

IN THE HIGH COURT OF FIJI  
AT SUVA  
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 050/2012

**BETWEEN:** THE STATE

**AND:**

APOROSA TUICOLO

**COUNSEL:** Ms A Vavadakua for the State  
Mr J Savou for the Accused

**Dates of Trial:** 25-28/03/2013

**Date of Summing Up:** 02/04/2013

Name of the victim is suppressed. She will be referred to as AL

## SUMMING UP

Lady 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 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 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.
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) AL, Domestic Duties of Nataveya Village, Naitasiri is the complainant in this case.
  - (ii) Aporosa Tuicolo, 20 years old at the time of alleged offence, Farmer of Nataveya Village, Naitasiri is the accused in this case.
  - (iii) The alleged offence occurred on 26<sup>th</sup> July 2011 at Nataveya Village, Naitasiri.
  - (iv) The accused was caution interviewed on 23<sup>rd</sup> August 2011 at Vunidawa Crime Office.
  - (iv) The accused was caution interviewed by DC 3456 Josua in the presence of DC 3768 Marika.
  - (v) The accused was charged on 26/01/2012 at the Vunidawa Police Station.
  - (vi) The accused was charged by DC 4230 Lasarusa.
  - (vii) The admissibility of following documents is not in dispute:

- The Medical Report of AL dated 22<sup>nd</sup> August 2012.
  - The written and typed Caution Interview Statement of Aporosa Tuicolo dated 23<sup>rd</sup> August 2011.
  - The written and typed Charge Statement of Aporosa Tuicolo dated 26<sup>th</sup> January 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 (amended).

## FIRST COUNT

### Statement of Offence

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

**APOROSA TUICOLO** on the 26<sup>th</sup> day of July 2011, at Nataveya Village, Naitasiri, in the Central Division, had carnal knowledge of AL, without her consent.

14. In order to prove the offence of Rape the prosecution has to prove following elements beyond reasonable doubt.
1. The accused had carnal knowledge of the complainant,
  2. without her consent,
  3. He knew or believed that that she was not consenting or didn't care if she was not consenting.

15. 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.
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 the victim does not have her birth certificate. If a victim is over 13 years of age at the time of the offence, she has the capacity under the law to consent. Under those circumstances the offence of rape is made out only if there was no consent from the alleged victim.
17. Now let's look at the evidence led by the prosecution in this case.
  1. The first witness was the victim, AL. According to her she is residing at Nataveya Village, Naitasiri with her grandmother since her birth. She has not gone to school nor can read or write. She does not know her age. Her mother is living and she does not know her father. On the day of the incident before the lunch while she was cooking dalo with Litiana in the kitchen accused who is her neighbour called her from his sister's house and requested to bring his bed sheet which was on the clothes line. As per request she took the bed sheet and put inside the accused's house. At that time accused closed the main door and dragged her inside the room. Thereafter he forcibly removed her sulu and closed her mouth. While she was lying on her stomach accused removed her panty and inserted his penis in to her anus. At that time another girl namely Loraini called the victim from outside the house. Accused told the victim to tell Loraini that she went to Buloula's house. She identified the accused in the open court. The matter was reported to police after two weeks of the incident. She was subjected to a Medical Examination. She had pain immediately after the incident and directly went her house and had a wash. At that time her grandmother was not at home as she had gone for a funeral on the previous day.

In the cross examination victim said that she is still live with her grandmother Saini. She admits that the accused is her neighbour. According to her the matter was reported to police by Taitai Veni. After the complaint a woman police constable Maritina had recorded her statement. She identified her statement and her thump impression. Line 25 of the statement was read out to the witness and was translated into Fijian language. She admitted that she gave her statement when the incident was fresh in her mind. Witness said that she picked both clothes and blanket from the cloth line. Next lines 19-23 of her statement was read out to her and translated into Fijian language. Witness said that she gave correct evidence in the court. Next line 24 of her statement was read out in the court. Witness said that When Loraini called her she was inside the accused's house. Witness further said that she told police that she went to a tap for washing and accused told her to tell that she was at Buloula's. Her second name was wrongly entered by the police. When she gave evidence she correctly told her second name in the court. Witness further said that she informed the incident to Litiana immediately after she returned from accused's house and Litiana told this to Taitai Veni. She further said that she did not inform the incident either to her sister or her grandmother. Even she had not informed the incident to any of her relations who reside close to her house. Witness said that the incident was happened to her and what she told Litiana is not a false story.

In the re-examination victim said that she took both clothes and the bed sheet from the cloth line. She was scared to tell her sister and her grandmother about the incident. Finally she said what she told in the court is a true story.

2. Litiana Naituku gave evidence next. According to her she lives in Nataveya Village. On 26/07/2011 she was at home with her sister and her nephew. While at home she received information that the victim was in accused's house. When she went to accused's house had seen victim coming out from accused's house. Thereafter she had gone to AL's house and confronted her. AL told her that she

returned after gathering coconut. When she told her that she saw victim coming out from accused's house victim told her that accused told her to say that she went to gather coconut. Thereafter victim told her what happened in the accused's house. When witness went to accused' house all the windows and doors except one were closed. She took the victim to her house and had lunch together. At that time she noticed that the victim was in pain.

In the cross examination witness admitted that she gave a statement to the police. Lines 14-17 were read out to the witness. According to her she had reported the incident to Peni Waqa but not to victim's grandmother. Defence suggested at the time of incident accused was in Talica Bativesi's house.

In the re examination witness said that due to fear she did not divulge this incident anybody else other than Peni Waqa.

3. Talica Bativesi called next. According to her on 26/07/2011 accused had come to her place for lunch. After having lunch he had gone to his house.

Witness was not subjected for cross examination.

4. Peni Waqa a farmer by profession gave evidence next. According to him there was a rumour in the village about this incident. He first inquired from the victim and informed this to her grandmother. Thereafter he reported the matter to police as village headman not taken any endeavour to report this matter to police.

In the cross examination witness said that he was waiting for village headman's action. As no action taken by village headman he reported the matter to the police.

He was not cross re-examined.

5. Loraini Vulagirua gave evidence next. According to her she was at Litiana's house on 26/07/2011. At that time only Titilia was with her. After that she had gone to accused's house to check the victim. When she called victim's name only accused answered. At that time she had

seen clothes on the line. In the evening while playing in the ground accused told her to take his clothes from the clothe line. As clothes were wet she left it on the cloth line.

In the cross examination witness said that she did not take clothes from the line as those were still wet.

6. DC/3456 Josua gave evidence next. He is the Interviewing and Crime Officer in this case. He has recorded the accused's Caution Interview Statement on 23/08/2011. The Caution Interview Statement of the accused was maked as P1.

In the cross examination witness said that he followed proper procedure and gave all the rights to the accused when he recorded the Caution Interview Statement of the accused. Witness further said that accused did not admit the charge.

State counsel marking P1 closed the case for the prosecution. Copies of all the exhibits are given to you.

18. When the defence was called and explained rights of the accused he elected to remain silence.

#### **Analysis of the Evidence**

19. Lady and Gentleman of assessors, in this case the victim gave evidence first. According to her accused had anal sex against her will. She clearly narrated the ordeal she encountered on 26/07/2011. Victim had never gone to school. She can't write or read. She immediately informed the incident to Litiana on the same day. According to the victim the incident happened before the lunch. The accused had called her when she was cooking dalo with Litiana. She did not inform the incident to her relations. In the cross examination victim said what said in this court is a true story. As assessors and judges of facts you have to consider her evidence with great caution.
20. Lady and Gentleman of assessors, you heard the evidence of Litiana. She had seen victim coming from accused house on the date of incident before lunch. The victim had told her what happened to her. She had informed the



same to Peni Waqa who reported the matter to police after two weeks. According to the Peni Waqa first he inquired from the victim and told her grandmother. As village headman did not take any interest reporting this matter to police he lodged the first complaint in the police.

21. Defence took up the position that accused was at Talica Bativesi's house at the time of the alleged incident. According to Talica Bativesi accused had come for lunch on day of incident and went home. But according to the victim incident had taken place before lunch. On that day victim had her lunch at Litiana's house after the incident. When Loraini called the victim from accused's house only accused answered. As Assessors and Judges of facts you have to consider this evidence very carefully.
22. Lady and gentleman of assessors, as I told you earlier, the caution interview statement of the accused person is in evidence. DC/3456 Josua had recorded the Caution Interview Statement of the accused. But he had denied the charge.
23. Lady and gentleman of assessors, in this case accused opted to remain silence. That is his right. He has nothing to prove to you.
24. In this case the accused is charged for rape contrary to section 207(1) and 207(2) (a) of the Crimes Decree No: 44 of 2009. I have already explained to you about the charges and its ingredients.
25. Lady and gentleman of assessors, in this case victim does not have a birth certificate. You have observed the victim giving evidence before this court. If there is no consent you can find the accused guilty of rape. If you find there was consent and that he is thereof not guilty of rape.
26. Lady and gentleman of assessors the defence took up the position that the prosecutrix's evidence not corroborated as the State failed to submit the Medical Report of the victim. As per section 129 of the Criminal Procedure Decree 2009 no corroboration shall be required in sexual offence cases. Further defence agreed the admissibility of the Medical Report of AL without any dispute.
27. 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. Use the tests mentioned above to assess the evidence of witnesses.

28. 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.
29. Lady 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.
30. 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.
31. 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.
32. Any re-directions

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

P Kumararatnam  
**JUDGE**

At Suva  
02/04/2013



