IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No.61 of 2016

STATE

V

MAIKELI DAWAI

Counsel: Mr R. Kumar with Ms. A. Vavadakua for the State
Mr. A. Sen for the accused

Date of Hearing : 11 May 2017

Date of Ruling : 11 May 2017

RULING
NO CASE TO ANSWER

1. The accused faces one count of rape on the 16th April 2010 of a 26 year old woman in Savusavu.

2. The complainant was the first prosecution witness at trial.

3. She had earlier written to both the D.P.P. and the Court saying that she wanted to withdraw her complaint and did not want to give evidence about it.

4. The reasons that she had given and which were known to the D.P.P. included factors of the age of the complaint and that she had moved on. She was now happily married with young children and wanted to forgive and forget. She had participated

in traditional cultural settlement and forgiveness rites and had no wish to punish the accused who now had a young family of his own.

5. She repeated these grounds when called to the witness box, again giving the Court a letter, imploring the Court to absolve her from giving evidence.

6. The prosecution submitted that they had been instructed by the D.P.P. to insist that she give evidence in accordance with her original complaint. The Court then had to option but to proceed.

7. The witness was obdurate, insisting that she would not give evidence.

8. The State then sought to rely on s.118 of the Criminal Procedure Act 2009 which reads:

"s.118.-(1) Whenever any person, appearing either in obedience to a summons or by virtue of a warrant, or being present in court and being verbally required by the court to give evidence-

(a) refuses to be sworn: or

(b) having been sworn, refuses to answer any question put to him or her:, or

(c) refuses or neglects to produce any document or thing which the person is required to produce:; or

(d) refuses to sign his or her deposition –

without in any such case offering any sufficient excuse for such refusal or neglect, the court may adjourn the case for any period not exceeding 8 days, and may in the meantime commit the person to prison unless he or she sooner consents to do what is required.

(2) If such person, upon being brought before the court at or before the adjourned hearing again refuses to do what is

required, the court may again adjourn the case and commit the person for the same period, and so again from time to time until the person consents to do what is required."

9. The court found, despite Mr.Sen's objection, that the stance of the witness came under the situation provided for in s.118(1)(b) and therefore it was in the discretion of the court whether to apply the sanction of imprisonment. It is to be noted that the word **"may"** is used and not **"shall".**

10. The section also provides for "**sufficient excuse"** which the Court finds in this case has been given both before the trial and after she had answered to her summons.

11. The prosecution being aware of those excuses which in all the circumstances could be said to be sufficient and reasonable told the Court that they wished to invoke the imprisonment sanctions of the section.

12. It is the view of the Court to do so would be draconian.
It is a basic principle of prosecution protocol that they do not strive for a conviction at all costs. *A fortiare* to compel a witness to give evidence under pain of imprisonment in unconscionable. In an effort to secure a conviction, they would imprison the victim of a rape.

13. Sometimes witnesses do not come up to proof and whether they be declared hostile or not, their evidence is virtually worthless. To refuse to give evidence at all after answering the summons is a similar circumstance. She has "sufficient reason". She is a happily married woman with 2 young children, she has forgiven the accused in both the cultural and her faith based ethic, and she does not wish to relive the trauma of events occurring seven years ago.

14. The prosecution can take no pride in their intransigence in this case:

15. The Court dismisses and releases the witness without sanction.

16. There being no other evidence there is no case to answer against the accused. He is found not guilty and acquitted.

P. K. Madigan

Judge

At Labasa

11 May 2017