

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

**Criminal Case No: HAC134 of 2012**

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

**AND** : **JOSUA WALILI**  
**ILIANI SUKALOA**  
**SAILOSI LAWALIGANA**

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

Counsel : Ms L. Koto for the State  
Mr. J. Savou with Ms L. Raisua (L.A.C)  
for all accused

Dates of hearing : 1<sup>st</sup> & 2<sup>nd</sup> May 2013

Date of summing up : 3<sup>rd</sup> May 2013

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**SUMMING UP**

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[1] Ladies,

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] Counsel 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 these 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 them not guilty - that doubt must be a reasonable one however, not just some fanciful doubt. The accused do not have to prove anything to you. If you are sure however that Josua raped Nunia you will find him guilty and if you are sure that Iliani raped Nunia you will find him guilty and if you are sure that Sailosi raped Nunia then find will find him guilty. If you are not sure you will find them not guilty

- [8] The accused are charged with one count of rape each. For the purposes of this trial, in law, rape is committed when a man unlawfully penetrates the vagina of a woman with his penis, without her consent.
- [9] Now because each of these accused faces a charge of rape, I direct you to look at the case for and against each accused separately. The evidence against each young man is different and just because you might think that one is guilty does not necessarily mean the others are guilty - and the same applies if you think one might be not guilty.
- [10] The first accused Josua, is charged with a representative count of rape for the month of January 2012. The prosecution alleges that Josua also committed another offence of the same kind in that month - that is to say once under the house and once by the mangrove tree. Instead of repeating the charge in the Information, they have charged one representative count. They are entitled to do this. To convict the accused you must be sure that he committed one of the two rapes that evidence has been led for. If you think he did rape Nunia on at least one of these occasions, that is under the house and at the mangrove tree, then you can find him guilty.
- [11] The State must prove to you in this case the following elements:
- (i) that it was the particular accused whose case you are looking at, who
  - (ii) penetrated the vagina of Nunia with his penis
  - (iii) when he did so Nunia was not consenting and he knew that she was not consenting or that he was reckless in having intercourse with her without knowing whether she was consenting or not.
- [12] You will realise that in our case it is not in dispute that these are the particular men involved; that is to say that identity is not in issue. Nor

does any one of the three accused deny that at one stage there was an act of sexual intercourse between him and Nunia. The only issue that is in dispute is the question of consent. Nunia says that these acts were forced upon her and each of the boys says that they had asked her for sex and she had consented. That ladies, is the ultimate matter of fact that you will be called upon to decide.

- [13] I know that this has been a very short trial and that the evidence will be very much still in your mind, but it is my duty to recap the evidence both for the prosecution and for the Defence and remind you of it.
- [14] We first heard from the Doctor who examined Nunia a couple of weeks after the alleged rape. You might think that the doctor's evidence does not help us because all she could say was that Nunia was not a virgin. There were no signs on her body of sexual abuse or violence.
- [15] Nunia gave evidence and you will realise that her evidence is crucial to both the prosecution and the Defence. She told us that at New Year 2012 she went to live with her aunt at Naikawaga Village, Tailevu. Early one Sunday morning at about midnight she went outside the house to relieve herself and she saw a man standing under a tree. She went to the side of the house, relieved herself and when she was washing herself the man came from behind and grabbed her stomach, he covered her mouth with a cloth and dragged her under grandmother's house. He took off his clothes and hers and he penetrated her for about 5 minutes. Her mouth was covered so she couldn't scream. When he had finished, Iliani (the second accused) came and said it was his turn. He lay on top of her and penetrated her for 5 minutes. By this time Josua had left. Nunia was feeling weak and got dressed and went home. She didn't tell anybody about these rapes because she was afraid.

- [16] Nunia then told us about another occasion on the day she went to play Volleyball. On the way back she went swimming in the sea, with her cousins. She took the lead to go home with Teresia. Josua (1<sup>st</sup> accused) was hiding near a mangrove tree - he pulled her hand. She didn't cry out to Teresia because her mouth was covered. Josua took off her skirt and pants and penetrated her. She was weak and he took about 5 minutes leaning her against a mangrove tree. After that she went home and showered and changed. She didn't tell anybody because she was afraid.
- [17] On a Wednesday her cousin/brother Ramasina came and asked her to go with him to get a C.D. They went to Sailosi's house. Ramasina went inside and she stayed outside. Sailosi sent Ramasina away to get a multi charger and she went inside. Sailosi was home alone. She sat down on the same seat as Sailosi and he told her to "shift up". He covered her mouth, took off her skirt and panties and then penetrated her for about 5 minutes. After that she got dressed and went home. She didn't tell anybody because she was scared and ashamed.
- [18] Sometimes after that, the Pastor heard rumors of young men behaving badly in the village and he came to Nunia to ask her what she knew. She told us in her evidence in chief that she didn't tell the Pastor anything; although defence counsel referred her to her Police Statement where she said that she confessed everything to the Pastor.
- [19] Nunia identified all three boys in Court as the boys that had raped her.
- [20] The remainder of the Prosecution witnesses were all Police Officers producing the formal investigation documents in connection with this case. Each of the accused conducted an interview with the Police under caution: that is to say that they were warned that whatever they said would be used in evidence against them. None of the three

accused objected to these interviews going into evidence before you and I therefore direct you how to approach those interviews. The answers given by each of the accused in those interviews is evidence for you to accept or reject in as much as you would do with any other evidence.

- [21] You will recall that in every one of the three interviews the accused being questioned denied that any force was used on Nunia to have sexual intercourse. They all said that they had "talked" and that she agreed to have sex.
- [22] The three charge statements of the respective accused were also placed before you but you may think that they don't help you, save as to say that the third accused, Sailosi did say in his charge statement that he "didn't force her".
- [23] Well, Ladies that was the end of the Prosecution case and you heard me explain to the accused what their rights in Defence are. An accused person does not have to prove anything to you; it is the State that must prove their case to you so that you are sure. An 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 first and second 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.

- [24] Josua, the first accused told us that Nunia's allegations are false. He says that at midnight on whatever day it was in January 2012 he was drinking grog on a step near her house and when she came out to go to the toilet she saw him; they had a talk. Josua said he wanted to have sex with her and she agreed. He then led her to the basement of Makereta's house and after another short conversation she pulled up her top and pulled her panties down. They then had sex. After he had finished he went back to those drinking grog. He had never forced Nunia to do anything, nor did she try to force him away from her. She never said anything to him that would make her think she was not consenting.
- [25] As to the second allegation, he said that he was having his bath in the river and he met Nunia when she was coming back from her swim. They talked for a while, he asked her for sex and she consented. They had sex standing up and when finished he went back to the place where he had been bathing. After three weeks there was a village meeting and as a result of the meeting the Police were called and they took him into custody. At Nausori Police Station he was interviewed where he gave the answers you see in the interview which is before you.
- [26] The second accused gave evidence and also said that Nunia's allegation against him was fabricated. On the night in question, which he insists was December and not January he was at Sailosi's house drinking grog when he saw Nunia outside the house. He wondered what she was up to so he thought of going to Grandma's house and see if he could find her. He then said something about Nunia's reputation which I asked you to put from your minds and I again ask you to ignore it because it was a prejudicial remark which was the result of a question from me. The question which is at issue here is one of consent and the reputation of the parties is totally irrelevant. You will judge this matter on the admissible evidence which is before

you and on nothing else. When he got to the basement of the house he saw Nunia there with a man. He was standing by a post watching and they didn't see him. When the man stood up he knew him. The man left and Iliani went and sat next to her and talked to her. He asked her for sex and she agreed. They had sex and she never showed lack of consent, nor did he threaten her or use force on her.

[27] The third accused chose not to give evidence which is his right. He is entitled to sit back and say to you that the State has not proved the case against him. Just because he does not give evidence does not mean that he is guilty. The fact that he has not given evidence doesn't prove anything one way or the other. You will evaluate the State's case against him and take into account his denials of force in his cautioned interview.

[28] Well, Ladies that is all I want to say about the evidence. Look at each accused separately and try to be in agreement with your opinions although that is not strictly necessary. Please let a member of my Staff know when you are ready and I will reconvene the Court. When you return you will be asked individually for your opinion on each of the three counts (that is against each of the accused in turn). You may take as long as you wish. However before I release you I am going to ask counsel if they wish me to add or amend anything in this summing up.

Paul K. Madigan  
**JUDGE**

At Suva  
3<sup>rd</sup> May 2013