging each other. He stopped touching her when she said "Rauta" in I-Taukei language. This means enough. After that both stopped each other. After embraced each other for about 10 minutes, both left the place and accused went to drop her back. On the way victim asked whether he loves her. He had told her yes but not at this moment. Due to this answer she became very angry. Accused said that he inserted his finger into her vagina with her consent.

[23] In the cross examination accused said that before 09/01/2012, the victim said to him that she likes him. The accused had met the victim in the month of December at his place. At that point they had the relationship of boyfriend and girlfriend. But he was never invited to victim's bedroom. Accused admitted that he put his index finger into her vagina with her consent. According to the accused the police had only called him once.

[24] In the re-examination accused said that the victim was not happy as he said that he can't really commit to her.

[25] That is the end of defence case.

Analysis of the Evidence

[26] Ladies and Gentleman assessors, in this case the victim gave evidence first. According to the victim, she too kissed the accused when accused kissed her first on 09/01/2012. Both were hugging each other and touched each others private part. The accused touched her vagina and inserted his finger into her vagina and victim touched his penis. This happened on the road. The victim said that she would not have reported the matter to police if the accused had said that he really feel for her. The victim had already kissed the accused in the year 2011. Both had intimate relationship since 2011. As assessors and judges of facts you have to consider her evidence very carefully.

- [27] Ladies and Gentleman assessors, you heard the evidence of the police officer who recorded the caution interview statement of the accused. She admitted the allegation pertains to this case was not put to the accused.
- [28] Accused admits that he inserted his index finger into victim's vagina with consent. He did so while both were hugging and touching each other. He confirmed that the victim had touched his penis when he inserted his finger into her vagina. The accused reiterated that he inserted his finger into her vagina with consent. The only reason the victim lodged a police complain as he said to her that he can't accept her love at that moment. As Assessors and Judges of facts you have to consider this evidence very carefully.
- [29] As I told you earlier, the caution interview statement of the accused is in evidence. What the accused said in his caution interview statement is evidence against him. The accused admitted that he put his finger into victim's private part as he thought that victim had agreed for him to do it. As per the police officer the charge pertains to this case was not put to the accused when his caution interview was conducted.
- [30] Ladies and Gentleman assessors, in this case accused opted to give evidence from witness box. That is his right. But he has nothing to prove to you.
- [31] In this case the accused is charged for Rape contrary to Section 207(1) and 207(2) (b) of the Crimes Decree No: 44 of 2009. I have already explained to you about the charges and its ingredients.
- [32] 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.
- [33] 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.

- [34] 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.
- [35] In relation to issue of consent, you have to consider whether the accused knew or ought to have known whether the victim was not consenting.
- [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
20 /03/2014

