

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 058/2013

BETWEEN : THE STATE

AND : SEVANAIA MIKAELE

COUNSEL : Ms. P. Low for the State
Mr. P. R. Lomaloma for the Accused

Dates of Trial : 19-22/05/2014

Date of Summing Up : 22/05/2014

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

SUMMING UP

Ladies and Gentleman Assessors,

[01] 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 opinions. 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.

- [02] 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.
- [03] Prosecution and defence made 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.
- [04] 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.
- [05] 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.
- [06] 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.
- [07] 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.

[08] 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.

[09] In assessing evidence of witnesses you need to consider certain tests. Examples:

- Consistency: That is whether a witness saying the story on the same lines without variations and contradictions.
- Probability: That is whether the witness was talking about in his/her evidence is probable in the circumstances of the case.
- Belatedness: That is whether there is delay in making a prompt complaint to someone or to an authority or to the police on the available opportunity about the incident.
- Spontaneity: That is whether a witness has behaved in a natural or rational way in the circumstances that he/she talking about.

[10] The prosecution and defence agreed to tender the medical report by consent.

[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.

The First Count

Statement of Offence

RAPE: *Contrary to Section 149 and 150 of the Penal Code Cap.17.*

Particulars of Offence

SEVANAIA MIKAELE between the 1st day of January 2008 and the 30th day of June 2008, at Vunisalusalu, Cakaudrove in the Northern Division, had the unlawful carnal knowledge of a girl namely I.M. without the said I.M's consent.

- [14] The offence of Rape is committed when the vagina is penetrated by the penis of the accused. Hence in this case the prosecution has to prove:
- i) The accused had carnal knowledge of the complainant,
 - ii) Without her consent; or
 - iii) With consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the act, or in the case of a married woman, by personating her husband.
- [15] Carnal knowledge is the penetration of vagina by the penis. It is not necessary for the prosecution to prove that there was ejaculation, or even that there was full penetration.
- [16] As far as the element of consent is concern, in our law, a child under the age of 13 years is incapable of giving consent. In this case victim was 14 years of age at the time of the offence and, therefore, she had the capacity under the law to consent. Therefore, the offence of rape is made out only if there was no consent from the alleged victim.
- [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 I.M. is originally from Domokavu, in Vaturova. When she was three years old her uncle Sevanaia Mikaele and her aunty brought the victim to their house and looked after her. She is related to her aunty. She went back to her mother when she was 7 years old. She came back to her uncle when she was 9 years old. From Class 4 to Form 03 she lived with her uncle. As she got pregnant she did not go to school after Form 03. She attended Vunisalusalu Central School. For her secondary education she went to Vaturova Koroalau Secondary School. In the year 2008, she was in Class 08. In the first term of the school, one Saturday, in the year 2008, she went with her uncle, Nai (daughter) and Susie (adopted daughter) of Sevanaia Mikaele, to the cassava plantation. Accused told to his children to take the lead, therefore he told the victim that he wants her. When she said no he came behind, pushed her on the ground, forcefully took off her skirt and undergarment and inserted his penis into her vagina and had sex against her will. When she tried to resist, her uncle punched both of her thighs. After doing so, he threatened the victim not to reveal this to anybody. She could not say anything as she was weak and unconscious and was crying. When she got up saw blood on her body and her clothes. This happened in a mid day. She identified her uncle in the open court as the accused in this case. She did not divulge this incident to anybody due to fear of the accused.
- [20] Two weeks after the first incident, the accused took the victim and Susie to the sea to catch fish. After putting the fishing net he took her to nearby coconut field to collect some coconut leaving Susie near the fishing net. As earlier, he had forceful sexual intercourse against her will after putting her on the ground. Due to fear she remained silent. She did not tell anybody due to fear of the accused.
- [21] In the same year, during school holiday, one night, while she was making roti with Nai and Susie, the accused called her to his bedroom to massage his body. At that time he sent out Nai and Susie to collect coconut in his garden. In the meantime he forcefully removed her clothes and had sexual intercourse

against her will. She remained silent due to fear of him. This time too she did not divulge these incidents to anybody due to fear.

- [22] Another day during school holiday, while her aunty was out, he took the victim under the guise of catching prawns, took her to a creek and had sex forcibly after removing her clothes. She did not consent but remained silent due to fear of him.
- [23] After these incidents she told her aunty who then inquired from the accused. Denying the act the accused told her that it was the work of demon. In the year 2011 while she was at Vunusalusalu, a police officer came to her house. She was pregnant at that time. When police came to her house her aunty, accused's wife told her to implicate another school teacher in this incident. His name is Tuvai Leweniqila who was passed away in the month of July, 2011. Her aunty also warned her if she not implicate the dead teacher in this case she would cut off her neck. Then police called her to Savusavu Police Station for an inquiry. She went to police with her aunty who was waiting outside during questioning. Due to fear and advice of her aunty she told that the dead school teacher is the father of her child.
- [24] In the cross examination witness that the accused has 04 sons. When accused said in I-Taukei that he will do something bad to her, she thought he was going to hit her. Due to fear she did not divulge this to anybody after four incidents. She told that she gave a statement to police on 25/01/2013. Witness denied that she consented for sex at the cassava plantation. She reiterated that due to fear of the accused she did not divulge this to anybody. Witness said that the place where she went to collect coconut in the second incident is not far from the beach. Although she was in fear of the accused after first incident she went with the accused as he ordered her to come. Victim said that she could not shout or scream due to fear of her uncle. Witness admitted there are houses close to scene of crime at Vunusalusalu. According to victim, Nai and Susie were collecting coconut in garden of the house when accused called her to his bedroom for a massage. She said that she never crack jokes to her uncle or touch his body. She denied telling the accused that he is very handsome. She admitted that there was a rumour that the dead person is the father of her child. According to her Susie came to know this from the accused as she was kept to stand and watch. Witness said that she is not lying in the court. She

denied that she consented for sex with the accused. Her statement was taken at Korotasere Police Post. First she was taken to Savusavu Police Station as it was suspected the dead teacher. Once it came to light the accused's name, his statement was recorded at Korotasere Police Post. Witness reiterated that she told police about dead person due to threat of the accused's wife. Due to fear she could not tell police about threatening of her aunty. The incident first reported to police by her another uncle namely Kameli Velovelo.

- [25] In the re-examination witness said that she would do whatever she is asked to do by the accused.
- [26] Susie Weatherall is the adopted daughter of the accused. She is still schooling at Savusavu Secondary School. Between years 2007-2008 she was with accused's family at Vunusalusalu. Accused is her uncle. One day in the year 2008, she went to the cassava plantation with the victim and the accused. At that time accused forced victim to have sex with him. He took the victim to a slope. She was crying as accused threatened her with death if she tells this to anybody. The victim was crying at that time. As per the request of the victim, she told this to her aunty but she did not take any action. She was not aware where accused and victim went after putting fishing net in the sea. Another day when she returned from the beach, the accused called the victim to the bath room and used her. When victim wanted to go out accused banged on her head. She saw this through moon light. When victim came out she was crying. After she informed this to accused's wife, she took them and forced them to cross the river to escape from her uncle. They swam through mangroves. She identified the accused in open court.
- [27] In the cross examination she admitted that she did not tell police that victim told her to inform her aunty. Also admitted that she did not tell the police about crossing the river. She said that she crossed the river from bridge side and the village is far from the bridge. She reiterated that she was threatened by the accused at cassava plantations and saw victim crying. Also said that she saw victim crying after she came out from the bathroom.
- [28] PC 4252 Aminiasi is a retired police officer. He is the investigating officer and interviewing officer in this case. While serving in Korotasere Police Post he received a report pertains to this case and referred the matter to Savusavu

Police Station. The victim and the accused were staying at Domokau. The interview was recorded on 28/01/2013 after giving all of his rights. At this stage the prosecution attempted to mark a photocopy of the caution interview statement of the accused. Defence counsel said that he has no objections. The caution interview was marked as P2. The Charge statement was marked as P3. He identified the accused in open court.

- [29] In the cross examination witness said that the inquiry commenced after a report from the school. Witness said that he was not the investigating officer with regard to the pregnancy of the victim. With consent the Medical Examination Form was marked through this witness.
- [30] After calling three witnesses prosecution closed their case.
- [31] Defence was called and explained the rights of the accused. Accused elected to give evidence from witness box. According to him he lived in Vunisalusalu in the year 2008. He lived with his family along with the victim and Susie. He said that the victim used to crack jokes and holds his body. Sometimes she looks at him while he was dressing. When he went to the cassava plantation he requested sex from the victim and she agreed. After having sex both went home and nobody was seen this. Second time they had sex at a coconut plantation closed to the beach. At that time Susie was there but she was 20-30 meters away from the place where they had sex. In another occasion they had sex at a coconut plantation. One day while he was at home in the night he called the victim to do a massage. At that time both had sex inside the room. At that time his children were collecting coconut outside. In another occasion both had sex inside the bathroom. Once he went to catch prawns which is 10 km away from his house. Both had sex on that occasion too. According to him he had sex twice at the cassava plantation. Once though he requested Jordan to bring a sack to collect cassava, victim came with the sack and both had sex at that time. He says that Susie and his wife know this. When Susie told this to his wife after her returning from cassava plantation, his wife questioned him. Finally he said at all relevant times; the victim had sex with him with consent and on her freewill.
- [32] In the cross examination accused said that he is father of five children. He admitted that he loves his children. In the year 2008 the victim was between

13-14 years. Accused said that the victim asked sex from him all the times. Accused said that the victim was never fear of him. Accused denied that he bang on victim's head in the bathroom. Accused said that he told entire truth to the police.

- [33] In the re examination accused said that he assumed that the victim wanted sex through her behaviour.

Analysis of the Evidence

- [34] Ladies and Gentleman Assessors, in this case the accused admits that he had sexual intercourse with consent of the victim. The victim was 14 years and the accused was 43 years old in the year 2008. The accused has children and he looked after the victim as his daughter. The victim says that she was raped by the accused after threatening her. Susie Weatherall had seen victim crying after she was subjected for sexual intercourse. Victim had told her aunty but no action taken. Victim told her ordeal to Susie Weatherall who then informed her aunty immediately. Her aunty insisted her to implicate a dead teacher's name in this case. Further she threatened her with death if does not comply with her advice. As assessors and judges of facts, you have to consider evidence of the victim and Susie very carefully.
- [35] The medical report was marked without calling the doctor to give evidence. The victim in her history to the doctor claimed she has been sexually assaulted by her uncle since 2008 while she was a Form 2 student of Vaturova Koroalau High School. She became pregnant in 2011 while repeating her Form 3. Claimed that her uncle in pregnant her. She had given birth to a child on 01/09/2011. According to the doctor she has been sexually active since 2008. Her hymen not intact. Consider this evidence when you assess this case.
- [36] Ladies and Gentlemen Assessors, the accused admitted the charge in his caution interview statement. He was not intimidated or threatened at the time of recording his interview. What weight you give to this evidence is entirely a matter for you to decide.
- [37] In this case the accused is charged for rape contrary to sections 149 and 150 of the old Penal Code Cap.17. I have already explained to you about the charge and its ingredients.

- [38] Ladies and Gentleman Assessors, in this case accused opted to give evidence from witness box. That is his right. But he has nothing to prove to you.
- [39] Accused in his evidence admitted that he had sexual intercourse with consent of the victim. He said that victim never asked for sex but he assumed through her behaviour that she was a consenting party. The accused has children in the same age of the victim. He brought up the victim as his child. The victim was schooling in the year 2008. She was only 14 years at the relevant time. Consider this evidence with great caution.
- [40] 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 his evidence you consider reliable, and therefore to accept, and which witness's evidence, you consider unreliable and therefore to reject. Use the tests mentioned above to assess the evidence of witnesses.
- [41] 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.
- [42] Ladies and gentleman 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.
- [43] 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.
- [44] 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.
- [45] Any re-direction ?

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



P Kumararatnam
JUDGE

At Labasa
22/05/2014