

IN THE HIGH COURT OF FIJI  
AT SUVA  
CRIMINAL JURISDICTION.

Criminal Case No. HAC 63 of 2013

BETWEEN

STATE

AND

KITIONE KAMIKAMICA

BEFORE THE HON. JUSTICE PAUL K. MADIGAN

**Counsels:** Ms. A. Vavadakua for the State  
Mr. J. Savou (L.A.C.) for the accused

**Dates of hearing:** 14 & 15 April 2014  
**Date of summing up:** 15 April 2014

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**SUMMING UP**

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**Ladies and Gentleman assessors:**

- (1) 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 you heard in this court room. There will be no more evidence. You are not to speculate on what evidence there might have been or should have been. You judge this case solely on what you have heard and seen here.
- [5] The court room is no place for sympathy or prejudice. You may have particular moral or religious views about sexual relationships but you must not let that cloud your view of the proceedings. You will judge the case solely on the law as I direct you and on the evidence before you and on nothing else. . You must use the evidence you have heard to apply it to the principles of law that I direct you on in this summing up as they apply to the crimes of rape that the accused faces and to nothing else. 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.
- [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 this 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 him not guilty - that doubt must be a reasonable one however, not just some fanciful doubt. The accused does not have to prove anything to you. If however you are sure that the accused raped Joana, once in January 2010 and once in early 2012, then you will find him guilty of the charges he faces.

- [8] Rape in our law is sexual intercourse by an offender when there is no consent from the victim. The State has to prove to you that it was indeed the man who is on trial (in this case Kitione) and that there was some degree of penetration of his penis into the vagina of the victim (in this case Joana) . Our law also says that any child under the age of 13 is incapable of giving consent, so that is not an element for you to find. you must decide therefore in our case whether Kitione had laid Joana on the floor of the toilet and if he had, did he penetrate her to some degree with his penis?
- [9] Obviously the chief witness in the prosecution's case was the victim herself, Joana. She was only 9 years old when the incident she told us of took place. She said that sometime during the first term of 2012, it was a Sunday, Mum had gone to church with her brother and sisters. She was at home with one of her sisters Laisa, who was sick. Kiti was also told to go to church but he didn't. When Mum left he came and pulled her by the hand to the toilet which was inside the house at the back. He locked the door by means of a nail catch on top of the door . He then took off her clothes, closed the seat of the toilet and sat on it, telling her to sit on him. She said that he was wearing his "church clothes". She didn't sit on him , but he then spread her skirt on the floor and she lay on the skirt. By this stage Kiti had taken his clothes off and he inserted his penis into her vagina. She shouted because it was painful. He then dressed, flushed the toilet, and left the toilet telling her to have a bath. She then left the toilet crying. She told us that she told Tarusila about it and

Tarusila took her to her mother and told her. She went to the hospital for a medical check-up. She identified the accused in court as the Kiti that had done this to her.

[10] In cross examination she admitted that she didn't run to her relatives who were living in two houses nearby, but said in re-examination that she was scared. She denied that she was confusing Kiti with Netani.

[11] The second prosecution witness was Joana's sister Laisa. She remembers the day that she was home sick. Kiti came and dragged Joana into the toilet and closed the door. After a while he flushed the toilet and came out followed by Joana, who was crying.

[12] Dr. Maharaj is the doctor who examined Joana at Nausori Medical Clinic on January 3, 2013. Joana was with her mother and consent was given for the examination. His examination showed that the hymen was broken, that there were no injuries on either the vagina or the anus.

[13] Joana's cousin, Tarusila, told us that Joana told her about the incident in January 2013. She related the story told by Joana, about sitting on the toilet, about lying on the floor and they then went and told Joana's mum about it.

[14] Joana's Mum first produced Joana's birth certificate which shows that she was born on the 19th June 2003 proving that she was under the age of 13 at the time (and still is). She is therefore unable to give consent to any acts of intercourse. Her Mum then went on to tell us about the time that Tarasila came to her with Joana and told her what Kitione had done to Joana. I will not go into detail again but what she told us was the same as Joana had told us, including his inserting his penis into her. She said that after this, her family's relationship with Kitione's family deteriorated.

- [15] The final witness for the State was the Police Officer who came and told us of the interview about this affair that he conducted with Kitione. Kiti didn't admit anything in that interview and you may think that it does not help the State's case at all. it is all a matter for you.
- [16] Well Madam and Gentlemen, that was the end of the prosecution case. You heard me tell Kitione that there was a case to answer on the rape count and he was put to defence on that count. In defence, he had the choice of remaining silent or giving evidence and no matter what his decision he could call witnesses. He chose to remain silent and to call no witness. Now I must direct you Madam and Gentlemen, the accused does not have to give evidence. He is entitled to sit in the dock and require the prosecution to prove its case. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing one way or the other. It does nothing to establish his guilt.
- [17] There being no evidence in the defence case, you can look to the caution interview for some evidence of the accused's response to the allegation of rape. In looking at the record of interview you must decide if the answers were his answers and if they were then they are answers for you to accept or reject as evidence in the normal way. You will note that he admits calling Joana into the toilet but does not know why, and then he denies doing anything to her. It is for you to decide whether you believe his evidence or not.
- [18] I wish to say a little about the mystery man Netani, a person Mr. Savou is making a lot of. Well, Madam & Gentlemen it is Kitione who is on trial and not Netani. We don't have any evidence about Netani apart from Joana agreeing that she told Ana that it was Netani who did this. Why she said that is for you to decide. Was she confused? Did she misunderstand? There is

certainly no evidence from anybody that Netani was there at the house that day. I remind you to judge this case on the evidence that is before you.

[19] You are only to look at the first count of rape. The second count has been withdrawn from your consideration.

[20] So, Madam & Gentlemen your task is simply this. Looking at the evidence as a whole, do you find that Kiti had sexual intercourse with Joana or not. If yes, then you will find him guilty, if no, then you will find him not guilty. It is best that you be all agreed but it is not strictly necessary. When you return you will be asked individually for your opinion.

[21] You may retire now but before you do, I will ask counsel if there is anything they wish me to add to or alter in this.

[22] Counsel?



At Suva  
15/04/2014

A handwritten signature in black ink, appearing to read "P.K. Madigan".

P.K. Madigan  
Judge