IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICATION

LAUTOKA CRIMINAL CASE NO. HAC 149 OF 2013L

STATE

vs

VINEND KUMAR

Counsels	:	**Ms. L. Latu for State**
		Mr. M. Fesaitu and Ms. A. Prakash for Accused
Hearings	:	**22 to 25 and 28 November, 2016**
Summing Up	:	**29 November, 2016**
Judgment	:	**29 November, 2016**
Written Reasons for Judgment & Sentence	:	**30th November, 2016**

WRITTEN REASONS FOR JUDGMENT AND SENTENCE

1. From 22 to 25 and 28 November 2016, the accused went to trial on the following information:

COUNT 1

Statement of Offence

ATTEMPTED TO COMMIT RAPE: Contrary to section 208 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

VINEND KUMAR on the 15th day of July 2013 at Malele, Tavua in the Western Division, attempted to penetrate the vagina of **SITAMMA** with his penis, without the consent of the said **SITAMMA.**

COUNT 2

Statement of Offence

MURDER: Contrary to section 237 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

VINEND KUMAR on 15th day of July 2013 at Malele, Tavua in the Western Division, murdered **SITAMMA.**

2. Yesterday, the three assessors returned with a mixed opinion, after deliberating on the matter. Assessors No. 1 and 3 found the accused not guilty on Count No. 1 and 2, but guilty of the lesser offence of the manslaughter of the deceased on 15 July 2013. Assessor No. 2 found the accused guilty on Count No. 1 and 2.

3. Yesterday, as the trial judge, I accepted the opinion of Assessor No. 2, and did not accept the opinions of Assessors No. 1 and 3. I found the accused guilty as charged on Count No. 1 and 2 and convicted him accordingly on those counts. I said, I would give my reasons today. Below are my reasons.

4. Section 237 (1), (2), (4) and (5) of the Criminal Procedure Decree 2009, 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..."*

5. 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 judge alone and in the terms of the Criminal Procedure Code, section 308, he is not bound to follow the opinion of the assessors..."***

6. 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..."***

7. Prior to reaching my decision yesterday, I had reviewed the evidence called in the trial, and I directed myself in accordance with the summing up I gave yesterday. The three assessors' opinions were not perverse. It was open to them to reach such conclusion on the evidence. However, I am not bound by their opinions. On my analysis of the case based on the evidence, and on my assessment of the credibility of the witnesses, I agree with the guilty opinion of Assessor No. 2 and disagree with the not guilty opinions of Assessors No. 1 and 3 on Count No. 1 and 2.

8. My reasons were as follows.

9. After the alleged murder and attempted rape of the deceased on 15 July 2013, the accused voluntarily surrendered himself to the Lautoka Police Station. He was later taken to Tavua Police Station where he was caution interviewed by police on 18, 19 and 20 July 2013. He was later formally charged by police on 20 July 2013. In his police caution interview and charge statements, the accused admitted attempting to rape the deceased and later murdering her on 15 July 2013. After considering all the evidence, I had come to the conclusion that the accused voluntarily made his caution interview and charge statements to the police, and the same were true.

10. After listening to all the evidence, I accept that the police officers who caution interviewed the accused and formally charged him, including the witnessing officers, treated the accused well when he was in their custody and they did not assault, threaten or force him to admit the offences. As to the defence's allegation that the accused was threatened and assaulted while in police custody, I reject that allegation. Although the burden of proof is always on the prosecution, there was no evidence to suggest the police did the above to the accused. When the accused first appeared in the Magistrate Court and later in the High Court, the accused never complained to the Magistrate or the Judge of any untoward police behaviour. This suggested to me that he had no complaints against the police, and the inferences therefrom was that the police treated him well when he was in their custody.

11. Furthermore, the state of the deceased's injuries as itemized in her post mortem report, and the cause of her death, spoke volumes about how she met her death. She was severely injured in the face and head. In his caution interview statements, the accused said he struck the deceased twice on the head with the grog pounder (iron rod), and also hit her twice on the face with a small coffee table. Both the grog pounder and the coffee table were produced as exhibits. I lifted both exhibits in court, and they were pretty heavy. The deceased suffered broken teeth and a broken jaw. Her head was severely injured. When putting the accused's admissions together with the contents of the deceased's post mortem report, the inescapable inferences was that the deceased met her death after been hit four times with the grog pounder and small coffee table. The accused showed no mercy to the 53 year old deceased when he assaulted her to death.

12. For the above reasons, I accepted Assessor No. 2's guilty opinion, found the accused guilty as charged on both counts and convicted him accordingly.

13. The facts were somewhat disturbing. In July 2013, the accused held himself out as a person who could cure women's menstrual problems by praying for them and giving them herbal medicine. He was not a "pundit" or doctor by profession. As such, the deceased invited him to her home to pray for her and give her herbal medicine. The accused was 25 years old and a labourer by profession. He reached Form 7 level education. The deceased was a 53 year old housewife. As part of the prayer ceremony, the deceased gave him her gold jewellery.

14. Unbeknown to the deceased, the accused took the gold and sold the same, and used the proceeds of sale for himself. The deceased was continually asking the accused to return her gold jewellery, but he was evading her. On 15 July 2013, the matter came out into the open. The accused admitted to the deceased that he had sold her gold jewellery. An argument erupted between the two. They struggled. The deceased fell on the floor. Her skirt came up and she was wearing no under garments. The accused got tempted and wanted to insert his penis into her vagina without her consent. He forcefully laid on top of her. He took his pants down to knee level. The deceased scratched his face with his fingernails. He stood up and hit the deceased with a small coffee table. He did so twice. Then he got a grog pounder (iron rod). He then hit her twice on the head. The deceased later died of her injuries. The accused fled the crime scene.

15. There is only one penalty for murder, and that is a mandatory life imprisonment (section 237 of the Crimes Decree 2009). However, the court can set a minimum term to be served before the prisoner can apply to His Excellency the President of the Republic of Fiji for a pardon. The accused came to the life of the deceased by pretending to be a pundit. He held himself out as a person who could assist women with menstrual problems by praying for them and offering them herbal medicine. In fact, he was nothing but a fraud. He was not a pundit. He was not a doctor. In performing the prayers, he asked the deceased for her gold jewellery. She gave the same to him to assist in the prayer ceremony. The accused then stole the gold jewellery and sold them for his own use. When confronted by the deceased, he fought her and assaulted her to death, in her own home. The accused is now 29 years old and a first offender. He is single with no children. He was previously remanded for 5 months. He surrendered himself to the police. He is a market vendor earning $150 per week. He is supporting his elderly parents.

16. Taking the above factors into account, on the murder charge (Count No. 2), I sentence you to the mandatory life imprisonment and you are to serve a minimum term of 17 years, before you are eligible for a pardon.

17. On the attempted rape charge (Count No. 1), I sentence you to 4 years imprisonment.

18. The summary of your sentences are as follows:

(i)	Murder (Count No. 2)	:	Mandatory life imprisonment with 17 years imprisonment as the minimum term to be served, before a pardon may be considered by His Excellency the President of the Republic of Fiji.
(ii)	Attempted Rape (Count No. 1)	:	4 years imprisonment.

19. Because of the principle of totality of sentencing, the above sentences are concurrent to each other.

20. Mr. Vinend Kumar, for attempting to rape the deceased and later murdering her on 15 July 2013 at Malele, Tavua in the Western Division, I sentence you to the mandatory life imprisonment, with a minimum term of 17 years imprisonment to be served, before a pardon may be considered by His Excellency the President of the Republic of Fiji.

21. The above sentence is designed to punish you in a manner which is just, to protect the community, to deter would be offenders, to establish the pre-conditions for rehabilitation and to signify that the court and the community denounce what you did on 15 July 2013.

22. You have 30 days to appeal to the Court of Appeal.

Salesi Temo
JUDGE

Solicitor for State : Office of the Director of Public Prosecution, Lautoka
Solicitor for Accused : Legal Aid Commission, Lautoka