

IN THE HIGH COURT OF FIJI  
AT LABASA  
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 025/2013

BETWEEN: THE STATE

AND: TOMASI TAVAKATOGA TUIWAILEVU MATENI

COUNSEL: Ms. P. Low for the State  
Ms. M. Lemaki for the Accused

Dates of Trial: 22-24/04/2014

Date of Summing Up: 24/04/2014

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

**SUMMING UP**

Ladies and Gentleman 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 opinion. 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 their 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 certain circumstances the court would allow witnesses to give their opinions on a matter. These witnesses should be experts on that particular subject. For example, you get experts on medical field.
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.
  - (i) M.M (hereinafter known as the victim) was born on 16<sup>th</sup> November 2002 as per the birth certificate registration number 964551.
  - (ii) The victim was 9 years of age in August 2012(at the date of alleged offending) and class 4 student of Khemendra Central School, Savusavu.
  - (iii) In 2012, the victim resides with her maternal grandfather namely Iliesa Siganiyavi and other relatives at Nakama Heights, Savusavu.
  - (iv) Tomasi Tavakatoga Tuiwailevu Mateni (hereinafter known as the accused person) is 23 years of age in 2012. (Date of Birth: 26/10/1989).
  - (v) The accused person is originally from Kilaka, Kubulau, Bua but resides in Nakama Heights, Savusavu.
  - (vi) In the month of August 2012, the accused person was residing in Namaka Heights, Savusavu, and has been residing at the place for the last 8 years from the said time.

- (vii) Both victim and the accused person knew each other by name and knew that they both reside at Nakama Heights, Savusavu.
  - (viii) The victim and the accused person are in Nakama Heights, Savusavu on the nights of 6<sup>th</sup> August 2012 and 07<sup>th</sup> August 2012.
  - (ix) A complaint was lodged against the accused person to the police and the accused person was interviewed under caution at the Savusavu Police Station on 12<sup>th</sup> August 2012.
  - (x) On 13<sup>th</sup> August 2012 the accused person was formally charged at the Savusavu Police Station.
  - (xi) The victim was medically examined at the Savusavu Hospital on 10<sup>th</sup> August 2012.
  - (xii) The admissibility of following documents is not in dispute between the Prosecution and the Defence and will be tendered in Court as prosecution evidence.
    - The birth certificate of the victim registration number 964551.
    - The Caution Interview Notes of the accused person dated 12<sup>th</sup> August 2012.
    - The Charge Notes for the accused person dated 13<sup>th</sup> August 2012.
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 charge.

**FIRST COUNT**

*Statement of Offence*

**INDECENT ASSUALT:** contrary to section 212(1) and (2) of the Crimes Decree No: 44 of 2009.

*Particular of Offence*

**TOMASI TAVAKATOGA TUIWAILEVU MATENI**, on the 06<sup>th</sup> day of August 2012, at Savusavu, in the Northern Division, unlawfully and indecently assaulted M.M a 9 year old.

**SECOND COUNT**

*Statement of Offence*

**RAPE:** Contrary to section 207(1) and 207(2) (b) and (3) of the Crimes Decree No: 44 of 2009.

*Particular of Offence*

**TOMASI TAVAKATOGA TUIWAILEVU MATENI** on the 07<sup>th</sup> day of August 2012, at Savusavu, in the Northern Division, penetrated the vagina of M.M a 9 year old, with his finger.

14. In order to prove the offence of Indecent Assault the prosecution has to prove the following elements beyond reasonable doubt.

- (i) The accused

- (ii) Unlawfully, and
  - (iii) Indecently
  - (iv) Assaulted
  - (v) The female complainant.
15. In Fiji law, the offence of Rape is committed when the vagina is penetrated either by the penis or by the finger of the accused. Hence in this case the prosecution has to prove:
- 1. It was the accused
  - 2. Who had sexual intercourse with the victim or that he sexually abused the victim by invading her with his finger,
  - 3. Penetrated the vulva or vagina of the victim to some extent, by inserting a finger,
  - 4. Without her consent.
16. As far as the element of consent is concern, in our law, a child is under the age of 13 years is incapable of giving consent. In this case victim was 9 years old at the time of the offence. Hence consent is immaterial in this case.
17. I now remind you of the prosecution and defence cases. In doing this it would be tedious and impractical for me to go through the evidence of every witness in detail and repeat every submission made by the counsel. I will summarize the salient features. If I do not mention a particular witness, or a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case.
18. Now let's look at the evidence led by the prosecution in this case.
19. The victim is now 11 years old was a class 04 student. She is residing with her grandfather as her mother got re-married after her father's demise. She has two younger sisters. All lived in Nakama Heights, Savusavu in the year 2012. She was 09 years old at the time of the incident and was schooling at Khemendra Central School. In her grandfather's house her Uncle and Aunt

also lived. On 06/08/2012, she slept on a bed with her sisters. The bed was placed closed to the door. Her Uncle and Aunty were sleeping in a separate room. Her grandfather had gone to the church. While sleeping she felt someone touching her face, shoulder, stomach and thighs. Light was on and she identified Tomu was sitting beside her on the bed. He was wearing a wig but he removed the same and was staring at the victim. She knew Tomu as he too stays in the same village. She identified the accused as Tomu in open court.

20. On 07/08/2012, she went to bed with her two sisters and was sleeping in the middle. Her grandfather had gone to the church and her Uncle and Aunty were sleeping inside the room. While sleeping she had seen the accused sitting beside her sister Kereleyani Wati. The accused then touched her vagina and inserted his finger into her vagina. She felt pain at that time. Due to fear of the accused she did not shout at that time. This time her sister Kereleyani Wati also saw the accused. She identified the accused through room light. On the following day she had noticed blood coming from her vagina and her skirt and her undergarment also stained with blood. She then showed it to her grandfather but did not divulge the incident due to fear. Her grandfather told her to wash the same. On 10/08/2012 she went to school and cried due to pain in her vagina. This was informed to her teacher Ms. Vaseva who then took her to the head teacher. Thereafter she was taken to Savusavu Police Station. She then lodged her complaint and went for a medical check up at Savusavu Hospital. The doctor had examined her vagina. Her birth certificate was marked as P1.
21. In the cross examination victim said that she saw the accused through bright solar light. The house door is usually locked from inside in the night. But on 6<sup>th</sup> and 7<sup>th</sup> August 2012, her grandfather had gone to the church in the night. Therefore the door was not locked inside or padlocked outside. She agreed that she did not give a history to the doctor. She was unaware about a Crusade happening for three days in Savusavu. She reiterated that her Uncle and Aunty were sleeping in a separate room on both days. Victim said that she don't know whether the accused went to the Crusade on 6<sup>th</sup> and 7<sup>th</sup> August 2012, but she confirmed that the accused came to her house on both

days in the night around 8pm. She further said that the accused was wearing a black colour wig, a brown T-shirt and a white pant. Victim said that nobody forced her to lodge a complaint against the accused. She also agreed that the accused did not threaten her on both days.

22. Kereleyani Wati, sister of the victim said that on 07/08/2012 while they were sleeping on a bed the accused entered her house and sat beside her sister. She saw accused face with the room light. The accused was wearing a mask and removed when sat on the bed. She was 08 years old in the year 2012. Presently she is schooling and she is in the care of her grandfather. She identified the accused in open court. She was frightened when she saw the accused on 07/08/2012.
23. In the cross examination witness said that the accused wore a brown colour mask. She is unaware about the Crusade but confirmed accused's presence at her house on 07/08/2012 in the night. She was not forced to make a statement to the police by anybody.
24. Iliesa Siganiyavi, grandfather of the victim gave evidence next. He looks after three granddaughters as his daughter got re-married after the demise of her husband. In the year 2012 he lived in Nakama Heights, Savusavu. With him his son and daughter-in-law also stayed in the house. On 10/08/2012 in the morning he had noticed blood stains on victim's clothes. Thinking that could be due to a boil, he told the victim to have a bath. He did not pay much attention as he was cooking and in a hurry to go for work. When he came after work, he came to know that the victim was in the police station. Victim did not tell anything in the morning.
25. In the cross examination witness said that victim did not complain anything on 07/08/2012. But she was scared and ashamed when he saw blood on her skirt. He admitted that he did not inquire how victim got blood on her skirt.
26. Vaseva Muaibeqa, the class teacher of the victim at Khemendra Central School said that on 10/08/2012 the victim was found crying in the toilet and complained of vaginal pain. She immediately took her to school head teacher. Victim had told head teacher that one guy had done something to



her vagina. As per the direction the victim was taken to Savusavu Police Station. A woman police constable had recorded her statement first. Thereafter victim was taken to Savusavu Hospital for a medical examination. As she was the guardian at that time she gave her consent for the medical examination. After examination victim was taken back to school and handed over to her mother.

27. In the cross examination witness said that the victim not named any person who touched her vagina.
28. WPC 3184 Maca Balinamoto was the investigating officer in this case. She has ten years experience in Fiji Police Force. She has recorded the complaint and took the victim for a medical examination. She charged the accused at Savusavu Police Station. Accused had denied the charge. He identified the accused in open court. The charge statement was marked as P2.
29. Witness admitted that she recorded a statement from Sanita. No sketch of the crime scene prepared. She had not examined the lighting system of the victim's house. No wig recovered from the accused.
30. DC 3521 Saiyasi had recorded the caution interview statement of the accused on 12/08/2012. The accused denied the charge and took up the position that at the relevant time on 6<sup>th</sup> and 7<sup>th</sup> of August 2012 he was attending a Crusade which was held at Savusavu.
31. Dr. Dinesh Lingam a MBBS doctor with about 08 years experience examined the victim on 10/08/2012. He performed the examination at Savusavu Hospital at about 11.45am. Due to language barrier he obtained the history from Victim's teacher Vaseva. He examined the victim in presence of Dr. Seniti, the class teacher, the police officer and nurse Sisilia. According to the history victim had noted blood on her under garment. When she woke up and was cleaning herself found blood coming out from her vagina. She also complained of pain in her private part. According to his specific findings, the victim's hymen is not intact. However no visible injuries or bleeding from vagina noted.

32. According to his conclusion the hymen could be damaged due to entering a blunt object in to the vagina. He expressed an opinion that injuries caused to vagina could be healed fast due to high blood circulation. Victim's Medical Report was marked as P4.
33. In the cross examination witness said that he is unable to say the reason for rupture of victim's hymen. He said that it is very rare that hymen rupture during cleaning of the vagina. Also said that hymen can be broken without the knowledge of a female. Finally he said that he examined the victim two days after the alleged incident.
34. That is the end of prosecution case. Defence was called and explained the rights of the accused. After understanding his rights he elected to give evidence from witness box and called a witness.
35. According to the accused he was residing at Nakama Heights in the year 2012. He was working for a construction company in the month of August 2012. On 6-7/08/2012 he went for work and returned home at 5.30pm. After returning home he went to church service which was held at Foreshore Grounds, Savusavu with his cousin Sanita. Both left home after 7.00pm on both days and returned home after 9.00pm. After arriving home he did not go anywhere as he had to go for work in the morning. A paper said to be marking of Crusade entrance was produced by the defence. The prosecution did not object. In that page both the accused and Sanita's name appeared at number 14 and 13 respectively. In front of their names a marking had been done for 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> 8<sup>th</sup> and 9<sup>th</sup> of August. This was marked as D1 by the defence. He said that he denied the charges at the police station. He says that on both days he was attending the Crusade at all relevant time pertains to this case. He denied the charge in his caution interview statement as well as in his charge statement.
36. In the cross examination accused admitted that he knows the victim as he is related to the victim. He also stayed in Nakama Heights in the year 2012. According to him he had attended the Crusade on 6<sup>th</sup> and 7<sup>th</sup> August 2012. He agreed that he can leave the Crusade at any time. He denied the charges. Accused agreed that he had a wig dark brown to black in colour which was

kept in his parent's house. It was given to its owner one month before the incident. Accused admitted that he was wearing ¾ pants and a black pullover on 06/08/2012. But he denied that he went to the victim's house on 06/08/2012 with same cloth. He also said that plenty of people were wearing the same dress at the Crusade.

37. Sanita Dilioni a cousin of the accused gave evidence on behalf of the accused. She was residing at Nakama Heights in the year 2012 with his Aunty. She confirmed that she went with the accused and attended a Crusade which was held at Foreshore grounds on 6<sup>th</sup> and 7<sup>th</sup> August. On both days she came to the venue with the accused at about 7.00pm and left the venue and reached home at about 9.30pm. According to her both attended the Crusade from 6<sup>th</sup> -9<sup>th</sup> August.
38. In the cross examination witness reiterated that she went to the Crusade on both days with the accused. Their attendance was taken. Witness further said the accused was sleeping after he came from the Crusade. She admitted that she give evidence to protect his cousin.
39. That is end of defence case.

#### **Analysis of Evidence**

40. Ladies and Gentleman of assessors, in this case the victim gave evidence first. According to her the accused came to her house on 6<sup>th</sup> and 7<sup>th</sup> August in the night and touched her body and inserted his finger into her vagina. She had identified the accused through the solar light which was on at that time. She knew the accused earlier as he too lived in Nakama Heights. She was not forced by anybody to implicate the accused in this case. She said that the accused was the person who entered her house on 6<sup>th</sup> and 7<sup>th</sup> of August 2012 and performed unpleasant acts on her. The accused wore a wig on both days but he removed it when he touched and inserted his finger into victim's vagina. The victim was a 9 year old girl when she encountered these unpleasant acts. She was not aware accused attending a Crusade on 6<sup>th</sup> and

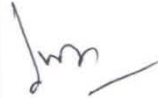
7<sup>th</sup> August 2012. As assessors and judges of facts you have to consider her evidence very carefully.

41. The victim's sister Kereleyani Wati corroborated the incident that happened on 07<sup>th</sup> August 2012. She had identified the accused through room light when he seated on the bed close to her sister. She too had seen accused wearing a mask but he removed it when he seated on the bed. She was 8 years old in the year 2012.
42. Ladies and Gentleman of assessors, you heard the evidence of victim's grandfather. He had seen blood marks on victim's skirt. No complain received from the victim when he saw blood on her skirt.
43. Ladies and Gentleman of assessors, after seeing the victim's cry, the class teacher Vaseva took the victim's to school head teacher who then referred the victim to Savusavu Police Station. WPC Maca after recording victim's statement produced her before Dr. Dinesh Lingam for a medical examination.
44. Ladies and Gentleman of assessors, the doctor gave evidence and explained the injury. He had examined the victim's vagina. He gave evidence as an expert. According to his opinion hymen could be damaged due to entering a blunt object into the vagina.
45. Accused denied the charge. According to him on both disputed days and time he was present in a Crusade which was held at Savusavu. To prove a document marked D1 produced by the defence. Although the prosecution not objected for the production of the document D1, you have to be satisfied whether it came from proper custody. Accused admitted that he had a wig but was handed over to the owner one month before the incident. As Assessors and Judges of facts you have to consider this evidence very carefully.
46. Sanita was called to corroborate the accused's position taken in his defence. She is a relation of the accused.

47. Ladies and Gentleman of assessors, in this case accused opted to give evidence from witness box and called a witness. That is his right. But he has nothing to prove to you.
48. In this case the accused is charged for Indecent Assault contrary to section 212(1) and (2) and Rape contrary to section 207(1) and 207(2) (b) and (3) of the Crimes Decree No: 44 of 2009. I have already explained to you about the charges and its ingredients.
49. Ladies and Gentleman of assessors, as per section 129 of the Criminal Procedure Decree 2009 no corroboration shall be required in sexual offence cases.
50. 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 their evidence you consider reliable, and therefore to accept, and which witness's evidence, you consider unreliable and therefore to reject.
51. 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.
52. Ladies 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.
53. 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.

54. 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.
55. Any re-directions

I thank you for your patient hearing to my summing- up.



P Kumararatnam  
JUDGE



At Labasa  
24/04/ 2014