

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 385/2012

BETWEEN: THE STATE

AND: SEMI KOROITUKANA

COUNSEL: Ms S Kant for the State
Ms N Nawasaitoga for the Accused

Dates of Trial: 09-10/12/2014

Date of Summing Up: 11/12/2014

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

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 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.

[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 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.
- [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 judgment.
- [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 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. Copies of agreed facts are given to you.

The following facts are agreed between the parties:

1. Semi Koroitukana [hereinafter the accused] was born on the 8th day of September 1961.
2. That E.K [hereinafter the victim] resides at Nakavika Village, Namosi.
3. That the victim and the accused were staying in Nakavika Village, Namosi.
4. That the accused is originally from Nukusere Village, Namosi.
5. That the accused is married to Vosita Teresia who is originally from Nakavika Village, Namosi.
6. That the accused and Vosita Teresia have 5 children together.

[09] 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.

[10] 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.

[11] Now let's look at the charge.

FIRST COUNT

Statement of Offence

RAPE: Contrary to Section 207(1) and (2) (a) of the Crimes Decree No.44 of 2009.

Particulars of Offence

SEMI KOROITUKANA on the 16th day of October, 2012, at Nakavika Village, Namosi, in the Central Division, had carnal knowledge of **E.K** without her consent.

[12] 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:

- i) The accused had carnal knowledge of the complainant,
- ii) Without her consent,
- iii) He knew or believed that she was not consenting or did not care if she was not consenting.

[13] Carnal knowledge is the penetration of vagina or anus by the penis. It is not necessary for the prosecution to prove that there was ejaculation, or even that there was full penetration.

[14] 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 the victim was 31 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.

[15] According to Section 206(1) of Crimes Decree No. 44 of 2009, the term "consent" means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent.

[16] According to Section 206(2) without limiting sub-section (1), a person's consent to an act is not freely and voluntarily given if it is obtained:

- a) by force; or
- b) by threat or intimidation; or
- c) by fear of bodily harm; or
- d) by exercise of authority; or
- e) by false and fraudulent representations about the nature or purpose of the act; or
- f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

- [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 in her evidence said that she lives in Nakavika Village. One day she had encountered a bad incident. When she went out and came home after dark her house was closed. After some time she went back but the house was still closed. Hence she had gone to the accused's house and slept there. While lying the accused had come on top of her, removed her panty, put his penis on her body, harassed her and bit her neck. Answering further, the victim said that the accused put his penis in to her "yaya". To clarify further, a Teddy Bear was shown to the victim. The victim has shown the place between the Teddy Bear's legs. Answering further victim said that the accused's penis went inside her vagina which she did not like it. All family members of the accused were sleeping when accused did this to her. Though accused's wife saw this but had not intervened. The house is an open house. According to the victim, she did not want sexual intercourse at that time. She identified the accused in open court.
- [20] In cross examination, the victim said that she lives with her parents and their house is situated close to the village house. She admitted that the village generator was switched off after 10.00pm. She admitted that if she had shouted that could have been heard by members of the house. She further admitted that the accused did nothing to her on that night. But answering further, the victim said what the accused really did to her and she had seen the bite mark when she went home in the morning.
- [21] In re- examination, the victim reiterated that the accused inserted his penis into her vagina. According to her she did not consented for the act. The victim said that she did not shout at that time but she shouted at the accused.

- [22] Dr. Josese Vuki was called to give evidence on behalf of Dr. Mafa who had examined the victim on 19/10/2012. At present she had gone abroad. Dr. Josese Vuki has over 30 years service. He is familiar with hand writing of Dr. Mafa. The victim was examined on 19/10/2012 at Navua Hospital. In the history the doctor, had written that the patient was allegedly raped by "Semi" at his house, when she went to sleep at their place, as her house was locked after returning from playing "VIDIVIDI". The patient claims that in the middle of the night "Semi" came on to her fondled her private part with his fingers; penetrated in to her with his penis. According to initial impression the victim was not distressed, slow in recall memory-responding appropriately in Fijian Language. Doctor had noted small/mild laceration at 9 o'clock, 3 o'clock, 4 o'clock and 5 o'clock positions in her vagina. According to doctor's conclusion –allegedly assaulted by "Semi" on 16/10/12 while at his residence and patient claims was witnessed by assailant's wife but not fight in protest. According to witness penile penetration could cause the injuries noted in the vagina but he said that he can't really guarantee as examination was not done by him. The medical report was marked as P1.
- [23] In the cross examination, the witness said that doctors cannot say who caused the laceration to the vagina of victim but only can express an opinion whether hymen is disrupted or not.
- [24] That's the end of the prosecution case. Defence was called and explained the rights of the accused. After understanding his rights he elected to give evidence from the witness box.
- [25] The accused said that he went for a meeting at the village headman's house on 16/10/2012. After coming he went to sleep at 10.00pm as the power goes off at 10.00pm in the village. While lying on the floor he saw a lady peeping inside his house. This was seen by his wife as well. He then ran after her and found that the victim was the person who peeped inside the house. She requested to spend the night in his house as her house was locked. His wife gave a pillow and a blanket. As the house has no rooms they all slept in the hall with three meters distance. His house has three doors. The closest house to his house is situated about 15 meters away. Nothing happened on that night and the victim had gone home in the morning. The accused denied committing rape of the

victim as she his "Daku"(wife's sister). Accused denied his wife saw what happened that night.

[26] In cross examination, accused said that he had known the victim for the last three years. She is a normal person but she gets angry. Accused admitted that he has no reason for victim to be angry. According to the accused what the victim said in this court is told to her by others. The incident came to light after two days. People of the village suspected him as the victim spent the night in his house on 16/10/2012 and had beaten him up. Accused denied the allegation repeatedly. Accused admitted the incident was first reported to the Turaga-ni-Koro and he investigated the matter.

[27] That is the end of defence case.

Analysis of the Evidence

[28] Ladies and Gentleman Assessors, in this case it is not disputed that the victim spent the night at accused's house on 16/10/2012. The dispute is that the accused did not indulged sex with the victim. In this case the victim is slow in recall memory. But she gave evidence about the incident. She took long time to answer the questions. But she maintained that the accused inserted his penis in to her "yaya" (vagina). She sought refuge at her sister's place to spend the night on 16/10/2012 as her house was closed in the night. She told the incident to the doctor when she was examined. As Assessors and Judges of facts you have to consider her evidence very carefully.

[29] Ladies and Gentleman Assessors, the doctor gave evidence on behalf another doctor who prepared the medical report after examination of the victim. Victim has said that the accused after folding her private part, inserted his penis. Hymeneal injuries noted by the doctor. Though this was witnesses by accused's wife she did not interfered.

[30] Ladies and Gentleman Assessors, in this case the accused person opted to give evidence from witness. That is his right. But he has nothing to prove to you.

[31] Accused in his evidence denied the charge. According to him the victim only spent the night at his residence. According to him what victim said in court was told to her by others.

- [32] I have summarized all the evidence before you. But, still I might have missed some. That is not because they are unimportant. You heard every items of evidence and you should remind yourself of all that evidence and form your opinion on facts. What I did was only to draw your attention to the salient items of evidence and help you in reminding yourself of the evidence.
- [33] Ladies and Gentleman Assessors, in this case state has to prove lack of consent before you can find the accused guilty of rape. If you find there was consent and that he is thereof not guilty of rape.
- [34] In this case the accused is charged for Rape Contrary to Section 207(1) and (2) (a) of the Crimes Decree No: 44 of 2009. I have already explained to you about the charge and its ingredients.
- [35] Ladies and Gentleman Assessors, you have heard all the prosecution and defence 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.
- [36] 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.
- [37] 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.
- [38] Ladies and Gentleman Assessors as per Section 129 of the Criminal Procedure Decree 2009 no corroboration shall be required in sexual offence cases.

[39] 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.

[40] 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.

[41] Any re-directions

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



P Kumararatnam
JUDGE

At Suva
11/12/ 2014