

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 347 of 2011

BETWEEN: THE STATE COMPLAINANT

A N D: MATEO MATAVURA ACCUSED

Counsel : Mr. Vosawale M with Mr. Kumar R for the State
 : Ms. Raisua L with Ms. Nawasaitoga N for the Accused

Hearing : 2nd to 4th December 2013

Summing Up : 5th December 2013

SUMMING UP

[With the request of the prosecution it was ordered to suppress the name and the identity of the victim.]

1. ROLE OF THE JUDGE AND ASSESSORS.

Madam Assessors and Gentleman Assessor:

- (i) This is the second last step of this trial in your presence. After my Summing Up you will be asked to retire for deliberations. Once you are ready with your individual opinions, this court will reconvene. You will not be asked to give reasons for your opinions. Your individual opinions can be unanimous

or divided. If the opinions are unanimous, it is more desirable, but what matters is, your honest individual opinion on the already led evidence. I am not bound by your opinions when delivering the final judgment of this court. Nevertheless, the due weight and recognition will be given to your opinions.

- (ii) In my Summing Up, I will mainly address you on matters of law. That is because “legal issues” are in my domain. Therefore, you have to accept and act upon on my directions in relation to the legal matters. ‘Facts’ of this case are entirely in your ‘periphery’. In fulfilling their duties the counsel for the prosecution and defence made their submissions and made certain suggestions to substantiate their arguments. In my Summing Up, I might, though inadvertently, express or appear to express certain views. You are not bound to accept any of those views, suggestions or arguments, unless you agree with them. That is how you become the ‘masters of facts’ in this trial.
- (iii) In this instance, it is your task to deliberate what exactly took place on 30th day of August 2011 at the village of Waivaka. That deliberation has to be done based on the evidence led in court and nothing else. There are two conflicting versions before you. The complainant says that the accused penetrated his fingers and penis to her vagina without her consent. The accused says whatever the act performed was done with the complainant’s consent. Your duty, after this Summing Up is to decide whose version that you are going to accept and believe.
- (iv) As I said earlier, your decisions should be solely based on the evidence presented in court. You must disregard anything you heard or saw in relation to this case from the electronic or printed media or from your family members, relatives, friends or anybody else, before or during the trial. Simply focus on what you heard and saw as evidence within the four corners of this court room. In my Summing Up, I might not touch or mention all the evidence that you might think to be crucial. You are at liberty to take into consideration whatever the piece of evidence you think relevant and important.
- (v) Whereas this is a case which solely rests on the issue of ‘consent’, a proper assessment of the credibility and the truthfulness of the witnesses is vital. In deciding that, you have to consider the demeanour of the witnesses when

they took the stand, especially the way they faced the cross examination. The firmness or evasiveness in stand can be a guiding factor to determine their credibility.

- (vi) When it comes to the truthfulness of the witnesses, you have to utilize your day to day life experiences and common sense. You were chosen to be the judges of facts in this trial as you represent a pool of common sense and experience of human affairs in this community. You are not alien to the life pattern of the ordinary people of the society. It is that experience you have to apply to conclude whether a particular witness is honest and truthful. In doing so, you can accept the whole testimony of a witness or a portion, or else, you can reject the whole testimony or a part of it.
- (vii) Madam assessors and gentleman assessor, please recall your oath administered when you assume duties as assessors; your true opinion to be given without any fear or favour or ill will in accordance with the evidence and the law. You are not supposed to be passionate towards anybody or any party. The complainant was just over 15 years when she faced the alleged acts. The accused was 28 years with a age gap of around 12 years. You are not supposed to be sympathetic of the fact that the complainant was a school girl during the alleged time. You cannot get prejudiced over the 'taboo' when the accused had sexual intercourse with the complainant, being her uncle. You should not have any hate over the complainant getting pregnant while schooling. Simply decide whether the sexual intercourse took place on 30th August 2011 night between the accused and the complainant was consensual or not. You are expected to decide upon on this issue based on the evidence lead during the trial. Please do not get yourself distracted from the main objective.

2. THE BURDEN OF PROOF

- (i) The accused is presumed to be innocent until proven guilty. Even though the accused is charged with one count of 'Rape', his innocence is presumed until otherwise decides by this court. The burden in proving that the accused is not innocent or guilty as charged rests on the prosecution throughout the trial. That burden never shifts. The accused need not prove anything, either to show his innocence or otherwise.

- (ii) The prosecution must discharge their burden by proving the charge against the accused beyond reasonable doubt. That is for you to be 'sure' of the guilt of the accused. If you have any reasonable doubt over the guilt of the accused after analyzing the evidence, the benefit of such a doubt should be awarded to the accused. Nevertheless, a 'doubt' must be reasonable or substantial and stemmed out of the evidence. A mere trivial or imaginary doubt won't create a reasonable doubt.

3. THE INFORMATION

- (i) The information filed by the Director of Public Prosecutions against the accused contains following count of Rape.

First Count
Statement of Offence

RAPE: Contrary to section 207 (1) and (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence

MATEO MATAVURA on the 30th day of August 2011 at Waivaka Village in Namosi in the Central Division had carnal knowledge of **Ms. J.L.** without her consent.

4. ELEMENTS OF THE OFFENCE

- (i) The charge against the accused is based on Section 207 (1) (2) (a) of the Crimes Decree 2009. For the prosecution to bring home this charge successfully, they have to prove the following elements in the charge.

- The accused, (Mateo Matavura in this instance)
- had the carnal knowledge with the complainant (Ms. J.L. in this instance),
- without her consent.

- (ii) According to the legal definition of 'Rape', if any person penetrates the vulva, vagina or anus of the other person to any extent with his penis, any object or any part of the body, other than the penis, such an act constitutes the offence of Rape. In this instance, prosecution claims that the accused had carnal knowledge with the complainant by inserting his penis. The term 'carnal knowledge' can be used in the same context of 'sexual intercourse'. The moment prosecution proves beyond reasonable doubt that the penis of the accused penetrated the complainant's vagina, may it be a slightest of penetrations, the element of 'carnal knowledge' is proved. Therefore, ejaculation inside the vagina is not a 'must' to prove the penetration.
- (iii) The only contested element in this case is the 'consent' of the complainant to have sexual intercourse with the accused. 'Consent' must be freely and voluntarily given by a person, (Ms. J.L. in this case) with the necessary mental capacity, to have the alleged sexual intercourse. As a matter of law I am directing you that the 'consent' is not freely and voluntarily given if it is obtained by force or threat or intimidation or false and fraudulent representations about the nature and purpose of the act or sexual intercourse. Furthermore, if the consent was obtained by exercise of the authority of the accused, it is not a free and voluntary 'consent'. Therefore, 'consent' is not proper or legitimate in the eyes of law, though it is visible on the face of it, had it been obtained in such a manner described above. I direct you that the complainant, Ms. J.L., was around 15 years of age at the time of the alleged sexual acts and thus, she is capable of giving consent to have sexual intercourse as there is no evidence to say that she did not possess the requisite mental capacity to consent. As a matter of law I am directing you that the absence of injuries or remarks for physical resistance on the complainant does not necessarily mean that she 'consented' to the alleged sexual acts.
- (iv) As a matter of law, I am directing you that there is no need to look for any corroboration of the complainant's evidence for an accused to be convicted on a charge of 'Rape'. If the evidence of the complainant is so convincing that you can place your reliance beyond reasonable doubt, you can solely act upon it even in the absence of any corroborative evidence.

5. AGREED FACTS

(i) The following facts are been agreed between the prosecution and the defence at the beginning of this trial. Thus, the prosecution is relieved from proving those facts. You madam assessors and gentleman assessor can positively assume that the prosecution has proved those facts beyond reasonable doubt. A copy of the Agreed Facts is provided for your perusal.

- It is agreed that the father of the complainant is Eneriko Lagidra and the mother is Siteri Adidamudamu.
- It is agreed that the complainant and her family reside at Waivaka Village, Namosi.
- It is agreed that the accused Mateo Matavura was born on the 25th day of June 1980.
- It is agreed that at the time of the incident the accused was residing at Waivaka Village, Namosi.
- It is agreed that on the 30th day of August 2011 at about 9pm, the complainant was at her aunt's place just a few meters from her home.
- It is agreed that the matter was reported to Police on the 20th of October 2011 and the accused was arrested on the 25th of October 2011
- It is agreed that the complainant was medically examined on the 22nd October 2011 by Dr. Alipate Vakamocea.
- It is agreed that the accused was interviewed under caution on the 25th of October 2011 and formally charged on the 26th of October 2011.

6. CASE OF THE PROSECUTION

(i) Prosecution called three witnesses to prove their case. Ms. J. L. was the first witness. She recalled 30th of August 2011 and said that she had 'grog' at her mother's elder sister's place when Josivini, the sister of the accused, called to tell her that the accused wants to speak to her. Ms. J. L. has initially refused to see the accused, but, agreed with Josivini as she kept on telling. After meeting the accused at the foot path to her aunt's house, all three had proceeded to the village hall. Then Josivini had left the accused and Ms. J. L. leaving them at the village hall. It is after that, Ms. J. L. had been forced by

the accused to lie down. When the complainant refused to do so, she was punched at her knee, which resulted she fell on the ground.

- (ii) While pressing her thighs and closing her mouth by one hand, the accused had removed all her clothes. Then he had inserted his fingers to her vagina. When Ms. J. L. kept on pushing the accused as she did not want him to do that, the accused had pressed and bitten her neck. It was after that the accused had forcefully inserted his penis into her vagina. She said that the intercourse went about 10 minutes and it was very painful. She claimed that she could not wear her under pant as it was torn when the accused forcefully pulled it out. Ms. J. L. agreed that the accused is her uncle and Josivini is her aunt and both of them were known to her since her childhood.
- (iii) Later on, it was suspected by the teachers of her school that Ms. J. L. is pregnant and confronted her. Since the suspicion was true, the complainant was referred to her parents in the village. Ms. J. L. said that she was afraid of telling this incident to any of her family members as she thought that they will 'smack' her.
- (iv) The second witness of the prosecution was Ms. Maitokana. She was the Assistant Principle of Ms. J. L.'s school. She said that the school Vice Principal referred Ms. J. L. to her for counselling as rumours were on that Ms. J. L. was pregnant. The complainant had told her that the accused had sexual intercourse with her forcefully. Upon her asking as to why Ms. J. L. did not raise any noise, Ms. J. L. had told her that she was afraid to do so. The teachers of the school had taken the complainant to the village and handed over to her parents.
- (v) Police Constable 2030, Tuaci Tasoqosoqo was the Interviewing officer of the accused. He read the Cautioned Interview statement of the accused and tendered it to court as Prosecution Exhibit No: 1.

7. THE DEFENCE CASE

- (i) At the end of the prosecution case, court called for the defence and the accused opted to give evidence from the witness box, under oath and subject to cross-examination. The accused confirmed that what he said to the police, at the cautioned interview is correct and accurate. (Prosecution Exhibit No. 1) Further to that, he said he had a love affair with the complainant for 2 years.

- (ii) The accused said he had sexual intercourse with Ms. J.L. twice during this time and on both the times it was with her full consent. He described that once it was behind the village hall and the second time it was behind the village pre-school teacher's house. Therefore he does not deny that he had sexual intercourse with the complainant on 30th of August 2011. He admitted that he is an uncle of the complainant from her father's side, though he is not blood related to her. He denied the facts that he forced her to have sex or inserted his finger to her vagina or pressed or bitten her neck

8. ANALYSIS

- (i) Having heard the evidence of both sides, prosecution and the defence, madam assessors and gentleman assessor, you know that there is no dispute between the parties that a sexual intercourse took place between the accused and the complainant on 30th of August 2011. The deciding factor of this instance is the 'consent' of Ms. J.L. You have to decide whether or not the complainant consented to perform the sexual intercourse in issue. I remind you once again, that the prosecution has to prove that Ms. J.L. did not 'consent' to this sexual intercourse to your fullest satisfaction.
- (ii) The accused highlighted that he had a love affair with Ms. J.L. for at least 2 years. He admitted that it is a 'taboo' to have such a 'love affair' being her uncle. He agreed that he wanted to keep this 'affair' as a secret from Ms. J.L.'s parents as they would not agree with that. The prosecution suggested that in the village setting 'an uncle' has an authority over his nieces and nephews. The accused agreed with that. The prosecution then argued that the accused used his authority as the 'uncle' of the complainant to have sexual intercourse with her. It was further pointed out by the prosecution that, the accused used his own sister, Josivini, as the 'messenger' as she also has the same authority over Ms. J.L., being the aunt.

The crux of this argument is that the complainant did not respond in any way to the conduct of the accused, until her teachers found her pregnant, with the belief of she been disbelieved by others due to this "traditional village protocol" context. The prosecution urges you to believe the narration of the complainant to be true and genuine.

Madam assessors and gentleman assessor, it is left to you now to assess this version of the prosecution and decide whether you are going to accept it or not.

- (iii) In contrary, the defence argues that from the very first move of Josivini accompanying the complainant to the accused, who was waiting at the foot path, up until the teachers found that she was pregnant after about 2 months of the 'sexual intercourse' in issue, the complainant did not divulge this incident to anybody, because she was a willing participant to the sexual act. The defence highlighted that she was not dragged by Josivini to the accused and had the complainant raised alarm it would have been easily heard by the villagers as the houses are just few meters away from the village hall.
- (iv) It was pointed out by the defence that it is strange for the complainant to think that she will be disbelieved by the villagers, if she raise alarms when the accused was in the process of having sexual intercourse with her. The learned defence counsel said that had not she got pregnant, there won't be any matter of this nature as teachers would not come to know anything. It is the 'delay' in reporting this incident to anybody highlights by the defence. It is the conduct of the complainant by going with Josivini and without raising any alarm during the sexual intercourse highlights by the defence. Further to that, the defence pointed out that the complainant was at her real aunt's house (mother's sister) at the time she was called by Josivini and therefore she could have waited there by informing to her aunt had she really wanted to avoid the accused. It was further stressed that the complainant had 1.5kg of "grog" for 7 long hours with the friends before the incident in issue.
- (v) The essence of all these arguments by the defence, is that you should not believe the complainant. In contrast, defence asks you to believe the accused. He said that he had a love affair with the complainant and had sexual intercourse with the complainant not only once, but twice. It is open now madam assessors and gentleman assessor for you to decide what weight that you are going to attach to these arguments put forward by the defence.

9. SUMMARY

- (i) Please recall that the accused need not to prove anything to show his innocence. You might not agree with the explanation offered by the accused. That does not necessarily mean the accused is guilty as charged. The burden of proving the guilt of the accused beyond reasonable doubt still lies on the prosecution. The evidence adduced by the prosecution to prove their case must be appealing to your conscience to be sure of the guilt of the accused.
- (ii) I have directed to you at the very beginning that you have to approach the case in an open mind. That is because the accused is presumed to be innocent until proven his guilt. If you are satisfied that the prosecution has proven the guilt of the accused to your fullest satisfaction or for you to be sure, you must return with an opinion of 'guilty'. If you are not sure of the guilt of the accused, it must be an opinion of 'not guilty'.
- (iii) Your possible opinions in this instance are 'GUILTY or 'NOT GUILTY' to the charge of Rape.
- (iv) You may now retire to deliberate your opinions. When you are ready with the opinions, I will reconvene the court and ask your individual opinions.
- (v) Any re-directions or additions to what I said in my summing up Mr. Vosawale?
- (vi) Ms. Raisua?

Janaka Bandara
Judge

At Suva
Office of the Director of Prosecution for State
Office of the Legal Aid Commission for the Accused

