

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**  
**CRIMINAL CASE NO. HAC 346 OF 2011S**

**STATE**

**VS**

**FRANK KONARE**

**Counsels** : **Mr. J. Niudamu and Ms. R. Uce for the State**  
**Mr. S. Waqainabete for Accused**  
**Hearings** : **5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> August, 2013**  
**Summing Up** : **8<sup>th</sup> August, 2013**

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**SUMMING UP**

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**A. ROLE OF JUDGE AND ASSESSORS**

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.
2. State and Defence Counsels have made submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

**B. THE BURDEN AND STANDARD OF PROOF**

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.
5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that 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.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victim. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

**C. THE INFORMATION**

7. You have a copy of the information with you, and I will now read the same to you:

*"... [read from the information]...."*

**D. THE MAIN ISSUES**

8. In this case, as assessors and judges of fact, each of you will have to answer the following questions:

- (i) On count no. 1, did the accused, on 16<sup>th</sup> October 2011, at Jittu Estate, Samabula, rape the complainant?
- (ii) On count no. 2, did the accused, on 16<sup>th</sup> October 2011, at Jittu Estate, Samabula, burgle the complainant?
- (iii) On count no. 3, did the accused, on 16<sup>th</sup> October 2011, at Jittu Estate, Samabula, steal the second complainant's mobile phone?

**E. THE OFFENCES AND THEIR ELEMENTS**

9. Count no. 1, in the repealed Penal Code, Chapter 17, was often known as “unnatural offence” (Section 175(a) and (c) of the Penal Code). It is sodomy or buggery. In the Crimes Decree 2009, “unnatural offence, sodomy or buggery”, is now classified as “rape” (Section 207(1) and (2)(a) of Crimes Decree 2009). For the accused to be found guilty of “rape”, the prosecution must prove beyond reasonable doubt the following elements:
- (i) the accused had anal sexual intercourse with the complainant, that is, his penis penetrated the complainant's anus;
  - (ii) without the complainant's consent; and
  - (iii) the accused knew the complainant was not consenting to anal sex, at the time.
10. The slightest penetration of the complainant's anus by the accused's penis, is sufficient to satisfy element 9(i) above. Whether or not the accused ejaculated, is totally irrelevant to element 9(i) above.
11. “Consent” is to “agree freely and voluntarily and out of her own free will”. If consent was obtained by force, threat, intimidation or fear of bodily harm to herself, that “consent” is deemed to be no consent. The consent must be freely and voluntarily given by the complainant. If the consent was induced by fear, it is no consent at all.
12. It must also be established by the prosecution beyond reasonable doubt, that the accused knew the complainant was not consenting to anal sex, at the time. You will have to look at the parties' conduct, at the time, and the surrounding circumstances, to decide this issue.

13. Count No. 2 involved the offence of “burglary”. For the accused to be found guilty of “burglary”, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused
  - (ii) enters or remains
  - (iii) in a building
  - (iv) as a trespasser
  - (v) with intent to commit theft
  - (vi) of a particular item or property
  - (vii) in the building.
14. Elements no. 13(i), 13(ii) and 13(iii) are straightforward. They mean the accused enters or remains in a building. Whether or not he came through the main door or window is irrelevant. He has entered or remained in the building.
15. The phrase “as a trespasser” means that the accused entered or remained in a building, without the owner’s permission. In other words, if you enter or remain in a building, without the owner’s permission, you are doing so “as a trespasser”. You had no right to enter or remain in the building.
16. Elements 13(v), 13(vi) and 13(vii) above basically meant that, when the accused entered the complainant’s house at the material time, he intended to steal an item from the building. The accused’s spoken words, actions and the surrounding circumstances, will basically tell you, whether or not the accused is guilty of the offence of “burglary”.
17. Count no. 3 is “theft”. Theft is another word for “stealing”. Theft or stealing is done when someone dishonestly takes away property that belongs to another, with the intention of permanently depriving the owner ownership of that property. For example, I picked \$100 cash from your purse, and used the same on beer and entertainment. I had no right to your \$100, but I took it away dishonestly and without your permission, I used it on myself. That is, theft or stealing.
18. There are 3 counts in the information. You are to approach them separately, having regard to the whole evidence.

**F. THE PROSECUTION'S CASE**

19. The prosecution's case were as follows. On 16<sup>th</sup> October 2011, the female complainant was 40 years old, with three children aged 21 years, 14 years and 11 years. She had separated from her husband in 1993, and at the time, her eldest child was in Australia. She lived in a 2 bedroom house in Raiwaqa with her children and a sickly brother. She worked nearby to support her family. She attends a church group namely, "Prayer and Praise Ministry". At this church was the accused, aged 21 years, at the time. He was a pastor, at the church. The two came to know each other through this church.
  
20. On 16<sup>th</sup> October 2011 (Sunday), between 4 am and 5 am, the accused returned from a nightclub drunk. He came to the complainant's home at Raiwaqa. He knocked on the door, and no-one answer. He then climbed through the kitchen window. According to the prosecution, the complainant, her children and her sickly brother were all asleep. He then forced open the complainant's bedroom door. The complainant awoke because of the noise, but went back to sleep, facing down.
  
21. The complainant had no undergarment on, but her nightie. According to the prosecution, the accused took off his clothes, and lay on top of her. He then allegedly held her down, and thrust his penis into her anus. He then had anal sex with her. The complainant tried to resist and shout, but the accused forced her head and mouth on the pillow to silence her, including physically subduing her. According to the prosecution, the accused later turned her around, facing up. She tried to resist, but was met with a punch to the jaw and her thighs. He bit her on the chest. She became weak. The accused then lifted her legs, and thrust his penis into her anus. He later ejaculated, after 3 minutes of anal sex.
  
22. According to the prosecution, the complainant did not consent to the above, and the accused well knew she was not consenting to anal sex, at the time. Afterwards, the accused stole a mobile phone from her house. He wiped himself with a towel and left. The complainant later met a friend, Losana Tuirewa (PW2). She told her what the accused did to her. The matter was reported to the police. An investigation was carried out. The accused was cautioned interviewed by police on 21<sup>st</sup> October 2011, and was subsequently charged on the present offences. Given the above, the

prosecution is asking you, as assessors and judges of facts, to find the accused guilty as charged. That was the case for the prosecution.

**G. THE ACCUSED'S CASE**

23. On 5<sup>th</sup> August 2013, the first day of the trial, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to all the counts. In other words, he denied the allegations against him. He denied raping the complainant (count no. 1); denied burgling her house (count no. 2) and denied stealing a phone from her house (count no. 3). When a prima facie was found against him, at the end of the prosecution's case, he choose to give sworn evidence, in his defence, and called no witness. That was his right.
24. On the anal sex allegation in count no. 1, he denied the same, on oath. However, he admitted he was at the crime scene, at the material time. He admitted, he was with the female complainant, at the material time. He admitted, he had normal consensual vaginal sexual intercourse with the complainant, at the material time. He said, he and the complainant, had been going out since April 2011, and had two previous sexual encounters. He said, the complainant invited him to her house, and that's why he came, at the material time. He admitted he came in through the window, and admitted taking a mobile phone from her home.
25. He did not dispute his police caution interview statements, dated 21<sup>st</sup> October 2011, which were tendered as Prosecution Exhibit No. 2(A), 2(B) and 2(C). Given the above, the defence is asking you, as assessors and judges of fact, to find him not guilty as charged. That was the case for the accused.

**H. ANALYSIS OF THE EVIDENCE**

**(i) The Agreed Facts:**

26. You have a copy of the "Agree Facts" with you. Please, read it carefully and understand the same. These facts are not disputed by the parties. There are 6 paragraphs altogether, although marked as paragraphs 1, 3, 4, 5, 6 and 7. Because the parties are not disputing the same, as a matter of law, you may take it that the prosecution had proven those facts beyond a reasonable doubt. You may treat the same as established facts.

**(ii) The Complainant's Evidence vs The Accused's Evidence:**

27. You have heard the sworn evidence of the complainant (PW1), as against the sworn evidence of the accused (DW1), on counts no. 1, 2 and 3. It is not my purpose to bore you with the details, but I will summarize to you the parties' competing version of events, as far as the allegations were concerned.
  
28. On count no.1 (ie. the anal sex allegation), the complainant said, she was asleep at her house in Raiwaqa at 4 am on 16<sup>th</sup> October 2011, with her two children and sickly brother. It was a two bedroom house, and she slept alone in a bedroom, while the others shared the other bedroom. She was sleeping facing down, with her hands under her pillow. She wore her nightie with no undergarments. Suddenly, she felt the accused on top of her. He pulled up her nightie, and thrust his penis into her anus, and had anal sex with her. She tried to resist by turning around and shouting, but the accused pressed her head on the pillow to stabilize her and prevent her shouting. Nevertheless, she managed to turn around.
  
29. The accused then punched her on the thighs. She said, she again tried to shout, but the accused blocked her mouth with the pillow. He then bit her chest in an angry manner. She said, she was weak as a result of the struggle, and could not resist any longer. She said, the accused lifted her thighs, forcefully penetrated her anus with his penis, and had anal sex with her for about 2 to 3 minutes. She said, the sex act was painful and she was crying. She said, the accused then ejaculated into her anus. She said, she never consented to the above, and it appeared through her evidence, that the accused well knew she was not consenting to the above, at the time.
  
30. She said, the accused shouted at her afterwards, and asked for a toothbrush and towel. She said, he smelt of liquor. He later banged her kitchen door and left her house. She said, Losana Tuirewa (PW2) later came into her house, to get her husband's mobile phone, which was being re-charged in her house. They found the phone missing. The complainant said, she was in pain, and she told PW2 what the accused did to her that morning. PW2 later reported the matter to police. She said, the accused came through her window, and left her house, through the door. It appeared she gave him no permission to enter her house that night.

31. As far as the accused was concerned, he appeared to admit all the other matters, except the anal sex allegation. In paragraph 1 of the Agreed Facts, the accused admitted that the alleged incident occurred on 16<sup>th</sup> October 2011, between 4 am and 5 am. He agreed in paragraph 3 of the Agreed Facts that he and the complainant had sexual intercourse, at the material time. In his sworn evidence, he denied anal sexual intercourse, but admitted vaginal sexual intercourse. In paragraph 4 of the Agreed Facts, the accused admitted the two knew each other from the same church, that is, "Prayer Praise Ministry". In paragraph 5 of the Agreed Facts, he admitted that he entered the complainant's house, at the material time, by climbing through a window.
32. In his sworn evidence, he said, he returned from the nightclub drunk. He said, the complainant had a relationship with him, and they have been intimate twice before. He said, he had previously been to the complainant's house. He said, the two planned to meet in her house, at the time. He said, he entered the complainant's house through the window, went to her bedroom, and the complainant welcomed him. They kissed, hugged and had normal consensual vaginal sex. He denied having anal sex with the complainant. He said, after having sex, he asked for a towel and had a bath. He said, he asked the complainant for the mobile phone, but she was asleep. He said, he then took the mobile phone (Prosecution Exhibit No. 1) and the charger. He later went home.
33. So, you will see, as assessors and judges of fact, the parties' two competing version of events. The complainant said, she did not give the accused permission to come to her house, at the time. She said, the accused forced himself into her house through the window, unlawfully raped her by having anal sexual intercourse with her without her consent, and he well knew she was not consenting to the same, at the time. According to the prosecution, the accused entered the complainant's house as a trespasser, with intend to commit theft therein. She said, the accused later stole PW3's mobile phone and left her house.
34. The accused's version on the allegations were as follows. He denied anal sex with the complainant. He said, they had normal consensual vaginal sex, at the material time. He admitted entering the complainant's house through the window. He admitted he took the mobile phone.



35. Your decision, on which version of events to accept and/or reject, will depend largely on your assessment on which of the two witnesses is the credible one. In other words, the State's case against the accused stands or falls, on whether or not, you find the complainant or the accused to be a credible witness. You have watched them give evidence in the courtroom. Who was the more credible of the two? Who was the more forthright of the two? Who was the evasive witness of the two? Who was hiding something from you? Who, from your point of view, was telling the truth? Your answers to the above questions, will determine your answers to whether or not the accused is guilty as charged. If you find the complainant to be a credible witness, then you will find the accused guilty as charged. If you find the accused a credible witness, then you will find him not guilty as charged. It is entirely a matter for you.

**(iii) The Complainant's Medical Report (Prosecution Exhibit No. 3):**

36. On 19<sup>th</sup> October 2011, at 5.10 pm, the complainant was medically examined by Doctor Kitione Waqanisau (PW5), at CWM Hospital, and he tendered his medical report as Prosecution Exhibit No. 3. The examination was done 3 days after the alleged incident. In D(10) of the report, the doctor recorded the complainant's history as such, "...**This patient was raped 3 days ago by her pastor Frank. It was a rectum penetration...**" In appendix 1 of the medical report, the doctor drew a diagram of the complainant's private area, showing injuries to her anus. Lacerations were found at the top and below PW1's anus. The doctor also found an abrasion at the back left buttock of PW1. You will have to carefully study and understand PW1's medical report, because in a rape case, whether or not it is a vaginal or anal sex, the issue of penetration is always a medical question. The human body, although silent, always tell their stories through their injuries, despite what witnesses say, through their mouths.
37. In this case, vaginal sexual intercourse is irrelevant to the anal sex allegation in count no. 1, so you can put it out of your mind. We are here to determine whether the allegation, as described in paragraph 9 hereof are satisfied. After examining PW1, the doctor concluded as follows in D(16) of the report, "...**There is evidence that she has had rectum penetration...**" The doctor said, his conclusion in D(16) of the report is consistent with the complainant's complaint as recorded in D(10) of the report. He said, the abrasion noted in PW1's left buttock, as shown in appendix 1, was evidence of force used on her, "to stabilize her", before anal penile penetration. In the doctor's

words, “...Laceration on top of anus is consistent with force separation of the bum, and then the laceration at the bottom of the anus, which is consistent with forceful dilation (ie. stretching of the anus)...”

38. The doctor is a professional man, with no interest whatsoever in the outcome of this case, but only to state the facts, as he saw it, and his opinion thereof. If you accept the doctor's view above mentioned, it will have the effect of strengthening the complainant's evidence and version of events, and thereby increasing her credibility as a witness. In addition, it will decrease the accused's credibility as a witness, because the medical evidence will shatter his denials. If you don't accept the doctor's evidence, then you will have to work on the other evidence, to reach a decision in this case. It is a matter entirely for you.

**(iv) The Accused's Caution Interview Statements [Prosecution Exhibit No. 2(A) – Hand-written “i-taukei” version; 2(B) – Hand-written English version and 2(C) – Typed English version]:**

39. In questions and answers 30 to 41 of Prosecution Exhibit 2(C), the accused denied the allegation in count no. 1, but admitted having normal consensual vaginal sex with the complainant, at the material time. In questions and answers 22 to 27, the accused appeared to admit that he entered the complainant's house, at the material time, without her permission. In questions and answers 42 to 45, the accused admitted stealing the mobile phone [Prosecution Exhibit No. 1]. By admitting that he stole the mobile phone, and entered the complainant's house, at the material time, without her permission, as mentioned above, the accused appeared to be admitting the burglary charge in count no. 2, including the theft charge in count no. 3.
40. The defence didn't challenge the admissibility of the accused's caution interview statements [see paragraph 7 of the Agreed Facts], thus it could be imputed that they agree that the accused gave his caution interview statements voluntarily and out of his own free will, to the police. In other words, through his caution interview statements to the police, on 21<sup>st</sup> October 2011 – 5 days after the alleged incidents – the accused admitted committing burglary against the complainant (count no. 2), and stealing PW3's mobile phone (count no. 3). If you accept the above, it will have the

effect of strengthening the complainant's version of events, and increasing her credibility as a witness. Whether you accept the above or not, is entirely a matter for you.

**I. SUMMARY**

41. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it 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 beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. 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.

42. Your possible opinions are as follows:

- |       |             |   |           |   |         |   |                      |
|-------|-------------|---|-----------|---|---------|---|----------------------|
| (i)   | Count No. 1 | : | Rape      | : | Accused | : | Guilty or Not Guilty |
| (ii)  | Count No. 2 | : | Burglary: | : | Accused | : | Guilty or Not Guilty |
| (iii) | Count No. 3 | : | Theft     | : | Accused | : | Guilty or Not Guilty |

43. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive your decisions.

**Salesi Temo**  
**JUDGE**

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