

IN THE HIGH COURT OF FIJI  
AT SUVA  
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 056 of 2012

BETWEEN:                                 THE STATE                                 COMPLAINANT

A N D:   SAMUELA TUIVESI                             ACCUSED

Counsel   :   Ms. P. Madanavosa for the State  
  :   Ms. N. Nawasaitoga for the Accused

Dates of Hearing                                 :   2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> June 2014

Date of Summing Up                             :   05<sup>th</sup> June 2014

Date of Judgment                                 :   06<sup>th</sup> June 2014

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**J U D G M E N T**

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1. Mr. Samuela Tuivesi, the accused is been charged with the following count of 'Rape' contrary to section 207 (1) (2) (a) of the Crimes Decree No. 44 of 2009.

*Statement of Offence*

**RAPE:** contrary to section 207 (1) and (2) (a) of the Crimes Decree No. 44 of 2009.

*Particulars of the Offence*

**SAMUELA TUIVESI** on the 5<sup>th</sup> day of February, 2012, at Khalsa Road, Valelevu in the Central Division, had carnal knowledge of **A.S.** without her consent.

2. After a weeklong trial the three assessors unanimously found the accused 'GUILTY' to the said charge of 'Rape'.
3. When finalizing the judgment of court, in addition to the assessors's opinion, this court will also have to be satisfied beyond reasonable doubt that the prosecution has proved its case or all the elements of the charge without leaving any reasonable doubt. Section 237 of the Criminal Procedure Decree permits this process.
4. According to Ms. A.S., the complainant, she had been taken under the wooden house next to Dan's car wash, (which rests on Pine poles) by the accused when she was refused to go there. She had told the accused, when called her to join for a drink, that she has to go to work on the following day, a Monday, and therefore she cannot drink beer. After couple of cans of beer, the other two, one Iliesa and Pillay, were asked by the accused to go and bring some more drinks. After they left, Ms. A.S. said that the accused started fondling her breasts and made sexual advancements to her, despite her resistance. She said, at last she had to give up the struggle as she got scared that she will be killed, if she continues the resistance. Then the accused had capitalized her surrender and inserted his penis into her vagina after pushing her to the ground. After the alleged incident, she had gone home.
5. According to the evidence led by the prosecution, Ms. A.S. came into light once again on 10<sup>th</sup> February 2012. Doctor Unaisi Tabua told court that she examined Ms. A.S. on 10<sup>th</sup> of February 2012 around 5pm at the CWM hospital. In evidence, Doctor Tabua said that Ms. A.S. was referred to her by the police with the remark of '*raped by six youths from Kalabu on Monday (06/02/2012) at about 6.30pm*'. [A-4 of Medical Examination Form]. Then Doctor Tabua said that the history narrated to her by Ms. A.S. was noted down in column D-10. She read it to court during her evidence in chief. It says as follows:

*"According to patient, joined a drinking party of 3 on Monday with other 2 guys, known to her, after 3/4 glasses, feel unconscious, woke up the next day to be told, that she was found naked with four other guys "doesn't know them" and didn't know what happened. But previous day (Sunday) she was raped by her distant uncle who threatened her if she didn't come to him freely he would chase them*

*away from their home since he's the landowner, despite her refusal and efforts to get away from him, he forcefully penetrated her and had intercourse with her. He is also one of the guys she drank with on Monday."*

6. The other piece of evidence led by the prosecution was the caution interview statement of the accused. The accused had maintained his stance, as in this court as well, that he had sexual intercourse with Ms. A.S. on 5<sup>th</sup> of February 2012 with her consent.
7. The court is mindful of the fact that in terms of section 129 of the Criminal Procedure Decree No. 43 of 2009, there is no need of corroboration to the complainant's evidence for an accused to be convicted. Nevertheless, this court wishes to pursue whether there is any "contradiction" between the complainant's evidence and the doctor's evidence, or, to be more precise, the history narrated by the complainant to the doctor. Anyway, this court sees no impediment with such a move as it does not violate the provisions of section 130 (2) (a) and 130 (3) (a) of the Criminal Procedure Decree.
8. It is better to start with the 'history' given to the doctor by the complainant. She had claimed that she was "raped by her distant uncle who threatened her if she didn't come to him freely he would chase them away from their home since he is the landowner". She had started the alleged history given to the doctor from Monday, 6<sup>th</sup> of February 2012 and then referred to the previous day's incident, Sunday the 5<sup>th</sup> February 2012, and told that her distant uncle, (parties did not dispute that the accused is the distant uncle she meant) raped her on Sunday. The last sentence of D-10 is "*He is also one of the guys she drank with on Monday*". "He" stands to this distant uncle or the accused.
9. This history, if true, means that Ms. A.S. was raped by the accused on Sunday, 5<sup>th</sup> of February 2012 and she joined with him and two other 'guys' on the following day, Monday the 6<sup>th</sup> February 2012, for yet another 'drinking party'. No clarifications were sought from the complainant when she offered evidence as to why she joined the accused's company on Monday, if she was forced by him on the previous day to have sexual intercourse. It was rather a strange move by the prosecution as they heavily relied upon a "portion" of the same 'history' to show court that Ms. A.S. did not divulge this incident to



anybody as she thought that the accused “would chase them away from their home since he is the land owner...”

10. With the absence of a plausible explanation for her reunion with the accused on the very next day to another ‘drinking party’, how could a reasonable man view her “sexual experience” with the accused on the previous day?
11. On the other hand, Ms. A.S., in her evidence told court that she did not divulge the 5<sup>th</sup> of February incident to anybody as she was scared of losing their shelter due to accused being the landowner. No evidence was elicited from her by the prosecution as to what made her to break the silence on 10<sup>th</sup> February 2012, five days after the charged incident. Making things worse, the 5<sup>th</sup> February incident had been followed by yet another ‘serious incident’, if not ‘Rape’, committed by several other males.
12. Even if calculated from 6<sup>th</sup> February, it is four days silence from the part of the complainant. There is no clue as to why she was silent after the 2<sup>nd</sup> incident. From the alleged incident on 5<sup>th</sup> of February 2012, the prosecution had a big leap to 10<sup>th</sup> of February 2012, directly to doctor’s evidence, by conveniently omitting or deliberately forgetting that they have a duty to offer at least “some explanation” about the complainant’s subsequent conduct. It is in this light, the proposition of the defence has to be viewed. They argued that when the rumors were spreading around the village about the alleged sexual acts to which Ms. A.S. was a party, her uncle influenced her to report those to the police, but Ms. A.S. did not take the lead until such time because she was a willing participant to the acts.
13. This proposition, may it be true or not, is sufficient to create the ‘reasonable doubt’ that the ‘criminal justice system’ insists upon, especially when a huge vacuum is created with unexplained and unjustified ‘subsequent conduct’ of the complainant. Even though this court agrees with the complainant that that she could not raise alarms or shout for help when the alleged sexual act was in process under the wooden house due to fear psychosis, the doubt created with the ‘history’ provided to the doctor coupled with the delay in reporting the matter to anybody, may it be a family member or police, cannot be reconciled.

14. In the light of the above, this court concludes that the all important element of 'consent' is not been proved beyond reasonable doubt by the prosecution. Therefore, the benefit of the doubt stemmed out of complainant's own evidence will be awarded to the accused.
15. Mr. Samuela Tuivesi, the accused is found 'NOT GUILTY' to the charge of 'Rape'.
16. In terms of section 237 (4) of the Criminal Procedure Decree No. 43 of 2009, the unanimous opinion of the assessors is overturned.
17. That is the Judgment of this court.



Janaka Bandara  
**Judge**

**At Suva**

**Solicitors**

Office of the Director of Prosecution for State  
Office of the Legal Aid Commission for Accused