

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 334 OF 2012S

STATE

vs

PITA VUNIQUMU

Counsels : **Ms. A. Vavadakua for the State**
Mr. D. Toganivalu for Accused

Hearings : **7, 8 and 9 April, 2014**

Summing Up : **10 April, 2014**

Judgment : **11 April, 2014**

JUDGMENT

1. After a three day trial, the three assessors have returned with an unanimous decision finding the accused guilty as charged, on counts no. 1 and 2. In other words, they have found the accused guilty, of raping the complainant twice in August and October 2009.
2. Obviously, the assessors have accepted the prosecution's version of events, and have found the accused guilty as charged, on both counts. They have accepted the complainant's version of events.
3. The law at this stage of the trial is section 237 (1), (2), (4) and (5) of the Criminal Procedure Decree 2009, which reads as follows:

- “...237 (1) *When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.*
- (2) *The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors...*
- (4) *When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be –*
- (a) *written down; and*
- (b) *pronounced in open court.*
- (5) *In every such case the judge's summing up and the decision of the court together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for... all purposes...”*

4. In **Ram Dulare, Chandar Bhan and Permal Naidu vs Reginam** [1956 – 57], Fiji Law Report, Volume 5, pages 1 to 6, page 3, the Fiji Court of Appeal, said the following, on an equivalent section of the then Criminal Procedure Code:

*“...In our opinion learned counsel for the appellants is confusing the functions of the assessors with those of a Jury in a trial. In the case of the **King v. Joseph** 1948, Appeal Case 215 the Privy Council pointed out that the assessors have no power to try or to convict and their duty is to offer opinions which might help the trial Judge. The responsibility for arriving at a decision and of giving judgment in a trial by the High Court sitting with the assessors is that of the trial Judge and the trial alone and in the terms of the Criminal Procedure Code, section 308, he is not bound to follow the opinion of the assessors...”*

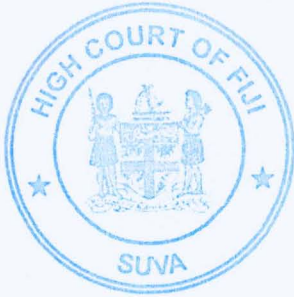
5. In **Sakiusa Rokonabete v The State**, Criminal Appeal No. AAU 0048 of 2005, the Fiji Court of Appeal said as follows:

“...In Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only, to offer their opinions, based on their views of the facts...”

6. I have reviewed the evidence called in the trial, and I have directed myself in accordance with the Summing Up I gave the assessors yesterday.
7. I have heard the complainant's evidence on the accused allegedly raping her, at the material times, as alleged in counts nos. 1 and 2 of the information. On its face, her evidence was enough to satisfy the three elements of rape, described in paragraphs 9, 10, 11 and 12 of my Summing Up. However, the prosecution was required to prove the accused's guilt beyond a reasonable doubt, and to make the court sure of his guilt.
8. Evidence that the complainant was interested in girls, and was found in the school toilet twice, with a female companion, does tend to raise some doubts on her story, regarding penile penetration, as opposed to finger or fingers probing. Both the doctor and the accused, who was a doctor himself, admitted in evidence that, a female's hymen could be penetrated by a penis or finger or fingers. And when the doctor was cross-examined on finger probing of the hymen, she was evasive. She didn't want to explain to the court that finger penetration of the complainant's hymen was a possibility. It appeared to me, she had taken a position in the case, and was not prepared to assist the court, on other possibilities of vaginal penetration. I am aware that we are dealing with an issue that is very private to human beings, and a taboo subject in many cultures. But in a rape case, penile penetration of the complainant's vagina is a vital issue that had to be proven beyond reasonable doubt, irrespective of its "taboo" nature in most cultures. In my view, doctors are supposed to be professional, and put their positions to the court, without getting too emotionally involved in the case. Because of the above attitude, I was not assisted, in finding element no.1 of rape (ie. penile penetration of the complainant's vagina) been proven beyond reasonable doubt. There was a lingering doubt in my mind as to whether or not element no. 1 of the offence of rape, had been proven beyond reasonable doubt. It was the duty of the prosecution to remove that reasonable doubt from my mind. In my view, they failed to do so.
9. Furthermore, the nature in how this rape allegations arose, appear suspicious to me. The complainant was beaten by the accused, in the presence of his wife, and her biological mother, after her "interest in girls" problem was brought up in school. She was told by the accused that she would be taken back to her biological father, who appeared to have had no part in her

upbringing. The complainant had lived with the accused's family for the previous 6 years, and was treated as part of the family. The accused's family had provided her with all the necessities of material and emotional life. Was she motivated by a desire to get back at the accused for "beating" her? Why didn't she raise the allegations earlier, so that the disciplinary matter at school and her beating by the accused, would not clutter her intentions? In my view, the proximity between the "beating" and the rape allegations were too close, as to raise more questions. It created doubts and suspicions in the mind of the court. As I've stated before, it was the job of the prosecution to remove these doubts, but in my respectful view, they failed to do so.

10. Furthermore, the complainant's medical report [Prosecution Exhibit No. 2], instead of assisting the prosecution, appeared to create more doubts. In A(4) of the report, the complainant told the police, and the police wrote, "...The victim allege that she was abuse by the uncle since 2003 until 13.10.09 inside his house at Nakasi..." In D(10) of the report, the doctor noted the complainant's complaint as follows, "...Has been sexually vagina penetration by her uncle for the past 5 years..." In court, the complainant said, she only had 2 sexual encounters with the accused in 2009. She never said, she had unlawful sexual encounters with the accused for the last 5 years. The complainant's inconsistent versions to the police, the doctor and the court created doubts in the court's mind. Was the complainant telling the truth or was she making up a story? When this doubt is added to the doubts mentioned above, the doubts became bigger and created a "reasonable doubt", despite the complainant's version of events. As I've said before, the burden of proof is on the prosecution from the start to the end of the trial, and it is their duty to prove the accused's guilt beyond a reasonable doubt. If there was a reasonable doubt as to the accused's guilt, the law required that the benefit of that doubt, must go to the accused.
11. It was for the above reasons, that I disagreed with the unanimous guilty opinion of the three assessors. I have heard the complainant's evidence. I have heard the defence's evidence. After carefully comparing and analyzing all the evidence, I am left with a reasonable doubt as to the accused's guilt. I am not sure whether or not he is guilty as charged. The law required the benefit of that doubt to go to him. I therefore find the accused not guilty as charged on both counts, and acquit him accordingly. Accused, you are free to go home.



Salesi Temo
JUDGE

Solicitor for the State
Solicitor for Accused

:
:

Office of the Director of Public Prosecution, Suva.
Toganivalu, Barristers and Solicitors, Suva.