

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**  
**CRIMINAL CASE NO. HAC 377 OF 2012S**

**STATE**

**VS**

**IOSEFO KABAURA**

**Counsels** : **Ms. A. Vavadakua for the State**  
**Ms. L. Raisua for Accused**  
**Hearings** : **24, 25 and 26 February, 2014**  
**Summing Up** : **28 February, 2014**

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**SUMMING UP**

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**A. ROLE OF JUDGE AND ASSESSORS**

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.
2. State and Defence Counsels have made submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

**B. THE BURDEN AND STANDARD OF PROOF**

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.
5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that 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.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victim. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

**C. THE INFORMATION**

7. You have a copy of the information with you, and I will now read the same to you:

*"... [read from the information]...."*

**D. THE MAIN ISSUE**

8. In this case, as assessors and judges of fact, each of you will have to answer the following questions:

- (i) Did the accused, on 27 July 2012, at Viria Naitasiri, in the Central Division, rape the complainant? (count no. 1)
- (ii) Did the accused, on 26 July 2012, at Viria Naitasiri, in the Central Division, sexually assault the complainant? (count no. 2)
- (iii) Did the accused, on 28 July 2012, at Viria Naitasiri, in the Central Division, sexually assault the complainant? (count no. 3)
- (iv) Did the accused, on 26 July 2012, at Viria Naitasiri, in the Central Division, assault the complainant, causing her actual bodily? (count no. 4)

**E. THE OFFENCES AND THEIR ELEMENTS**

- 9. On count no. 1, for the accused to be found guilty of “rape”, the prosecution must prove beyond reasonable doubt the following elements:
  - (i) the accused had sexual intercourse with the complainant, that is, his penis penetrated the complainant’s vagina;
  - (ii) without the complainant’s consent; and
  - (iii) the accused knew the complainant was not consenting to sex, at the time.
- 10. The slightest penetration of the complainant’s vagina by the accused’s penis, is sufficient to satisfy element 9(i) above. Whether or not the accused ejaculated, is totally irrelevant to element 9(i) above.
- 11. “Consent” is to “agree freely and voluntarily and out of her own free will”. If consent was obtained by force, threat, intimidation or fear of bodily harm to herself, that “consent” is deemed to be no consent. The consent must be freely and voluntarily given by the complainant. If the consent was induced by fear, it is no consent at all.
- 12. It must also be established by the prosecution beyond reasonable doubt, that the accused knew the complainant was not consenting to sex, at the time. You will have to look at the parties’ conduct, at the time, and the surrounding circumstances, to decide this issue.

13. Counts no. 2 and 3 involved “sexual assault”. “Sexual Assault”, is in fact, an aggravated form of “indecent assault”. For the accused to be found guilty of “sexual assault”, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused
  - (ii) unlawfully, and
  - (iii) indecently
  - (iv) assaulted
  - (v) the female complainant
14. To describe the offence, we will start with the verb “assault”. To “assault” someone means to apply unlawful force to the person of another, for example, to punch someone in the face, without any justification, is to apply unlawful force to the person of another. Likewise, in the context of this case, to touch, lick or suck a female person’s breast and /or vagina, without that person’s consent, is to apply unlawful force to the person of another.
15. Note, in this case, the female complainant was 14 years old, in July 2012. As a matter of law, a person under 16 years old is incapable of giving his or her consent to being sexually assaulted. In other words, an accused person cannot rely on the complainant’s consent as a defence to the offence. Consequently, any touching, licking or sucking of an under 16 year old female complainant’s breasts and/or vagina is unlawful.
16. The “assault” must not only be “unlawful”, it must also be “indecent”. An “indecent assault” is one committed in circumstances of indecency. A circumstance of indecency is what right-minded people would consider indecent, for example, a 46 year old man licking a 14 year old female complainant’s vagina, or the 46 year old man sucking the breast of the 14 year old female complainant. It is therefore essential for the prosecution to make you sure that the assault was not only unlawful, it was also indecent, that is, right-minded people would consider the assault to be indecent.
17. Count no. 4 involved “assault causing actual bodily harm”. For the accused to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements:

- (i) the accused
- (ii) assaulted
- (iii) the complainant
- (iv) occasioning her actual bodily harm

18. The definition of the word “assault” is similar to that discussed in paragraph 14 hereof. In other words, to “assault” someone is to apply unlawful force to the person of another. The “assault” must cause some “bodily harm”, that is, any type of bodily harm, for example, bruises, laceration, swellings, pain, etc. So, a punch to the face causing a “black eye”, is an “assault causing bodily harm”.
19. Remember, there are 3 separate offences in the 4 counts. You must consider each count separately and consider the evidence separately, for each count.

**F. THE PROSECUTION’S CASE**

20. The prosecution’s case were as follows. In July 2012, the female complainant (PW2) was 14 years old. The accused (DW1) was 46 years old. The accused previously was living with PW2’s mother, as man and wife. However, the relationship ended, and both parties went separate ways, and remarried. The accused is now living with DW2, as his wife. They are living in a settlement in Viria Naitasiri. According to the prosecution, the complainant’s biological dad died when she was young, that is, before she turned 1 year old. For most part of her life, she was raised by her grandfather.
21. Prior to July 2012, according to prosecution, the complainant’s mother and the accused agreed that the accused should look after the complainant. It was generally considered that the 14 year old complainant was a problem child and lacked discipline. It was considered that the accused’s house, in the interior of Viria and far from other houses, would be a perfect environment to groom the complainant into a well-mannered child. In late June 2012, the complainant was brought to the accused’s house in Viria Naitasiri. She joined the accused, his wife and their young son, as a family. The accused was happy to have the complainant, as his daughter. They lived in a house, which was open, with no rooms.

22. The accused earned his living through farming. His wife comes to the Suva market every Thursday, Friday and Saturday to sell the family's farm produce. The complainant began doing some domestic chores, for example, washing dishes and doing the laundry. However, friction began between the accused and the complainant. Although the accused sees her as his daughter, the complainant does not see the accused as her father. According to the complainant, the accused began to tell her to bear him some children, and appeared to counsel her not to go out with boys, as she could become pregnant.
23. On 26 (Thursday), 27 (Friday) and 28 (Saturday) July 2012, the accused's wife (DW2) went to the Suva market to sell the family's farm produce. The accused, his young son and the complainant were at home. According to the prosecution, the accused, his son and the complainant went to bed on Thursday night (ie. 26 July 2012) to sleep. While the son was fast asleep, the accused came to the complainant, punched her on the face, and forced himself on her by sucking her breasts and licking her vagina. She said, she couldn't raise the alarm by shouting, as their house was in the bush, and far away from the other houses. She got a "black" eye because of the punch. On Friday night (ie. 27 July 2012), the accused again came to the complainant at night. He forced himself on her by having penile sexual intercourse with her, without her consent and he well knew she was not consenting at the time. On Saturday (ie. 28 July 2012), before his wife returned from the market at about 6 pm, he forced himself on the complainant, by sucking her breasts, after she had her bath.
24. The above episode came to the knowledge of some of the people of Viria. The matter was reported to police. An investigation was carried out. The accused was questioned by police on 30 July 2012. On 31 July 2012, he was produced in the Vunidawa Magistrate Court charged with rape. Because of the above, the prosecution is asking you, to find the accused guilty as charged on all counts. That was the case for the prosecution.

**G. THE ACCUSED'S CASE**

25. On 24 February 2014, the first day of the trial, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the

allegations against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was put to his defence, he choose to give sworn evidence and called his wife as his only witness, in his defence. That was his right.

26. In his sworn evidence, the accused admitted he was at the crime scene, at the material time. However, he denied punching the complainant on the face or licking her vagina on 26 July 2012. He also denied raping the complainant on 27 July 2012. He denied sucking the complainant's breast on 28 July 2012. In other words, he denied all the allegations against him. He said, the complainant was fabricating all the allegations, because he was too strict on her, and she wanted to leave the family and be "free". He said, she also wanted to leave the family because she claimed he is not her father. However, he said, he is her father.
27. The accused was caution interviewed by police on 30 July 2012, at Vunidawa Police Station. They asked him a total of 72 questions and he gave 72 answers. In his police caution interview statements, he denied all the allegations against him [see Questions and Answers 44, 45, 50, 56, 63 and 64 of Prosecution Exhibit 2A and 2B]. Because of the above, the accused is asking you to find him not guilty as charged on all counts, and acquit him accordingly. That was the case for the defence.

#### H. ANALYSIS OF THE EVIDENCE

28. The State's case against the accused stands or falls, on whether or not, you as assessors and judges of fact, accept the complainant's evidence. Her evidence were as follow, and I will quote directly from the court record, **"...My name is M. R and I'm 17 years old. I lived with my husband. My mother is V. D. My father is J. V and he died before I was 1 year old. M. N brought me up, ie. he's my grandfather. My mum left me with my grandfather when I was small. In July 2012 ie. from 20 to 28 July 2012, I was in Viria with my "father". It was the first time I saw him. His name is Iosefo Kabaura. I heard his name, but I have not seen him before. At Viria, I lived with Iosefo Kabaura, his wife and another child. My mother sent me to Viria. We lived in the bush, a hilly area and the houses are far between. The house didn't have a room – it was a big open home.**

I recalled 26 July 2012, it was a Thursday, we were at home. He beat me. He punched my face, then he licked my vagina and sucked my breast. He punched my face. This happened in the night time. Only Iosefo and Osea were there. Iosefo's wife came to the market to sell produce. Osea was in class 2. Osea was sleeping. I couldn't shout out loud, because the other houses were far away.

I recalled the next day ie. 27 July 2012, Iosefo's wife was in Suva. She did not return that day. On 27 July 2012, Iosefo put his penis into me ie. into my vagina. Iosefo and Osea were at home ie. it was night time. When he inserted his penis into my vagina, I couldn't stop him, because he was heavy on me – he was ontop of me. I was getting weak and so was he. White substance was coming out of him. When Sala returned from Suva, she saw my black eye and she asked me what happened? I told her everything that happened. Sala is Iosefo's wife. She returned on Saturday evening ie. on 28 July 2012 – after having my bath, Iosefo sucked my breasts. He threatened to kill me if I told anybody. I remember Iosefo's face and I will identify him if I see him again. [screen put down]

[PW2 points at accused in the dock]. I didn't tell anybody because our home is far from the other houses and it is right in the bushes. Sala told me to change my story if police came. The Vunidawa Police took me away from accused's place..."

29. The accused, on the other hand, said the following, in his evidence, "...I am married to S. V (DW2) for 14 years. We have a son. He is in class 6, aged 11 years old. I have known PW2 (complainant) since 2009, 2010 and 2012. I have known her 3 years. I met her the first time in 2009 at Tacirua. She was brought to me to look after her. I was happy. I felt sorry for her. I look after her and counseled her. I also taught her "A, B, C, etc". In 2009, she stayed with us until August 2010, when she ran away from us. PW2 was brought to me because she was my daughter. I am not her step-father. She doesn't know what happened between me and her mother.

PW2 was brought to me on the last Friday of June 2012. She was brought to me in Viria, by her uncle Jo and 2 other boys. I haven't met Jo before. Jo introduced himself to me at



home. Her mouth was bleeding and she was not dressed properly and she looked dirty. PW2 stayed with me on the last Friday of June to the last week of July 2012.

PW2 washed the dishes, she does the laundry and picks lemon beside our house. I like PW2 because she is my daughter, but she says I'm not her father. My wife likes PW2, but PW2 doesn't like her because she is not her mother.

I deny that I told M. R that I want to make her pregnant by 2014 and I always advise her on the negative aspects of having a relationship with boys. On 26 July 2012, myself and PW2 were at home. I later went to the plantation. PW2 was cooking our lunch. My wife came to the Suva market. On 26 July 2012, I did not assault PW2. I did not punch her on her face. On 27 July 2012, I slapped PW2's face. I didn't punch her. On the first week, she ran away, and I threw a plastic bag of clothes on her head.

On 27 July 2012, myself and PW2 were at home. Osea went to school. I did not have sexual intercourse with PW2 on 27 July 2012 ie. I did not insert my penis into her vagina. I did not have sex with PW2. On 28 July 2012, I did not suck PW2's breasts. PW2 said I was not her father and she does not like to be at home and she likes males – that's why she made the allegations. It was her way of getting away from home.

I accept my statements to the police as my true statements. I came to know of the allegations, through my wife, on 28 July 2012. I felt sorry of the allegations, because she is my daughter and because she wants to go away from home..."

30. You will see that as far as the allegations in the four counts were concerned, the parties' version of events were completely different with each other. The complainant said, the accused punched her face on 26 July 2012 and gave her a black eye (count no. 4), then he licked her vagina on the same night (count no. 2), and on 27 July 2012, at night time, he inserted his penis into her vagina without her consent, knowing fully well that she was not consenting (count no. 1), then sucked her breast on 28 July 2012 (count no. 3). The accused, on the other hand, denied all the above allegations, and said that the allegations were a fabrication by the complainant, because she does

not accept him as her father, and that she wants an excuse to leave the accused's family. Which version of events to accept or reject is a matter entirely for you.

31. On 30 July 2012, the accused was caution interviewed by police at Vunidawa Police Station. This was a few days after the alleged incidents. The police asked the accused a total of 72 questions and he gave 72 answers. He denied all the allegations against him. [see Questions and Answers 44, 45, 50, 56, 63 and 64 of Prosecution Exhibit No. 2A (i-taukei version) and 2B (English version)]. What you make of the accused's denials in his police caution interview statements, is a matter entirely for you.
32. While the accused was being caution interviewed by the police, the complainant was being medically examined by Doctor Talei Tamaka (PW1) at Nausori Health Centre. The doctor submitted the complainant's medical report as Prosecution Exhibit No. 1. In D(10) of the report, the doctor recorded the complainant's complaint as follows, "...alleges that on Thursday 26 July 2012 around midnight was sexually defiled by her guardian. Had a sleepless night after the rape. Allegedly had been raped again Friday and Saturday by same man. Alleges that he on several occasions voiced his need for children..."
33. In D(12) of the report, the doctor recorded her medical findings as follows, "...Head – [found bruising]...vulval examination – hymenal contours is lost, evidence of recent penetration by way of labial laceration, noted at 3 and 9 o'clock..."she said, what she saw in her medical examination was consistent with the patient's history, as recorded in D(10) of the report. In D(16) of the report, she concluded as follows, "...Defilement via alleged rape in a 14 year old girl by her guardian (? Dad). Evidence seen of recent forced vaginal penetration..." The doctor is not related to either the complainant or the accused. She is an independent professional person who is only interested in stating the facts as she sees it. If you accept the doctor's evidence, it will have the effect of strengthening the complainant's evidence, and also her credibility as a witness. In any event, how you treat the medical report, is entirely a matter for you.
34. On the whole, your decision on the case will depend largely on who you think is the more credible witness. Was the complainant credible as a witness? Was the accused credible as a witness?

You have observed them give evidence during the trial. Who was the more forthright of the two? Who was the evasive witness of the two? Who, do you think, from your point of view, was telling the truth? If you decide that the complainant was the more credible witness of the two, then you must find the accused guilty as charged. If you decide that the accused was the more credible witness of the two, then you must find him not guilty as charged. It is a matter entirely for you.

**I. SUMMARY**

35. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, 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's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.

36. Your possible opinions are as follows:

- |       |             |   |                     |   |                      |
|-------|-------------|---|---------------------|---|----------------------|
| (i)   | Count No. 1 | : | Rape                | : | Guilty or Not Guilty |
| (ii)  | Count No. 2 | : | Sexual Assault      | : | Guilty or Not Guilty |
| (iii) | Count No. 3 | : | Sexual Assault      | : | Guilty or Not Guilty |
| (iv)  | Count No. 4 | : | Assault Causing     |   |                      |
|       |             |   | Actual Bodily Harm: |   | Guilty or Not Guilty |

37. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive your decisions.

**Salesi Temo**  
**JUDGE**

**Solicitor for the State** : **Office of the Director of Public Prosecution, Suva**  
**Solicitor for the Accused** : **Legal Aid Commission, Suva**