

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

**CRIMINAL CASE NO: HAC 320/2011**

**BETWEEN:**

**THE STATE**

**AND**

**ISIMELI RONA VUTUKALOU**

**COUNSEL: Ms A Vavadakua for the State  
Mr N Sharma for the Accused**

**Dates of Trial: 01-03/07/2013**

**Date of Summing Up: 05/07/2013**

[Name of the victim is suppressed. She will be referred to as NM]

## **SUMMING UP**

Madam and Gentlemen of Assessors,

1. 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 opinions. 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.

2. 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.
3. Prosecution and defence made 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.
4. 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.
5. 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 accused person is presumed to be innocent until he is proved guilty. This is the golden rule.
6. 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.
7. 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.
8. In assessing evidence of witnesses you need to consider certain tests.  
Examples:
  - Consistency: That is whether a witness saying the story on the same lines without variations and contradictions.
  - Probability: That is whether the witness was talking about in his/her evidence is probable in the circumstances of the case.

- Spontaneity: That is whether a witness has behaved in a natural or rational way in the circumstances that he/she talking about.
9. 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.
  10. The facts which agreed between the prosecution and the defence are called agreed facts. You may accept those facts as if they had been led from witnesses from witness box. The following facts are agreed between the Prosecution and the Accused.
    1. Isimeli Ronavutukalou, 23 years of age at time of alleged offending, farmer of Naitasiri Settlement, Naitasiri is the Defendant in this case.
    2. NM, Waitress of Naisogo, Village, Naitasiri is the complainant in this case.
    3. The alleged offending occurred on the month of August 2011 at Naisogo, Village, Naitasiri.
    4. As per paragraph 3, the complainant got off the bus at Naisogo Village and walked quite a distance to her home.
    5. As per paragraph 4, the complainant slowed down and walked to the side of the road since she wanted to relieve herself.
    6. The admissibility of following documents is not in dispute.
      - a) The medical report of NM dated 31/08/2011.
      - b) The typed and hand written Caution Interview Statement of Isimeli Ronavutukalou dated 01/09/2011.
      - c) The typed and hand written Charge Statement of Isimeli Ronavutukalou dated 01/09/2011.
  11. 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.

12. 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.
13. Now let's look at the charges.

### **Statement of Offence**

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

### **Particulars of Offence**

**ISIMELI RONA VUTUKALOU** on the 31<sup>st</sup> Day of August 2011 at Naisogo Village, Naitasiri in the Central Division had carnal knowledge of NM without her consent.

14. In order to prove the offence of Rape the prosecution has to prove following elements beyond reasonable doubt.
  1. The accused had carnal knowledge of the complainant,
  2. without her consent,
  3. He knew or believed that that she was not consenting or didn't care if she was not consenting.
15. Carnal knowledge is the penetration of vagina or anus by the penis. It is not necessary for the prosecution to prove that there was ejaculation, or even that there was full penetration.
16. In this case victim was 20 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.

Now let's look at the evidence led by the prosecution in this case.

17.

1. The first witness was the victim, NM. According to her she is 22 years old and resides at Gaji Road, Samabula. In the year 2011 she was working in a restaurant in Suva market. On 31/08/2011 she finished her work at 4.30pm and went to R. B. Patel Supermarket to buy some food items for her child. After purchase she had boarded a Nausori bound bus to go to Naisogo Village as her daughter was looked after there. When she got off the bus it was dark. As her house is little far from the road she started to walk. When she came closer to Isimeli's house she had seen accused, Emoni and two other boys were standing there. She knew the accused and Emoni as they are related to her. She had requested from Emoni whether he could come with her up to her house. He agreed and all walked up to a bridge. At the bridge accused told Emoni that he was going to drop the victim. At that time victim wanted to relieve herself. She had gone to a grassy land and relived herself. At that time a taxi went passing her. When she was about to wear her undergarment the accused came there and grabbed her hand and pushed. As a result she fell on the grass. At that time accused had asked whether she was going to give him. He then pulled down her undergarment and inserted his penis into her vagina for about two minutes. As she was terrified and scared she did not shout for help. According to her she never consented for sex. When she saw the two boys accused stood up and ran away from the scene. She then stood up and went towards the bridge. While seated on the bridge Emoni had come there and she told the incident to him. Emoni brought her shoes and hand bag from the scene of crime. She had told Emoni that she was going to report this to the police. Accused then pleaded forgiveness. She was then picked by a police vehicle and brought to Nausori Police Station. She had changed her clothes before she went to the police station. She had then undergone medical check-up. She identified the accused in open court.

In the cross examination witness denied that she was joking with accused and agreed for sex with him. She did not suffer any injuries when accused grabbed him and push on the grass. Witness admitted she neither shouted nor tried to run away from the scene. She admitted that she told police that the accused told her to wait when he went up to two Fijian boys. According to witness accused did not ejaculate at that time. Witness denied

that she consented for sex and was happy at that time. She further admitted that she took anti pregnant injection one month prior to the incident. She had not given her clothes to the police.

In the re-examination witness said that she never consented for sex.

2. Dr. Kitiana Drugu was called next by the prosecution. She is a MBBS qualified doctor and was serving at Wainibokasi Hospital in the year 2011. After obtaining consent she examined the victim on 01/09/2011. In her history victim said that she was raped by the accused at road side on 31/08/2011 while returning after work. Victim was subjected to speculum examination and laceration noted on her cervix. According to her professional opinion injuries sustained are consistence with history of forced sexual assault.

In the cross examination witness said that the injury is very mild, superficial and less than 0.5cm in size. But she had not noted down the size in the Medical Examination Form. But it was noted in her personal notes. Witness said the injury noted cannot be found in consensual sexual intercourse.

3. Cpl/Arvin had brought the victim to Nausori Police Station from Sawani, Naisogo Settlement. According to him victim was in a disturbed mood.
4. DC/3312 Vilivo had recorded the Caution Interview Statement of the accused.
5. Emoni Natokaimalo was finally called by the prosecution. On 31/08/2011 while coming after Rugby training witness had met the victim. At that time accused, Inoke and Sevuloni were there. When he came back after a bath in the creek victim came there and informed that she was going to report that accused had raped her.

In the cross examination witness said that he met the victim on the road second time in 5 minute interval. He first went to the creek leaving others on the road. Witness admitted that he told police that victim had told him that accused wanted to have sex with her and he ran away from the scene when another boy came and requested for sex. Further he said that victim never told that

accused forced her to have sex with her. Finally he said that victim's main complaint was that a boy wanted to have sex with her.

In the re-examination witness said victim complaint that while she was having sex with the accused another boy was standing behind them.

After calling five witnesses Prosecution closed their case.

18. Defence was called and explained the rights of the accused. Accused elected to give evidence from witness box and called a witness.

1. According to accused on 31/08/2011 while talking to Emoni, Niko and Mako on the road after rugby practices victim had come there and requested Emoni to take her down to her house. Accused and others all went with the victim. While walking victim was joking to the accused and consented for sex. Then both had sex on a grassy land which lasted about two minutes. Others went to the creek for bathing. She was happy and joking after they had sex.

In the cross examination accused said that he is related to the victim but they are not brothers and sisters. Accused denied that the victim cried after sex.

He was not re examined.

2. Niko Timocikoro was called next for the defence. According to him he played rugby with the accused, Mako and Emoni. A lady came and walked with the accused holding hands. They took the lead and accused and the lady came behind. After 05-06 minutes he had seen both accused and the lady coming by talking to each other. Emoni went to drop the lady as accused was having a bath.

In the cross examination witness said that he saw the victim and accused walking holding their hands. They were very happy at that time.

After calling accused and 01 witness defence closed their case.

### **Analysis of the Evidence**

19. As assessors and judges of facts, in this case this victim (NM) gave evidence first. According to her she had been raped by the accused on 31/08/2011 while she was returning home. Accused pushed her down and committed the offence. She says that she never consented for sex. Though there were three other persons including her relation she neither shouted nor tried to free herself. In her statement to police she had said that the accused told her to wait and went up to Fijian boys. You have to consider her evidence with great caution.
20. As assessors and judges of facts, you heard the evidence of Emoni. He admitted that he told police that victim had told him that accused wanted to have sex with her and he ran away from the scene when another boy came and requested for sex. Further he said that victim never told that the accused forced her to have sex with him. Finally he said that victim's main complaint was that a boy wanted to have sex with her. In the re-examination witness said victim complained that while she was having sex with the accused another boy was standing behind them. You have to consider this evidence very carefully.
21. Dr. Kitiana not noted the size of the injury in her Medical Report. But she noted the same in her personal notes. Prosecution did not take any endeavour to mark those notes. According her a mild injury found in the cervix of the victim.
22. The Caution Interview Statement of the accused was not challenged. Accused in his caution interview statement admitted that he had sex with the victim with consent.
23. Madam and gentlemen of assessors, in this case accused elected to give evidence from witness box. That is his right. In his evidence he denied the charge. According to him the victim consented for sex. She was very happy at that time. His evidence was corroborated by defence witness Niko.
24. I have summarized all the evidence before you. But, still I might have missed some. That is not because they are unimportant. You heard every items of evidence and you should remind yourself of all that evidence and form your opinion on facts. What I did was only to draw



your attention to the salient items of evidence and help you in reminding yourself of the evidence.

25. In this case the accused is charged for rape contrary to sections 207(1)(2)(a) Of the Crimes Decree No: 44 of 2009. I have already explained to you about the charges and its ingredients.
26. Madam and gentleman of assessors, in this case state has to prove lack of consent before you can find the accused guilty of rape. If you find there was consent and that he is thereof not guilty of rape.
27. 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 his evidence you consider reliable, and therefore to accept, and which witness's evidence, you consider unreliable and therefore to reject. Use the tests mentioned above to assess the evidence of witnesses.
28. 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.
29. Madam and gentleman of 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.
30. 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.
31. 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.

32. Any re-direction?

P Kumararatnam  
**JUDGE**

At Suva  
05/07/2013

