

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO: HAC 242/2011**

**BETWEEN:** THE STATE

**AND:** ISEI KORODRAU

**COUNSEL:** Ms A Vavadakua for the State

Mr R Vananalagi for the Accused

**Dates of Trial:** 28-31/10/2013

**Date of Summing Up:** 01/11/2013

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

**SUMMING UP**

Madam and Gentlemen 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 is 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 judgment.
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 is talking about.

9. 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. The following facts are agreed between the parties:
  - a. The Complainant is AKB.
  - b. The accused is Isei Korodrau
  - c. The alleged rape occurred on or about 20<sup>th</sup> day of February 2011 at Laqere.
10. 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.
11. 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.
12. Now let's look at the charge.

*Statement of Offence*

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

*Particulars of Offence*

**ISEI KORODRAU** on the 20<sup>th</sup> day of February 2011, at Nasinu, in the Central Division, had unlawful carnal knowledge of AKB without her consent.

13. In order to prove the charge 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.

14. 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.
15. 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 victim was 46 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.
16. 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.
17. Now let's look at the evidence led by the prosecution in this case.
18. Victim in this case is married but was separated from her husband. After her separation she was living with Aisha Bibi whose house is located just close to her husband's house. She is working at Home of Compassion in Tamavua. On 20/02/2011 as usual she left her house to catch the 5.30am bus to go to her work place. She walked on a footpath which leads to the main road. At that time she saw a person walking in a zigzag manner. While she pass walking the person she suddenly felt his left hand was put around her neck. When she turned around she saw his clothes. He was wearing a three quarter jeans and a T-shirt. Though she called for help he closed her mouth and dragged her to a slope. When she raised her voice he punched her face several times. She had enough light to identify the person as the street light was close to the place of the incident. He pulled her down up to a ditch and tried to take off her skirt. At that time she crushed his penis. He then strangled her neck and punched her mouth and eyes. Then he tore her under garment and had sex forcefully. He had inserted his penis into her vagina three times and ejaculated. When he tried to kiss her she bit his lower lip. Due to this he punched right side of her face. Then he demanded to do 69. He then asked her whether she can give his fare. When she went back home the person had disappeared. Before she went home she picked her bag from the crime scene. After informing her land lady, she went to the Police and lodged a complain. She had seen the face of the person when he dragged her down the slope. After reporting the incident to Valelevu Police she was taken to Colonial War Memorial Hospital

(CWMH) for medical examination. A week later police show her some photographs and she identified the accused's photograph. The photograph was marked as P1. An identification parade was held at Valelevu Police Station after few days of photo identification. She pointed out the accused who was standing last at the parade. She pulled down his lower lip and showed the biting injury caused by her at the time of the incident. She identified the accused in open court.

19. In the cross examination victim said that it was not dark at 5.30 am as a lamp post was just in front of Aisha Bibi's house. She lived with Aisha Bibi after she separated from her husband. Her husband's house is about 15 steps from Aisha Bibi's house. From Aisha Bibi's house to the bus stop it is about 20 steps. Victim agreed that she gave her statement to police on 21/02/2011. From the main road to the ditch where the rape occurred is about 2 meters. There are no trees between the ditch and the lamp post. The ditch is grown with grass. After rape the accused asked \$2.00 while he was standing near the lamp post. Witness said what she said to police is correct.
20. According to Aisha Bibi, victim was living with her after she separated from her husband. On the day of the incident victim left for work at 5,30am. After about 20-25 minutes she came back with blood oozing from her face. She told her a boy grabbed her from the road side and pushed her down on the bushes and punched her face several times. As she was crying she told her husband to call police. She did not tell anything about rape at that time but told the incident after some time.
21. In the cross examination witness said that she can see the other houses from her house porch. Victim had showed her the place of incident. The place is called Vunivaivai. No trees around the place. On 20/02/2011 at 5.30am it was not much dark as the street light was on. A person can be recognised with that light. Due to fear victim did not tell her about the rape. She admitted that she did not tell about the rape to police as the victim did not tell her about rape at first.
22. DC/Pita Qiolevu had conducted the photo indemnification at Valelevu Police Station. 30 photographs were shown to the victim and she identified the photograph of the accused. No instructions given to her prior to photo identification. He identified P1 in the court. Further he had observed the street light near victim's house when he went to pick the victim from the village.
23. In the cross examination witness said that he accompanied the victim to Valelevu Police Station from Vunivaivai village. The photo identification was done on the following day of the incident.

24. IP/Manueli had conducted the police identification parade on 27/02/2011 at Valelevu Police Station conference room. Eight Fijian male with similar age and height had been called for the parade. Victim identified the accused twice at the parade. He was standing at number 9 in the parade. She also pointed out the lower lip of the accused. He identified the accused in open court.
25. In the cross examination witness said that he did not see any injury on accused's lips. He further said that victim did not identify any wrong person at the identification parade.
26. Dr. Osea Volavola had examined the accused at CWM Hospital on 26/02/2011. The background information given by the police is that he was allegedly bitten on the lips by a victim of rape at Valelevu sometime last week. In the history given by the accused is that he was apparently punched by his uncle in the village and sustained injury to his lower lip three days ago. The injury was in the healing process. According to the conclusion of the doctor, the injury is typical of blunt force trauma and consistent with the history. He further said that if the accused was examined of the date of injury, the cause of injury may be different.
27. In the cross examination witness said that the injury was caused by biting could be an injury with laceration.
28. Dr. Moape Vavou was the last witness for the prosecution. He is working in the CWM Hospital for last five years. On 20/02/2011 he examined the victim in this case. Consent obtained before examination. According to the history she was assaulted by a Fijian male who attempted to rape her on her way to her work place.
29. There was swelling and black eye on the upper eye lid and laceration on the right eye lid. There was Scratch (finger nail) mark on left cheek and laceration on upper and lower lips. Bruising found on her chest wall and no semen or marks in the vagina. Hymen is not intact. According to his professional opinion that the victim was physically restrained and attempt to have been rape. Swabs taken from vaginal wall for sperm test and no results received.
30. After the examination he had no insufficient evidence to confirm vaginal penetration.
31. In the cross examination witness said no blood found in the vagina. He did not receive the results of the swabs taken from victim's vagina. According to him if the victim is young and not sexually active some injuries can be seen in the vagina. If the victim is married and sexually active penile penetration evidence cannot be obtained. Further no anti pregnancy tablets prescribed for the victim.

32. That is the end of prosecution case. Defence was called and explained the rights of the accused. After understanding his rights he elected to give evidence from witness box.
33. According to the accused on 20/2/2011 at 5.30am he was at home at Tonia, Tailevu. On the following day while he was at one of his brothers house police arrested him and was brought to Valelevu Police Station. On 26/02/2011 he was taken to hospital but no injury seen on his lips. But he told the doctor that he was assaulted by one of his uncle in the village. At the identification parade he was shown to the victim by the police. He denied the charge.
34. In the cross examination accused said he was nowhere close to Vunivaivai Settlement on 20/02/2011 and he don't know anyone in Laqere. He reiterated that he was shown to the victim by the police.
35. That is the end of defence case.

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

36. Madam and Gentlemen of Assessors, the victim, a married woman, while going for work in the early morning on 20/02/2011 was forcefully dragged to nearby slope and committed rape on her by a person. She was beaten on her face severely before being raped. With the help of street light she identified that person as the accused in this case. She immediately lodged a complaint to the police and identified accused in the identification parade. As Assessors and Judges of facts you have to consider her evidence very carefully.
37. Madam and Gentlemen of Assessors, you heard the evidence of Aisha Bibi. She had seen the victim with injuries on her face after 20-25 minutes of victim's departure for work. Victim had told her how and where she sustained injuries. She said that with the street light a person can be identified properly. As Assessors and Judges of facts you have to consider her evidence very carefully.
38. Madam and Gentlemen of Assessors, the police officers gave evidence and explained how they conducted the photo identification and the police identification parade.
39. Madam and Gentlemen of Assessors, two doctors gave evidence and explained the injuries they saw on the accused and the victim. The doctor who examined the accused said that his finding is consistent with the history given by the accused. According to his professional opinion of the doctor who examined victim that she was physically restrained and attempt to have been rape. Further he said, if the

victim is young and not sexually active some injuries can be seen in the vagina. If the victim is married and sexually active penile penetration evidence cannot be obtained.

40. The state's case against the accused person depends on the correctness of victim's identification evidence, which the defence alleged to be mistaken. Special caution is needed with regard to correctness of identity, as an honest and convincing witness, may be mistaken. You must closely examine the circumstances in which the identification was made by the victim. You must consider following questions and its answers:

1. How long did the victim have the accused person under her observation?
2. At what distance?
3. In what light?
4. Was the observation impeded in any way?
5. Has the victim seen the accused person before?
6. If so, how often?
7. Are there any special reasons for remembering the accused?
8. Was a police identification parade held?
9. Are there any special weaknesses in victim's identification evidence?

41. Madam and Gentlemen of Assessors, in this case the accused person opted to give evidence from witness box. That is his right. But he has nothing to prove to you.

42. Accused giving evidence took up the defence of alibi. In order to bring this evidence he should have given necessary notice to prosecution before the commencement of the trial. No such notice has been given to prosecution by the accused.

43. 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.

44. Ladies and Gentleman of assessors as per section 129 of the Criminal Procedure Decree 2009 no corroboration shall be required in sexual offence cases.



45. As per Daylight Saving Order 2010, between 25<sup>th</sup> of October 2010 until 6<sup>th</sup> of March, 2011 declared as daylight saving period.
46. Madam and Gentlemen of 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.
47. 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.
48. Madam and Gentlemen 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.
49. 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.
50. 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.

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

P Kumararatnam  
**JUDGE**

At Suva  
01/11/ 2013



