

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 158 OF 2014

STATE

-v-

CHANDAR KANT

Counsel : **Ms. J. Fatiaki for the State**
Ms. R. Kumar for the Accused

Dates of Trial : **17th February 2016 – 18th February, 2016**

Date of Summing Up : **01st March, 2016**

(Name of the Complainant is suppressed. She is referred to as AT)

SUMMING UP

Ladies and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me, as the Judge who presided over this trial to sum up the case to you. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.
2. I will direct you on matters of law which you must accept and act upon.

3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So, if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. In other words you are the judges of facts. All matters of fact 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.
5. The counsel for the Prosecution and the Accused made submissions to you about the facts of this case. That is their duty as the Counsel. But it is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions. Your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions. But I will give them the greatest weight when I come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the Accused person is innocent until he is proved guilty. The burden of proving his guilt rests on the Prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the Accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.
9. Your opinions must be solely and exclusively upon the evidence which you have heard in this Court and upon nothing else. You must disregard anything you might have heard or read about this case outside of this Courtroom. Your duty is to apply the law as I explain it to you to the evidence you have heard in the course of this trial.
10. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
11. As Assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of facts

in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.

12. In assessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole. In deciding on the credibility of any witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gives evidence. Was he or she evasive? How did he or she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable.
13. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. They are of course an important part of the case. The agreement of these facts has avoided the calling of number of witnesses and thereby saved a lot of time of this Court.
14. The agreed facts of this case are:
 1. *That the Accused in this matter is Chandar Kant.*
 2. *That the Complainant in this matter is AT.*
 3. *That the Accused had been in a relationship with a woman named Nisha.*
 4. *That the two children belong to Litia who is a friend of the Accused.*
 5. *That the Accused was caution interviewed on the 29th of November, 2014.*
 6. *That on the 1st day of December, 2014 the Accused was formally charged with 2 counts of Indecent Assault contrary to Section 212 (1) and 1 count of Rape contrary to Section 207 (1), (2) and (3) of the Crimes Decree No. 44 of 2009.*
 7. *That DC 3824 Vedh Prakash conducted the Caution Interview of the Accused in the Hindi language on the 29th of November, 2014.*
 8. *That DC 3824 Vedh Prakash also translated the Caution Interview of the Accused taken on the 29th of November, 2014 in the English language.*

9. That D/CPL 1898 Arvind formally charged the Accused in the Hindi language on the 1st day of December, 2014.

15. The Accused is charged with the following counts:

COUNT 1

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

CHANDAR KANT between the 1st of January 2013 and the 31st of April 2013 somewhere between Lautoka and Sigatoka in the Western Division, unlawfully and indecently assaulted **AT** by touching her vagina.

COUNT 2

Statement of Offence

INDECENT ASSAULT: Contrary to Section 212 (1) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

CHANDAR KANT between the 1st of January 2013 and the 31st of April 2013 somewhere between Lautoka and Sigatoka in the Western Division, unlawfully and indecently assaulted **AT** by making her sit on top of his lap whereby she felt his erected penis on her backside.

COUNT 3

Statement of Offence

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

Particulars of Offence

CHANDAR KANT between the 1st of January 2013 and the 31st of April 2013 at Sigatoka, in the Western Division, penetrated the vagina of **AT**, a 9 year 5 months old girl, by inserting his finger into her vagina.

16. I will now deal with the elements of the offence of Rape first. A person rapes another person if:
 - (a) The person has carnal knowledge with or of the other person without other person's consent; or
 - (b) The person penetrates the vulva, vagina or anus of other person to any extent with a thing or a part of the person's body that is not a penis without other person's consent; or
 - (c) The person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.
17. Consent as defined by Section 206 of the Crimes Decree, means the consent freely and voluntarily given by a woman with a necessary mental capacity to give such consent. A person under age of 13 years is considered by law as a person without necessary mental capacity to give consent. The complainant in this case was 9 years of age during the period of the alleged offence and therefore, she did not have the capacity under the law to consent. So, the Prosecution does not have to prove the absence of consent on the part of the girl because law says that she, in any event, cannot consent. The elements of the offence of Rape in this case are that:
 - a. the Accused,
 - b. penetrated vagina of the Complainant, to some extent with his finger.
18. Other parts of the offence are irrelevant to the facts of this case.
19. This position with regard to consent is applicable to all the charges including charge of Indecent Assault which I will be explaining to you in a moment. So, the elements of the offence of Rape as charged in count 3 of the amended Information is that the accused penetrated the vagina of the complainant, AT, to some extent with his finger during the period described in the Information. Insertion of finger fully into her vagina is not necessary. Slightest penetration is sufficient.
20. I will now deal with the elements of the offence of Indecent Assault. The offence of Indecent Assault is defined under Section 212 of the Crimes Decree:

A person commits Indecent Assault if:

- (a). Unlawfully and indecently,
- (b). Assaults another person without her consent.

21. For the assault to be indecent it must be accompanied by a circumstance of indecency. Conduct is indecent when it is as such that ordinary people would so describe it, in light of prevailing standards of morality and, more specifically, in light of whether the victim has consented to the conduct in question. In this case complainant is under the age of 13 years. Therefore, her consent is irrelevant.
22. Apart from the elements of the offence, the identity of the person who is alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the accused-person that connects him to the offence that he is alleged to have committed.
23. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a complainant who saw, heard and felt the offence being committed. In this case, for example, the complainant was a witness who offered direct evidence, if you believe her as to what they saw, heard and felt.
24. Documentary evidence is also important in a case. Documentary evidence is the evidence presented in the form of a document. In this case, medical report is an example if you believe that such a record was made. Then you can act on such evidence. You can take into account the contents of the document if you believe that contemporaneous recordings were made at the relevant time on the document upon examination of the complainant.
25. Expert evidence is also important to be borne in mind. Usually, witnesses are not allowed to express opinions. They are allowed to give evidence on what they have seen, heard or felt by physical senses only. The only exception to this rule is the opinions of experts. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their opinions expressed on a particular fact to aid court to decide the issues/s before Court on the basis of their learning, skill and experience. Doctor in this case gave evidence as an expert witness. That evidence is not accepted blindly. You

will have to decide the issue of rape before you by yourself and you can make use of doctor's opinion if her reasons are convincing and acceptable to you; and, if such opinion is reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence in the case.

26. In evaluating evidence, you should see whether the story related in evidence is probable or improbable; whether witness is consistent in his or her own evidence and with his or her previous statements or with other witnesses who gave evidence. It does not matter whether that evidence was called for the Prosecution or for the Defence. You must apply the same standards in applying them.
27. Another relevant aspect in assessing truthfulness of a witness is his or her manner of giving evidence in Court. You have seen how the witnesses' demeanor in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers or were they evasive? How did they conduct themselves in Court? In general what was their demeanor in Court? But, please bear in mind that many witnesses are not used to giving evidence and may find Court environment distracting. You observed demeanor of AT, other prosecution witnesses and the Accused when they gave evidence. Although, demeanor is not 100% accurate test to assess credibility of a witness, the behavior of them in the witness box will give you an idea in assessing their evidence for its truthfulness and reliability.
28. You must bear in mind that the evidence comes from human beings. They cannot have photographic or video graphic memory. The witness can be subjected to the same inherent weaknesses that you and I suffer insofar as our memory is concerned.
29. You can consider whether there is delay in making a prompt complaint to someone or to an authority or to police on the first available opportunity about the incident that was alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation to such delay.
30. Bear in mind, a late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily

demonstrates a true complaint. There can be a reasonable explanation for the delay. It is a matter for you to determine whether, in this case, the lateness of the complaint and what weight you attach to it. It is also for you to decide, when Complainant did eventually complain, whether it was genuine.

31. Victims of sexual offences, can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. Victim's reluctance to report the incident could also be due to shame, coupled with the cultural taboos existing in her society, in relation to an open and frank discussion of matters relating to sex, with elders. It takes a while for self- confidence to reassert itself. There is, in other words, no classic or typical response by victims of Rape.
32. Please remember, there is no rule in Fiji for you to look for corroboration of Complainant's story to bring home an opinion of guilt in a case of sexual nature. The case can stand or fall on the testimony of complainant, depending on how you are going to look at her evidence.
33. You saw Complainant giving evidence hiding behind a screen so she can't see the Accused. The screen was put up because the complainant is an underage vulnerable witness. You must not draw any negative inference from that against the accused.
34. I will now remind you of the Prosecution and Defence cases. In doing this it would not be practical for me to go through the evidence of every witness in detail and repeat every submission made by counsel. It was a short trial and I am sure things are still fresh in your minds although Cyclone Winston prevented us from meeting you for some time. I will refresh your memory and summarize the salient features. If I do not mention a particular witness, or a particular piece of evidence or a particular submission of counsel 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.

Case for the Prosecution

Evidence of DC Prakash

35. First witness for the Prosecution was Interviewing Officer DC Vedh Prakash. He conducted the interview of the accused on 29th November, 2014 under caution. Accused's rights were explained. Accused answered the entire questioner on his free will. Interview was conducted in Hindi and the same was later translated into English.
36. DC Prakash read out the contents of the interview, a copy of which was made available to you for your perusal.
37. Under cross examination, DC Prakash admitted that accused denied all the allegations leveled against him.

Evidence of Litia Gaveu

38. Next witness was Complainant's mother Litia. She has five children and the complainant, AT, is one of them. Complainant was born on 7th September, 2003. AT's birth certificate was tendered in evidence. Litia had problems at her home. Because of that Complainant had to stay in several places before, she, along with her younger brother Suli, was handed over to the Accused's custody in March 2013. Complainant and her brother lived in Lomolomo with the accused and his wife, Nisha, for about five months.
39. During that period, Litia got a phone call from the Accused and was told that the Complainant wanted to stay in Nine Miles with her aunt Rota. Complainant also talked to her and wanted to be with her aunt. Complainant did not make any complaint when she talked to her.

Evidence of the Complainant

40. Complainant is currently staying at her mother's cousin's place in Sigatoka. She was schooling at Class 6. Before she came to Sigatoka she was with the bus driver named Chandar Kant and his family for some time. Then she was staying at aunt Rota's place at Nine miles in Suva.
41. When she was in Chandar Kant's house, she had a problem. One day she went to Sigatoka in the bus driven by Kant. Kant's wife did not want her to be taken and a confrontation ensued between him and his wife. Nevertheless, he took her with him. After the passengers alighted from

the bus, driver started touching her head. He kept on touching and was going down and down and finally started to touch her private part. He really wanted to poke her but she smacked his hand. She was wearing a pink long pants and tights.

42. When she was asked to explain how he touched her private part she demonstrated to you how he touched and said “he just started touching me and he was trying to poke my private part, he was doing like this and he take out his hand he wants to poke me and I slapped his hand”. Then she ran away.
43. Then she described another incident happened earlier on the same day. Chandar Kant took her to the bus and made her sit on a seat and started driving somewhere. After that he asked her to sit on his lap so she can drive while he is paddling. While she was on the steering wheel he unzipped his pants so she could feel his penis.
44. One LTA man who was checking vehicles on road heard her asking for help. LTA man came inside the bus and inquired ‘what happened?’ Chandar Kant slapped her saying she is naughty. After that Chandar Kant took the bus to Sigatoka. When they were on their way home he told her not to tell anyone. She said ‘*if you tell anyone then I will murder you*’. She really wanted to tell Chandar’s wife but she was so scared. She felt really bad when Chandar did these things to her.
45. Finally, she described how she went to Suva with Chandar Kant to see her aunt Rota. She went with Chandar because she thought he will go to Nine miles where her aunty lives. When the bus reached near aunt Rota’s place he did not allow her to go there and turned the bus around. She managed to run away and went to aunty Rota’s place. She told her aunt that she does not want to go with Chandar. Aunty Rota told Chandar that AT won’t go back with him. Then, a police officer appeared. Complainant told police officer that she did not want to go back with him. Police officer asked her to tell everything Chandar did to her. She just told the officer that he used to give her and her brother beer.
46. She told aunty Rota that Chandar always used to touch her body. One day she was having stomachache and her private part was painig. Aunty Rota took her to a police officer and lodged a complaint. She complained to police about all bad things Chandar used to do to her.

47. Under cross examination, it was put to her that she never told police anything about LTA officer getting into the bus. In reply she said that she told police about LTA officer. She also denied having failed to mention about Chandar's warning that he will murder her if she were to tell anyone.

Doctor Miriama Tukana's Evidence

48. Last witness, ladies and gentleman was the doctor Miriama Tukana. She is a MMBS qualified doctor with pediatric post graduate qualifications. He was attached to the Pediatric Department of the CWM hospital with seven years' experience. She conducted the medical examination on the Complainant on 18th December 2013.
49. Explaining specific medical findings, doctor said that complainant's virginal muscles looked abnormally soft and her hymen, from 3 o'clock position to 9 o'clock position, was not visible. Doctor also found her posterior vaginal wall abnormally soft, not in keeping with normal vaginal condition of a child. Doctor said that her medical findings were consistent with vaginal penetration and possible repeated penetration with a blunt object.
50. Under cross examination, doctor conceded that she empirically treated the complainant for urinary tract infection. She, however, denied such a condition is likely to have been caused by penile penetration.

With Doctor's evidence, the Prosecution closed its case.

51. After the Prosecution closed its case, you heard me explain the Accused's rights in defence; his right to remain silent, right to give evidence and call witnesses on his behalf. His rights were explained not because the Accused had to prove anything. I had to do so since I am required, in law, to do so.

Case for the Defence

52. Accused elected to give evidence. That is his right. His election to give evidence does not mean that he had to prove his innocence or prove anything at all. He could have remained silent. As I said before, you must evaluate his evidence the same way you evaluate the evidence of the prosecution.

53. Accused denied all the allegations against him and blamed Complainant's aunt Rota for trapping him.
54. He raised or looked after the complainant and her brother for about two months in his Lomolomo house. He could not recall the name of the complainant but recollected only her brother's name. He admitted taking the complainant to Sigatoka and Suva in his bus. She did not want to return back when he took her to Suva.
55. He was a bus driver for Classic buses. His bus is a modified one. Driver's seat is fixed and can't be adjusted. There is no room between the steering wheel and the seat when the driver is seated.
56. Complainant was never alone while he was driving her to Sigatoka. She was sitting with two ladies and later went back of the bus to sit with a girl friend.
57. Under cross examination, he admitted accompanying the complainant not only to Suva but also to Sigatoka when he transported people to attend a church conference in 2013. He denied that he failed to mention, at the interview, that he took her to Sigatoka. He admitted that the Complainant is a smart and bright girl. He loved her and her brother. She also loved him.
58. He admitted that AT was alone in the bus with him when he went early in the morning to pick the people who attended church conference in Sigatoka. However, he said that he took one Fijian boy on the way at Koroi and stopped the bus for him to alight at Lomolomo.

That was the case for the defence.

Analysis

59. The Prosecution based its case mainly on the evidence of the Complainant. If you are satisfied that the evidence she gave in Court is reliable and trustworthy you can safely act upon her evidence in coming to your conclusion. You must remember that evidence of the Complainant alone is sufficient to bring about a conviction in a rape case, if the Court believes her evidence to be truthful.
60. A most important part of your task is to judge whether the child witness has told the truth, and has given a reliable account of the events she was describing. Some of you will have children and grandchildren who are of

a similar age to the Complainant who has given evidence. If so, I think you will recognize the sense of the advice I am going to offer you about your judgment of their evidence, but remember that I am speaking of an approach to the evidence and evaluation of the evidence is your responsibility. You do not have to accept my advice and if you do not agree with it you should reject it.

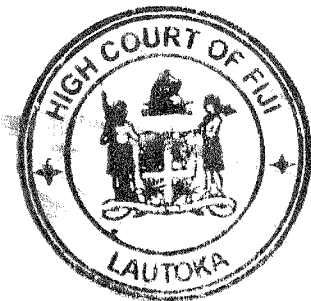
61. Children do not have the same life experience as adults. They do not have the same standards of logic and consistency, and their understanding may be severely limited for a number of reasons, such as their age and immaturity. Life viewed through the eyes and mind of a child may seem very different from life viewed by an adult. You have to be mindful about that.
62. Children may not fully understand what it is that they are describing, and they may not have the words to describe it. They may, however, have come to realize that what they are describing is, by adult standards, bad or, in their perception, naughty. They may be embarrassed about it, and about using words they think are naughty, and therefore find it difficult to speak. Bear in mind that they are being asked questions by an adult they see as being in a position of authority– the policeman in the interview, or a Counsel in Court. That can make it difficult for them.
63. I told you earlier that there must be positive evidence on identification of the Accused-person that connects him to the offence that he is alleged to have committed. There is no dispute in this case with regard to the identity of the Accused. In assessing the identification evidence in this case you only have to consider whether the victim had known the Accused before the incident.
64. You consider whether the Complainant had any reason or motive to fabricate a story against the Accused to put him in trouble. If there is no such motive or reason, then the credibility of her evidence should go up. The Complainant was only twelve years old at the time she gave evidence. Under cross examination she said that she told aunty Rota about all the bad things done to her because she wanted to stay with her in Suva. In re-examination she said that she did not want to stay with Chandar Kant because she feared he will do more bad things to her. It is up to you to form your own opinion as to whether Complainant had any reason to fabricate a story against the Accused.

65. You also consider whether Aunty Rota had any motive to falsely implicate the accused. Accused had met her in Suva for the first time.
66. According to Litia's evidence, Complainant did not report any of the incidents to her mother when she spoke to her over the phone from Suva. She was speaking to her mother in the presence of the accused. However, Complainant said in her evidence that she did not get a chance to talk to her mother when she was in Suva. Complainant did not complain to the LTA officer who came in the bus. Accused was present at that time also and he even slapped her. She did not complain about any incident of sexual nature when she met the policeman in Nine miles. That time too, the Accused was present. Complainant said she was warned not to tell anyone. Accused had some authority over the Complainant until she went to her aunty Rota in Suva. According to the Information, the alleged incidents occurred between 1st January 2013 and 31st April 2013. The medical examination was conducted on 18th December 2013. The interview was conducted by police on 29th November 2014. You take into consideration all the evidence, particular dates I mentioned and also my directions in respect of recent complaint evidence and on how to approach evidence of child victims in determining whether she had any reason not to make a prompt complaint to her aunty or police.
67. You watched the Accused giving evidence in court. You can expect any person accused of a crime to give an innocent self-serving version generally to escape criminal liability. However, you must evaluate the evidence of the accused in light of the evidence led in this particular trial.
68. You have the cautioned interview of the accused. You consider whether his previous statement is consistent with his evidence in court. If you find his two versions contradictory to each other or if he had omitted to mention an important thing to police, you decide whether those contradictions or omissions are material so as to affect the credibility of accused's evidence and what weight you should attach to his evidence.
69. You also consider whether his evidence is consistent with the stance taken by his Counsel in the course of cross examination of prosecution witnesses.
70. How probable is the accused's version? Is the version of the Defence appealing to you? What was his demeanor like? How did he react to being cross examined and re-examined? Was he evasive? How he

conducted himself generally in Court? It is up to you to decide whether you could accept the version of the Defence and that version is sufficient to establish a reasonable doubt in the prosecution case.

71. If you are satisfied that the Complainant had told the truth and her evidence is believable, then you have to consider whether the Prosecution has discharged its burden and proved each element of each charge beyond reasonable doubt. If you find accused guilty of one charge that does not mean he must be guilty of other charges as well unless you are satisfied that each element of the charge is proved beyond reasonable doubt. You have to consider each charge separately.
72. It is not necessary to prove full penetration in order to prove the charge of rape. Even a slight penetration is sufficient to prove the element of offence. Complainant said that accused started touching her private part and tried to poke her private part. When the State Counsel asked her how he touched her private part, you will remember, she demonstrated to us the way he touched. She had developed a pain in vaginal area somewhere in November 2013. She was treated for urine track infection. Information says incidents occurred between 1st January and 31st April 2013. It is up to you to draw inferences having considered all the evidence including that of the doctor in coming to your conclusion. You must be satisfied that the Accused penetrated her vagina with his finger.
73. Acts of touching vagina of a girl with hand and touching naked penis on the back side of a girl constitute indecent assaults. If you find the prosecution's evidence truthful and believable you can find the accused guilty of two charges of Indecent Assault.
74. If you accept the version of the defence that means you have a reasonable doubt in the prosecution case. In that event, you must not find the Accused guilty as charged. Remember, even if you do not believe a single word he uttered and completely reject the version of the Defence, still the prosecution should prove its case beyond reasonable doubt.
75. Remember, the burden to prove the Accused's guilt beyond reasonable doubt lies with the Prosecution throughout the trial, and never shifts to the Accused, at any stage of the trial. The Accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty.

76. If you accept the Prosecution's version of events, and you are satisfied that the Prosecution has proved the case beyond reasonable doubt, so that you are sure of Accused's guilt of each charge you must find him guilty. If you do not accept the Prosecution's version of events, and you are not satisfied beyond reasonable doubt, so that you are not sure of the Accused's guilt, you must find him not guilty as charged.
77. You may now retire to deliberate on the case, and once you have formed your opinions, you may inform our clerks, so that we could reconvene, to receive the same.
78. Your possible opinions are as follows:
1. First Count of Indecent Assault Accused guilty or not guilty?
 2. Second Count of Indecent Assault Accused guilty or not guilty?
 3. Third Count of Rape Accused guilty or not guilty?
79. Any re-directions?




Aruna Aluthge
JUDGE

AT LAUTOKA
1st March, 2016

Solicitors: Office of the Director of Public Prosecution for the State
Office of the Legal Aid Commission for the Accused