

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 247 OF 2012

BETWEEN : **STATE**

AND : **MARISILINO TABAKANACA**

Counsel : Ms. Prasad J and Mr. Tiwari P.K. for the State

: Mr. Rayawa for the Accused

Date of Hearing : 11th, 12th, 13th and 14th November 2013

Date of Summing Up : 15th November 2013

SUMMING UP

[With the request of the prosecution, it is hereby ordered to suppress the name and the identity of the complainant.]

1. **ROLE OF THE JUDGE AND ASSESSORS.**

Madam Assessor and Gentlemen Assessors:

- (i) This is the second last step of this trial in your presence. After my Summing Up you will be asked to retire for deliberations. Once you are ready with your individual opinions, this court will reconvene. You will not be asked to give reasons for your opinions. Your individual opinions can be unanimous or

divided. If the opinions are unanimous, it is more desirable, but what matters is, your honest individual opinion on the already led evidence. I am not bound by your opinions when delivering the final judgment of this court. Nevertheless, the due weight and recognition will be given to your opinions.

- (ii) In my Summing Up, I will mainly address you on matters of law. That is because “legal issues” are in my domain. Therefore, you have to accept and act upon on my directions in relation to the legal matters. ‘Facts’ of this case are entirely in your ‘periphery’. In fulfilling their duties the counsel for the prosecution and defence made their submissions and made certain suggestions to substantiate their arguments. In my Summing Up, I might, though inadvertently, express or appear to express certain views. You are not bound to accept any of those views, suggestions or arguments, unless you agree with them. That is how you become the ‘masters of facts’ in this trial.
- (iii) In this instance, it is your task to deliberate what exactly took place between 1st January 2011 to the 31st July 2011. That deliberation has to be done based on the evidence led in court and nothing else. There are two conflicting versions before you. The complainant says that the accused had sexual intercourse with her without her consent. The accused, on the other hand totally denied this allegation. Your duty, after this Summing Up is to decide whose version that you are going to accept and believe.
- (iv) As I said earlier, your decisions should solely base on the evidence presented in court. You must disregard anything you heard or saw in relation to this case from the electronic or printed media or from your family members, relatives, friends or anybody else, before or during the trial. Simply focus on what you heard and saw as evidence within the four corners of this court room. In my Summing Up, I might not touch or mention all the evidence that you might think to be crucial. You are at liberty to take into consideration whatever the piece of evidence you think relevant and important.

- (v) Whereas this is a case which solely rests on whose 'word' you are going to accept, either the complainant's or accused's, a proper assessment of the credibility and the truthfulness of the witnesses is extremely vital. In deciding that, you have to consider the demeanour of the witnesses when they took the stand, especially the way they faced the cross examination. The firmness or evasiveness in stand can be a guiding factor to determine their credibility.
- (vi) When it comes to the truthfulness of the witnesses, you have to utilize your day to day life experiences and common sense. You were chosen to be the judges of facts in this trial as you represent a pool of common sense and experience of human affairs in this community. You are not alien to the life pattern of the ordinary people of the society. It is that experience you have to apply to conclude whether a particular witness is honest and truthful. In doing so, you can accept the whole testimony of a witness or a portion, or else, you can reject the whole testimony or a part of it.
- (vii) Madam assessor and gentlemen assessors, please recall your oath administered when you assume duties as assessors; your true opinion to be given without any fear or favour or ill will in accordance with the evidence and the law. You are not supposed to be passionate towards anybody or any party. The complainant was around 14 years when she faced the alleged acts. She is still 16 years of age. You cannot get emotionally disturbed over her childhood or any other experiences that she referred to. The learned defence counsel told that if the accused is found guilty, he will be sent to jail at least for 10 years. You cannot be sympathetic towards the accused over such comments or any other aspect. Anyway, whether the accused will be convicted or acquitted or will receive a sentence or not, are not the matters for you to pay any attention. Please leave those issues to court. Any of these factors should not distract you from the main objective. The duty of you madam assessor and gentlemen assessors is to base your opinion on the evidence presented in court and nothing else. Please don't speculate or presume anything apart from the evidence what you saw and heard during the trial.

2. THE BURDEN OF PROOF

- (i) The accused is presumed to be innocent until proven guilty. Even though the accused is charged with the offence of 'Rape', his innocence is presumed until otherwise decided by this court. The burden in proving that the accused is not innocent or guilty as charged rests on the prosecution throughout the trial. That burden never shifts. The accused need not prove anything either to show his innocence or otherwise.
- (ii) The prosecution must discharge their burden by proving the charge against the accused beyond reasonable doubt. That is for you to be 'sure' of the guilt of the accused. If you have any reasonable doubt over the guilt of the accused after analyzing the evidence, the benefit of such a doubt should be awarded to the accused. Nevertheless, a 'doubt' must be reasonable or substantial and stemmed out of the evidence. A mere trivial or imaginary doubt won't create a reasonable doubt.

1. THE INFORMATION

- (i) The Director of Public Prosecutions, on behalf of the State has charged the accused for the following count of Rape.

One Count

[Representative Count]

Statement of Offence (a)

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

MARISILINO TABAKANACA between the 1st day of January 2011 to the 31st day of July 2011, at Nasinu, in the Central Division, had carnal knowledge of **M.L.**, without her consent.

2. **ELEMENTS OF THE OFFENCE**

- (i) The charge against the accused is based on Section 207 (1) (2) (a) of the Crimes Decree 2009. For the prosecution to bring home this charge successfully, they have to prove the following elements in the charge.
- The accused, (Marisilino Tabakanaca in this instance)
 - had the carnal knowledge with the complainant (Ms. M.L. in this instance)
 - without her consent.
- (ii) Madam assessor and gentlemen assessors, you are well aware by now that the accused denies the allegations of rape. Thus, all the above mentioned elements are challenged by the accused and it is the duty of the prosecution to prove all to you. The term 'carnal knowledge' can be used in the same context of 'sexual intercourse'. The moment prosecution proves beyond reasonable doubt that the penis of the accused penetrated the complainant's vagina, may it be a slightest of penetrations, the element of 'carnal knowledge' is proved. Therefore, ejaculation inside the vagina is not a 'must' to prove the penetration. Furthermore, to constitute the carnal knowledge it need not to be only the vagina, but can be penetration to either the anus or mouth of the victim as well.
- (iii) The next element in this case is the 'consent' of the complainant to have sexual intercourse with the accused. 'Consent' must be freely and voluntarily given by a person, (Ms. M.L. in this case) with the necessary mental capacity, to have the alleged sexual intercourse. As a matter of law I am directing you that the 'consent' is not freely and voluntarily given if it is obtained by force or threat or intimidation or false and fraudulent representations about the nature and purpose of the act or sexual intercourse. Furthermore, if the consent was obtained by exercise of the authority of the accused, it is not a free and voluntary 'consent'. Therefore, 'consent' is not proper or legitimate in the eyes of law, though it is

visible on the face of it, had it been obtained in such a manner described above. I direct you that the complainant, Ms. M.L., was around 14 years of age at the time of the alleged sexual acts and thus, she is capable of giving consent to have sexual intercourse as there is no evidence to say that she did not possess the requisite mental capacity to consent. As a matter of law I am directing you that the absence of injuries or remarks for physical resistance on the complainant does not necessarily mean that she 'consented' to the alleged sexual acts.

- (iv) In respect of this charge, I have to tell you that this is called a 'representative count'. The prosecution is relying on a charge of unconsensual rape, which is alleged to have repeated for several times during the specified times in the charge, that is January to June in 2011. In this type of a situation, the prosecution is not expected to prove, each and every single incident beyond reasonable doubt alleged to have taken place. It is more than enough for them to prove you beyond reasonable doubt that one incident took place during the stipulated period. Simply, if you are 'sure' of one incident of unconsensual sexual intercourse of the accused with the complainant during that time, you have to find the accused guilty for the charge of Rape.
- (v) As a matter of law, I am directing you that there is no need to look for any corroboration of the complainant's evidence for an accused to be convicted on a charge of 'Rape'. If the evidence of the complainant is so convincing that you can place your reliance beyond reasonable doubt, you can solely act upon it even in the absence of any corroborative evidence.

3. THE CASE OF THE PROSECUTION

- (i) The complainant in this matter is Ms. M.L. She was born on 9th of February 1997 and was around 14 years of age at the time of the alleged incident. She said that she was staying at her auntie's house at Laucala Bay in 2011 as she was schooling. She positively identified the accused and said he was a friend of her aunt. According to the witness, the accused was a frequent visitor to her auntie's place.

- (ii) Referring to the alleged sexual act committed by the accused, she said that he started kissing and touching her whilst fondling with her breasts. Then he had removed her panty and inserted his penis to her vagina. She said that she was scared and could not do anything. The accused had told her not to tell this to anybody else.
- (iii) Ms. M.L. said that after this incident, which took about 5 minutes, she felt that 'water' came out and the bed sheet got wet. She recalled that this incident occurred in 2011 and may be in January. Finally, she said that she did not tell this to anybody as she was afraid that it will spoil the family name.
- (iv) Detective Constable 2726 Jona Vatusevu, testified next as the Investigating Officer of the report lodged by the complainant. He had interviewed the accused under caution as well. DC/Jona tendered the Cautioned Interview Statement of the accused as Prosecution Exhibit No. 1.
- (v) The prosecution intended to call the officer recorded the complaint of Ms. M.L. The defence informed court that they don't have any clarifications from the recording officer. Thus, the recording officer of the complaint was not called to testify.
- (vi) The last witness for the prosecution was Doctor Kitone Waqanisau of the CWM hospital. He tendered the Medical Examination Form prepared by him as prosecution Exhibit No. 2. The doctor said that the complainant told him that she was raped by one Tukana and his friend in 2010 and then one Eparama. The medical examination had revealed that there was a deficit on the posterior part of her hymen.
- (vii) Then the court decided to call for the defence from the accused.

4. THE DEFENCE CASE

- (i) The accused opted to give evidence from the witness box subject to cross examination. The accused totally denied the allegation of rape leveled against

him. He basically stuck to his cautioned interview statement and said that it was in 2009 he visited the complainant's aunty at Lot No. 2 Laucala Beach. He then said that he went to Sinai in Middle East on a peace keeping mission in May 2009 and returned after one year. He stressed that after returning from Sinai in May 2010, he never went to see the aunty of the complainant and instead resided in Queen Elizabeth Barracks in Nabua. He said that the Army officers are not permitted to leave the barracks without prior permission.

5. ANALYSIS

- (i) The case theory of the defence suggests that the complainant being a child of 15 years at the time of reporting the alleged sexual incidents to police was fantasized with her own dreams and fabricated the entire story. To support their argument, the defence highlighted certain facts.
- (ii) The main concern of the defence, among several other factors, was the long delay in reporting the alleged incidents of rape to anybody. The complainant said that the accused raped her somewhere in January 2011. It was reported to police in June 2012 and that is a gap of almost 18 months. The complainant admitted that she never wanted to report any of these incidents to anybody as she was afraid and thought of family name. The defence suggested that she did not tell these incidents to anybody as nothing took place to do so. Madam assessor and gentlemen assessors, now you have to determine what version out of these two, you are going to accept.
- (iii) It was then highlighted by the defence that even after a delay of 18 months to report, it was only in the 2nd statement of the complainant that she referred to the accused. The complainant's statements were given to you marked as defence Exhibit No. 1. The complainant admitted that she told only about one 'Eparama' and 'Mulo' in her 1st statement. She agreed that she mentioned about the accused only after her Assistant Principal asked her to tell about any others who abused her. The learned defence counsel pointed that while the complainant accusing 'Mulo', been a friend of the accused, she did not mention anything about the accused in her 1st statement because she was fabricating the story against the

accused. Madam assessor and gentlemen assessors, you will have to assess both sides of the story about the omission to mention the accused's name in the 1st statement.

- (iv) Then the defence argued that the complainant had not told anything about the accused to the doctor before she was medically examined. The medical examination form tendered to court as prosecution exhibit No. 2 (D-10) states that the complainant was raped by one Tukana and his friend in year 2010 and one Eparama in 2012. When questioned by the defence, the complainant told she does not know who this Tukana is. Apart from the belatedness of the complainant to report the alleged rape incidents to police or anybody in authority, defence says the complainant's versions about the alleged allegations are inconsistent. In other words, the accused, Mulo and Eparama stated in the police statement had been changed to Tukana, his friend and Eparama to the doctor. You madam assessor and gentlemen assessors, are now required to assess the explanations of both parties and decide what appeals to your common sense most.

- (v) Madam assessor and gentlemen assessors, you would recall that the doctor said the deficit he observed in the hymen of the complainant is consistent with a sexual act performed one week prior to his examination. He said that he would have seen a hymen with multiple tears or deficits, had the patient been subjected to continuous forceful sex for a period of one year. He had not seen any evidence of sexual assault as well. With the agreement of both the prosecution and the defence, the court treated the doctor as a medical expert. Experts are allowed in criminal trials to express their opinions in relation to their expertise. Nevertheless, it is you who have to decide whether you are going to accept that or not.

- (vi) At one point, the complainant said that the accused 'raped' her only once, somewhere in January 2011. She said, it was the time when her aunty went to Australia. It was suggested to her by the defence that her aunty went to Australia in June 2011 and returned in August 2011. In cross-examination the complainant said that she was raped for several times by the accused. She in fact admitted that she 'lied' to court by telling she was raped only for once as she misunderstood the

questions put by the prosecutor. On the other hand, the history related to the doctor by Ms. M.L. says that the alleged incidents of 'Rape' took place in 2010.

- (vii) In contrary, the accused says that he was not in the country since May 2009 to May 2010 and never visited Ms. M.L's aunty upon his return from Sinai. The learned prosecutor questioned the accused to show that he is not telling the truth about the 'visitings' to the complainant's house. She further questioned the accused in respect of his 'relationship' with the complainant. As I told you at the very outset of this summing up, you now have to decide whose version that you are going to accept and keep your reliance.

6. SUMMARY

- (i) Remember that you do not have to believe the Accused's version to find him 'NOT GUILTY'. It is still the responsibility of the Prosecution to prove the case against the Accused beyond reasonable doubt. If you have any reasonable doubt in Prosecution's case you still have to find him 'NOT GUILTY' to the charge.
- (ii) Accused is presumed to be innocent until proven guilty and he need not to prove anything, inclusive of his innocence. If you accept the sequence of events narrated by the Prosecution and you are satisfied beyond reasonable doubt so that you are sure of the Accused's guilt, you must find him guilty as charged. If you do not accept the Prosecution version and you are not sure of the Accused's guilt due to reasonable doubts, you must find him 'NOT GUILTY' to the charge.
- (iii) Your possible opinions in this instance are 'GUILTY' or 'NOT GUILTY' to the charge of Rape.
- (iv) You may now retire to consider your opinions. When you are ready, you may inform one of the court clerks so that I will re-convene the court.

- (v) Before you retire, I would like to ask the Counsel of both parties if there is anything that they wish me to say in addition or want me to re-direct the assessors on any matter.

Janaka Bandara
Judge

At Suva
Officer of the Director of Prosecution for State
Rayawa Law for the Accused