

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

**Criminal Case No: HAC127 of 2011**

**BETWEEN** : **THE STATE**

**AND** : **BIJENDRA**

**BEFORE** : **HON. MR. JUSTICE PAUL MADIGAN**

Counsel : Mr. L. Fotofili for the State  
Mr. T. Sharma for the accused

Dates of hearing : 8 and 9 April, 2013  
Date of Summing Up : 10 April 2013

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**SUMMING UP**

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[1] Ladies and gentleman assessors:

The time has come now for me to sum up the case to you and to direct you on the law involved so that you can apply those directions to the facts as you find them.

[2] I remind you that I am the Judge of the Law and you must accept what I tell you about the law. You in turn are the Judges of the facts and you and only you can decide where the truth lies in this case. If I express any particular view of the facts in this summing up then you will ignore it unless of course it agrees with your view of that fact.

[3] The parties have addressed you on the facts but once again you need not adopt their views of the facts unless you agree with them. You will

take into account all of the evidence both oral and documentary. You can accept some of what a witness says and reject the rest. You can accept all of what he or she says and you can reject all. As judges of the facts you are masters of what to accept from the evidence.

- [4] You must judge this case solely on the evidence that you heard in this Courtroom. There will be no more evidence, you are not to speculate on what evidence there might have been or should have been. You judge the case solely on what you have heard and seen here.
- [5] The courtroom is no place for sympathy or prejudice. This has been a very short and straightforward case but you must give it your full attention without emotion as I am sure you will.

You must judge this case solely on the evidence produced in this Court and nothing else.

- [6] I am not bound by your opinions but I will give them full weight when I decide the final judgment of the Court.
- [7] It is most important that I remind you of what I said to you when you were being sworn in. The burden of proving the case against this accused is on the Prosecution and how do they do that? By making you sure of it. Nothing less will do. This is what is sometimes called proof beyond reasonable doubt. If you have any doubt then that must be given to the accused and you will find him not guilty - that doubt must be a reasonable one however, not just some fanciful doubt. The accused does not have to prove anything to you. If you are sure however that Manoj raped Priyekna on the 28<sup>th</sup> November 2010, you will find him guilty.
- [8] In our law rape is committed when someone invades the body of another without that other's consent and for the purposes of this case

rape is normal penile sexual intercourse without consent. Consent must have been freely given and not given in fear of authority or by threat. It is a specific legal stipulation that consent is not freely and voluntarily given if it is obtained by false and fraudulent representations about the nature and purpose of the act. There is evidence in this case which you may accept or reject, it is a matter for you, that the accused told the complainant and her aunt that he could cure all of Priyekna's problems by sex; and he did say by her boyfriend first. If you think that Priyekna only agreed to have sex with Bijendra because of his fraudulent and false promise of healing through the sexual act, then in law that is not consent at all.

- [9] The charge against the accused on the information is what is called a representative count. The Prosecution allege that, during the period alleged in that count (that is the 28<sup>th</sup> November 2010) the accused committed up to four (the accused says two) other offences of the same kind. Instead of loading up the information with counts charging many offences, they have selected one as an example, as they are entitled to do. To convict the accused you must be sure that he committed at least one such offence during the period concerned, whether or not you are sure that he also committed other such offences.
- [10] It is not in dispute that there was at least three, if not five, acts of sexual intercourse in the early morning of 28<sup>th</sup> November 2010. What IS in dispute is the issue of consent. If you believe Priyekna that the Accused in promising to heal her acne locked her in her bedroom and raped her, then you will find him guilty of rape. The accused however says that the sex was by mutual agreement and that Priyekna enjoyed it and agreed to it all along. If you think that is the case, then you will find him not guilty. It is a matter for you.

- [11] The evidence in this case was only heard yesterday and it is not necessary for me to cover it in much detail, but it is my duty to remind you of the main points of both the complainant's and the accused's evidence.
- [12] Priyekna told us that in November 2010 she had been staying with her aunty Umra in Makoi. At the time she was receiving medical treatment for bad acne; she wasn't happy with the results and Umra said that she knew someone who could help. She and aunty went to see this person who was called Manoj (it was the accused). He was at his home with his wife and he talked to them. He made some kava and called up a spirit; then he talked to Priyekna about her past. He said he was possessed by a spirit. When he talked about her family and past, Priyekna was impressed and started to believe in him. He said that he needed \$350 for the medication and he would make a meal for the spirits to calm them. Umra said that they would have the money by Saturday and on that day they could give the money and he could finish the process. He said that at the next session he would tell her what to do. On the Saturday Umra took her back to his house and it was there that she learned that there was a process although she was never told what the process was. On the Saturday there was more kava and he again called up the spirit and he again went into Priyekna's past. She now believed everything he said. She was sent out of the room while Manoj and Umra chatted. They talked for about an hour and then Umra took her back home. At home Umra told her that she would have to sleep with the accused because he could see that she was possessed by the spirit Mohini Churus. Priyekna said she was shocked when she heard this and couldn't believe her own aunt was suggesting it. She argued with her aunty about this. The aunt took her phone from her so that she couldn't talk to anybody about it. Umra told her that if she didn't sleep with him she would suffer for her whole life. She didn't want to sleep with him. At about 7.30 that night, Manoj came to their house bringing kava and

cigarettes: he said that he had come for the first session. He started talking in the Fijian vernacular. He started doing the sevusevu and calling up the spirit. He then said to Priyekna that now is the time for you to sleep with me. She said I am not going to do that at which Manoj started to threaten her; he said that he was about to reverse the process and within ten days he would finish her family and her. Priyekna was scared and said "stop - leave me as I am". Umra slapped her on the face because she was refusing to comply. At about 11pm Umra pushed her into the room and locked the door. Umra and Manoj were in the other room making another sevusevu. They then took her out and forced her to drink grog until she was grog-doped.

- [13] Finally at about 1am on Sunday 28<sup>th</sup> Umra pushed her into the bedroom and Priyekna lost control, feeling dizzy. Umra and Manoj followed her in, lit incense sticks to purify the room. After an hour Manoj asked Umra to leave the room which she did going to the lounge and turning the television on with a very very high volume. The accused pushed Priyekna onto the bed and took off all her clothes. Priyekna screamed for help but the TV was so loud no-one could hear her. He took his own clothes off and told her that he wasn't really possessed but he was just faking it. He kissed her all over her body then made her perform oral sex on him. He then pushed her back on the bed and entered her with his erect penis. He did that five times that night at hourly intervals. Priyekna said she was so ashamed; she felt she had nothing to live for and wanted to hang herself. At 7.30am the accused said the process was finished and left. Umra told her not to tell anyone. Priyekna slept all day and then on the Monday went to work where she told her boss and her colleague what had happened. (It is an agreed fact that you must accept that she had told her colleagues on November 29<sup>th</sup>). They took her to the Police and that is where we will leave Priyekna's evidence.

- [14] The second Prosecution witness was the lady Police Officer who shepherded Priyekna through the initial investigation stage. She took the complainant to be medically examined at CWM hospital.
- [15] The Police Officer from Valelevu told us about the interview of Bijendra after his arrest. The record of interview was produced and you read it along with the officer. Now what the accused says in his interview is all a matter for you to consider in the normal way. You understand that it is a complete denial of the offence and in the interview Bijendra says that he did have sex with Priyekna but it was all with her consent in her naive hope that he would be able to cure her medical problems. You will give the evidence in the interview whatever weight you wish.
- [16] Dr. Bavou told us that he had examined Priyekna on the 30<sup>th</sup> November. He said that there was an echymosis on the inside of her right arm (an injury he defined as "the movement of blood outside the vessels"), there was bruising on the posterior vaginal wall and there was minor bleeding from that bruise. The patient was not a virgin and the Doctor concluded that the injuries would have been inflicted within the previous 24 to 48 hours.
- [17] That was the end of the Prosecution case and you heard me explain to the accused what his rights in Defence are. The accused does not have to prove anything to you; it is the State that must prove their case to you so that you are sure. The accused is entitled just to sit back and say to you that the State has not proved their case to the requisite standard and therefore he is entitled to be found not guilty. However in this case the accused did elect to go into the witness box and give evidence. It then becomes evidence for you to consider but the difference is this: the fact that the accused gives evidence does not put a stop to the State's duty to prove their case beyond reasonable doubt. Even if you don't believe the accused it does not mean that he

is guilty, simply because he doesn't have to prove anything to you. If you think the State has proved their case beyond reasonable doubt then the accused's evidence becomes irrelevant, even if you don't believe it.

[18] The accused, Manoj or Bijendra, told us that Umra and Priyekna had come to his home on the 24<sup>th</sup> November to speak to him about Priyekna's sickness. He made some grog and he then told them what to do next. He told them that Priyekna had to be "sexed" by her boyfriend or partner. He didn't feel comfortable providing the service because he was married with kids. The pair came back to him on the 27<sup>th</sup>. They brought \$150 to buy the food to cook for the Gods. He says that Priyekna agreed to do the sex but with him because her boyfriend was abroad. At 4.30pm they called, asking him to go to their house. When he got there he mixed grog and they finished it at about 11pm. They cooked a meal of eggs and roti and then Priyekna went to have her bath. Manoj was smoking and Priyekna brought him toothpaste to clean his mouth. He and Priyekna went to the bedroom. For half an hour they just lay down talking. He then told her to undress which she did, Manoj helping her with her bra. She agreed to have sex which they did for three times. Aunty was next door but no TV. Priyekna was so relaxed that she fed him some mangoes. He stressed that he had voluntarily gone to the Police when he heard about the complaint. He told us that he had been consistent in his story of consensual sex.

[19] Well Ladies and gentleman, that is all I am going to say about the evidence. If I have not mentioned something you think is important, then you will give it whatever weight you think it deserves. When you come back with your opinions it is better that you be all agreed but that is not strictly necessary. You will be asked individually for your opinion and your possible opinion will be either guilty or not guilty. Please let a member of my staff know when you are ready and I will reconvene the Court.

[20] You may now retire but first let me ask both counsel if they wish me to amend or add anything to this summing up.

Paul K. Madigan  
**JUDGE**

At Suva  
10 April 2013