

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 443 OF 2012

BETWEEN : **STATE**

AND : **IOWANE ISIKELI SENILOLOKULA**

Counsel : **Ms. L. Koto for the State**
Mr. N. Nawaikula & Mr. N.Vere for the Accused

Date of Summing Up : **26th July 2013**

SUMMING UP

[Name and the identity of the victim is already ordered to suppress with the request of the Prosecution]

1. **ROLE OF THE JUDGE AND ASSESSORS.**

Madam Assessors and Gentleman Assessor:

- (i) The evidence for the prosecution and the defence have been led and concluded. There will be no more evidence. The learned Counsel for both

parties made their closing addresses to you. It is now my duty to sum up the case to you. After my summing up you will be asked to retire for your deliberations. Once, each of you, madam assessors and gentleman assessor, reach to a conclusion on the final verdict, the court will reconvene and your individual opinion will be asked. At any time, you will not be asked to give reasons for your opinions. The opinions of you three need not to be unanimous. Nevertheless, it would be desirable if you could agree on the final opinion. As the presiding judge of this case, though I am not bound by your opinions in delivering the final judgment of the court, I assure you, that your opinions will carry a great weight with me when I deliver my judgment.

- (ii) In my Summing Up I will direct you on the relevant areas of law which apply to this particular instance. You must accept that legal position and act upon that. In another words, you must apply the law as I direct you to the facts of this case. Facts, as you heard and saw in this court room, are entirely within your domain. You are the masters of the facts or judges of the facts of this case. It is your duty to determine what exactly happened during 01st April 2011 to 30th June 2011, based on the facts of the case. The alleged victim says that she did not consent to the sexual act performed by the accused. The defence says the sexual acts were done with the consent of the alleged victim. Therefore, you have to decide at the end of the day, whose version you are going to accept and believe.
- (iii) In reaching to your final opinion, you have to rely on the evidence you saw and heard, from the witness box and the documentary evidence tendered in court, and nothing else. You should simply disregard what you saw or heard from the printed or electronic media regarding this case before or during the trial. At the same time, any views or opinions expressed by your friends, family members, relatives or anybody should face the same fate. It is you who have to draw your own conclusions based on the evidence in this case. The learned counsel for the prosecution and defence, while making their closing submissions highlighted certain facts and tried to formulate their opinions according to their own case theories. You need not to accept either of those versions unless you agree with those. Same principle applies to me as well. If I express any opinion or appear to do so regarding any facts, do not follow it, simply because it came out of the Judge. It is solely your task to form your own opinions. In my summing up I might not touch all the areas or

evidence which you think to be important. Please feel free to give due consideration to all the evidence you see fit, though I mention it or not.

- (iv) You have to decide the credibility and truthfulness of each and every witness. In doing so, you can rely not only what you heard, but what you saw as well. The way witnesses offered evidence from the witness box, how they face the cross-examination of the opposing counsel, for instance, were they firm on their stand or evasive, can be helpful in determining their demeanour and in turn to judge their credibility as well. I would like to emphasize that you madam assessors and gentleman assessor, you were chosen to be judges of the facts of this trial as you represent a cross section of the pulse of the society. Your common sense and the experience in day to day life must come into operation when you deliberate this case. That common sense and the life experience have to be utilized in deciding or assessing the truthfulness or honesty of witnesses. In that task, you have the liberty to accept the whole version of a testimony of a witness or a portion of that testimony and reject the rest. You can refuse to accept even the whole testimony of a witness.
- (v) Coming back to the issue before hand, I must inform you that you must not be prejudiced or sympathetic towards anybody or any party involved in this case. The alleged victim in this case is a deaf and dumb girl, who was 16 years at the time of the charged incident. She was a student during the said time and was staying in the hostel where the accused and his wife looked after. This back ground does not warrant for you to be sympathetic towards the complainant girl or be harsh on the accused. Your final opinion should not be tainted with passion towards anybody. Anyway, remind yourselves the oath that you administered at the commencement of this process.

1. **THE BURDEN OF PROOF**

- (i) When approaching the matter in hand, you madam assessors and gentleman assessor, I would like to draw your attention to certain basic rules which govern our criminal justice system. The accused is presumed to be innocent, though he is charged before this court with a count of Rape, until he is found guilty by this court. Proving his guilt is the sole burden of the prosecution, as it was the prosecution, who accuses the accused of committing the offence of Rape. The duty of the prosecution to prove the case against the accused continues throughout the trial and it

never shifts to the accused. The law does not impose any obligation or duty upon the accused to prove his innocence or otherwise.

- (ii) When proving the case against the accused, the law expects the prosecution to prove it beyond reasonable doubt. That means the prosecution must prove the case for you to be 'sure' of the guilt of the accused, and nothing else will discharge their burden. There is no specific formula where you can have a mathematical precision to be 'sure'. It is all about your day to day experiences and common sense come into play once again. The ultimatum is that you, madam assessors and gentleman assessor, must be 'sure' of the guilt of the accused based on the presented evidence in court by the prosecution. If you have a 'reasonable doubt' over the guilt of the accused that benefit should immediately be awarded to the accused. Such a doubt, as stated, should definitely be a 'reasonable doubt'. A mere possible doubt or trivial and imaginary doubts will not create a reasonable doubt. It should be an actual or substantial doubt which shakes the foundation of the case of the prosecution. The doubts should stem out of the evidence what you saw and heard in court.

2. **THE INFORMATION**

- (i) The Director of Public Prosecutions, on behalf of the State has charged the accused for the following count of Rape.

First Count
Statement of Offence
[Representative Count]

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

Particulars of Offence

IOWANE ISIKELI SENILOLOKULA between the 1st day of April 2011 and the 30th day of June 2011 at the Harland Hostel, Suva in the Central Division had carnal knowledge of **S.V.** without her consent.

3. **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, (Iowane Isikeli Senilolokula in this instance)
 - had the carnal knowledge with the complainant (Ms. S.V. in this instance)
 - without her consent.
- (ii) The term ‘carnal knowledge’ is used in the same context of ‘sexual intercourse’ and the moment prosecution proves beyond reasonable doubt or the accused agrees that 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. Furthermore, to constitute the carnal knowledge it need not to be only the vagina, it can either be penetration to the anus or mouth of the victim as well.
- (iii) The most essential 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. S.V. 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 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. S.V, was over 13 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 sexual acts.
- (iv) In respect of this charge, I have to tell you that this is called a ‘representative count’. The prosecution is relying on a charge of

unconsensual rape, which is alleged to have repeated for several times during the specified times in the charge. In this type of a situation, the prosecution is not expected to prove, each and every single incident beyond reasonable doubt alleged to have taken place. It is more than enough for them to prove you beyond reasonable doubt that one incident took place during the stipulated period. Simply, if you are 'sure' of one incident of unconsensual sexual intercourse of the accused with the complainant, you have to find the accused guilty for the charge of Rape.

- (v) 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.

4. **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.

- Iowane Isikeli Senilokokula [hereinafter the "accused"] is also known as "Daddy" to the students at Gospel School of Deaf.
- That S.V. {hereinafter the victim} is a student at the Gospel School of Deaf.
- That S.V. has "hearing and speech impediment".
- That the accused and his wife looked after the hostel catering for students between the ages of 14 – 21 years of age.
- That the accused person and his wife looked after girls between the ages of 14 – 21 years of age.

- That the accused is also a Bible teacher at the Gospel School of Deaf.
- That the accused person's wife is also a staff at Gospel School of Deaf.
- That the accused had sexual intercourse with the victim between the 1st of April and the 30th of June 2011 at the Harland hostel.
- That on the 29th of December 2012 the accused was interviewed under caution and charged at Samabula Police Station.
- It is agreed that the admissibility of the following documents are not in dispute:-
 - [a] The Medical Report of the victim.
 - [b] The birth certificate of the child victim.
 - [c] The caution interview of Iowane Isikeli Senilolokula.
 - [d] The charge statement of Iowane Isikeli Senilolokula.

5. **THE CASE OF THE PROSECUTION**

- (i) You saw Ms. S.V. giving evidence in Court. She is deaf and had a speech impediment. Her evidence was interpreted to Court with the assistance of an interpreter. She has come to the Gospel School for deaf 12 years ago from the village of Ra. She was born on 25th September 1994 and by the time of the alleged incident she was over 16 years of age. She said that the first incident which she encountered with the accused took place somewhere in April 2011, at the Harland hostel. The accused and his wife were entrusted with the responsibility of looking after the said hostel where 11 other hearing impaired girls were also staying. Furthermore, she said that the accused was called as 'DADDY' by her and he was sharing the devotions at the hostel while teaching Bible studies at the school.

- (ii) Ms. S.V. said that she was not happy as all the other girls used to sleep till late while she woke up early in the morning and doing work. Since the accused was the curator looking after the hostel she had complained that to the accused. She referred to the first incident which had taken place in the living room of the hostel around 3.00am, in the morning. Accused had come to her room, as arranged in the early night and woke her up. It is at this time she had complained him her grievance about other girls. Then the accused had asked whether she has a boy friend and she knows anything about sex. She had answered in negative to both the questions. The accused had told her that he will teach her 'sex' as she will be experienced by the day she will get married. Accused had then asked her to change her shorts and have the 'sulu'. She had changed herself as the accused told. At the living room, soon before the first alleged sexual act, the accused had told not to get afraid as "I am your daddy and you are my daughter". Accused wanted her thighs to apart and she had refused to do so. Then the accused had forced to pull her thighs apart and touched her vagina. She said that she was scared. When she followed the instructions of the accused to lie on the floor of the living room, he had penetrated his penis to her vagina. She claimed the incident was so painful and she simply followed what 'DADDY' said and she did not know about his intentions.
- (iii) The same sexual act, according to Ms. S.V. had performed for the second time in the accused's room while his wife was sleeping. It was averred that his wife is also a hearing impaired lady. The accused had applied coconut oil on his penis before the intercourse. Third time the sexual intercourse had taken place in Ms. S.V's room while her room-mates were sleeping. She said she refused to have sex at this time, but the accused said he wants 'more sex' and it is natural. She testified that in both these occasions, accused inserted his penis to her vagina. She said that one of these occasions, he asked whether she is hungry or not. She said 'DADDY' taught her how to 'kiss' during these sessions.
- (iv) Ms. S.V. referred to an instance in which the sexual intercourse took place in the room of accused's daughter. There also accused had applied coconut oil on his penis and she said that she saw 'white liquid' came out of his penis. The complainant recalled another instance where the accused had sexual intercourse with her when she got sick. Since all the other girls had gone to the school, she said that they had 'sex' in the

living room of the hostel during the day time, though she was sick. That time, Ms. S.V. said that the accused wanted to check whether she was pregnant or not. The following night, she said that they had sex in the toilet of the accused's room. This time, according to her, the accused had penetrated his penis to her anus. She claimed that it was very painful.

- (v) The complainant or the alleged victim said that she did not report this behavior of the accused to anybody as the accused and his wife, Sereima were living with them in the same hostel. In 2012, when she was having her devotion she had come across Psalm 139 and verses 1-24 of the Bible where it says "*Lord you have evaluate me and you know all about me*". She said that she was challenged by this verse and decided to report the incidents. Then she had told her story to another teacher of the Gospel School for the deaf and matter was later reported to police. Ms. S.V. identified the accused from the accused box positively as the 'DADDY' that she was referring to and said she was medically examined by a doctor after the matter was reported to police.
- (vi) Dr. Elvina Ongibit was the next witness for the prosecution. She confirmed that she examined the alleged victim/complainant and prepared the Medical Report tendered by prosecution as Exhibit No. 2. The history given to doctor by Ms. S.V. says that "*Victim alleged to the school teacher for the deaf that she was raped by their Bible teacher last year in April 2011*". The medical expert said that according to her medical examination, she observed "totally healed lacerations at 4 o'clock and 11 o'clock; partial healed laceration at 8 o'clock", in the hymen and the observations are compatible with the given history by the victim.
- (vii) DC 2991, Clint Kelemeti was the Interviewing Officer of this case. He identified his signature and the Accused's signature in the Caution Interview and tendered it to court marked as Exhibit No. 3 of the prosecution. He confirmed that the accused was given all the rights before the interview was recorded in the question and answer form. According to the Caution Interview, accused admitted that he was the religion teacher of the complainant at school and the full-time maintenance worker at the Harland hostel. (Question 28) Further he had admitted that he was also a part of the school counselship. (Question 46). In answering to question No. 67, the accused had told police that he was frustrated for a long time as he was not given any freedom to go out

of the hostel, not even to visit his parents and he did not have a healthy sexual relationship with his wife.

- (viii) The last witness for the prosecution was WDC/3645 Salote Bola. She was the Charging Officer in this case. She tendered the charge statement to court marked as prosecution Exhibit No. 4. Both DC 2991 Clint and WDC Salote testified that the accused made his statements freely and voluntarily.

6. **THE DEFENCE CASE**

- (i) Accused opted to give evidence from the witness box. The accused said that he had sexual intercourse with the complainant for several times at the Harland hostel in the charged period with her full consent. The version of the accused is that the complainant had a boyfriend outside the hostel and she wanted to experience the same sexual pleasures that she got from her boyfriend through him. He admitted that he committed adultery, but denied having non-consensual sexual intercourse with the complainant. He denied the fact that he woke her up around 2am to 3am on the first meeting. He said that the name of her boyfriend was one 'Atu' and though he stated it to the police, it is not been reflected in his caution interview. According to the accused the complainant was a willing participant. He claimed that the complainant used to write love letters to him and the 4 letters he received showed to his wife as well. Accused said that the complainant never struggled or pushed him off or showed any signs of dislike or complained of any pain while he was engaging with the admitted sexual acts. He further stated that the complainant took around 17 months to report the matter for the first time and till then she did not complain these incidents to any of her friends or teachers.
- (ii) Ms. Sereima Maria, the wife of the accused was called next to give evidence on behalf of the accused. Ms. Sereima having been married to the accused has 3 children over their marriage. She confirmed that she saw 5 letters given to her husband by the complainant. She said that those letters contained 'kiss, love and handsome'. She had noticed some girls are not respecting her husband and some had gone to the extent to knock their room door in nights. She said she counseled these girls inclusive of the complainant, but didn't report those incidents to the higher management of the school or hostel. She admitted that had she reported those, the girls concern would have sent home. Finally, she

agreed with the prosecution that she gave evidence today in court to keep her husband out of trouble.

7. **ANALYSIS**

- (i) Having heard the evidence for both prosecution and the defence, you madam assessors and gentleman assessor, know that both the parties do not dispute that the alleged sexual acts took place at the Harland hostel during the months of April to June 2011. It is in fact, agreed between the parties in Agreed Facts at the very outset. The fact in dispute is the 'consent'. Prosecution says the complainant did not consent for the alleged sexual acts and therefore those acts do amount to Rape. On the other hand, the defence says, all the acts in all times did with the consent of the complainant and thus, do not constitute the offence of Rape.
- (ii) The complainant testified before you in sign language, yet you could see the way she faced the questions from the prosecution and defence. Accused also offered himself from the witness box and faced the same fate with counsel. As I reminded you earlier, it is entirely up to you to decide that whom you should believe and which version of the witnesses to be accepted and relied upon.
- (iii) As a matter of law I directed you that the 'consent' should be free and voluntary and it is not 'consent' if it was obtained by exercise of authority or by false and fraudulent representations about the nature or purpose of the act. It is now your duty to apply that legal principle to the facts and decide whether the narrated incidents by the complainant do fall within that ambit or not. If you are of the view, that there was no 'consent' in the part of the complainant, matter ends there. Then the sexual intercourse is rape. In another words, if you feel that though the 'consent' is visible on the face of it, the 'consent' could have obtained through exercise of authority or by false and fraudulent representations about the sexual acts, it is not 'consent', given freely and voluntarily. Thus, once again it amounts to Rape. Finally, if you think, after analyzing all the available material in Court, that the complainant had participated to the sexual acts, with a free and voluntary 'consent', you must return with a verdict of 'NOT GUILTY'.

- (iv) In deciding whether or not the accused exercised his authority towards the complainant, you might have to consider that the exact role the accused played in the Gospel School for deaf girls and in the Harland Hostel. Prosecution took up the position that the complainant was submissive or obedient to the accused as he was the Bible teacher of her in school, a member of the counseling team in school and looked after their hostel. Accused in his evidence admitted that had he reported any misconduct or misbehavior of the girls to the administration of the school, the girls would have sent home. The complainant told that on the first night she met the accused, he told him her grievance that she has to wake up early in the morning whilst others are sleeping. In this background, prosecution argued that it was merely surrendering herself to the accused's authority and not 'consented' to have sexual intercourse. It is entirely up to you madam assessors and gentleman assessor to decide upon whether the accused used his authority on the complainant to obtain her consent to have sexual intercourse or not. If you do think for sure that the 'consent' was obtained in such a manner, it is not legally accepted 'consent' and it would amount to 'non-consensual' sexual act.
- (v) At the same time, you would recall that the complainant told that the accused initiated this entire episode by telling that he will teach her what sex is all about as she will be experienced on sex by the time she get married. Furthermore, she told that the accused told her in that instance not to be afraid and he is her father and she is his daughter. I have directed you on law that if the consent is obtained by false and fraudulent representations about the nature or purpose of the act that the accused is going to commit, that is not a 'consent' given freely or voluntarily. After analyzing all the available evidence including the age of the complainant, if you are of the view that the accused made false and fraudulent representations about the nature or purpose of the sexual acts to the complainant and obtained her 'consent' that is also not a valid 'consent', in the eyes of the law. I have to remind you that in a given scenario there can be instances where exercise of authority and false and fraudulent representations about the nature and purpose of the act are used simultaneously to obtain 'consent'. That is not valid before law. Here, in this instance, you have to decide whether this scenario falls into such a category or not. It is something, madam assessors and gentleman assessor, you have to decide based on the evidence of this case.

- (vi) At the same time, I remind you again that this charge of 'Rape' is a 'representative count'. You have to consider the individual incidents of sexual intercourse separately. You are now aware that if the prosecution proves one instance of sexual intercourse without 'consent' to your fullest satisfaction, the burden of the prosecution is discharged. All what prosecution needs to prove is that there was one occasion out of the series of sexual acts, where the complainant did not 'consent'. Therefore, madam assessors and gentleman assessor, if you are 'sure' of at least one occasion that the complainant did not consent to the accused to have sexual intercourse, may it be the first or second or third or final instance, either to the vagina or anus, you have to return with a verdict of 'GUILTY'.
- (vii) The other side of the coin is the accused's version. He says that the complainant did consent to perform all the sexual activities. The defence highlighted that the complainant did not make any noises, shouts, yelling during any of those instances. In fact the complainant had undressed herself every time. She had not complained or reported these sexual acts to anybody, inclusive of her other teachers or friends and waited for over 17 months to report to the police after informing to a teacher of the school. The accused said that the complainant gave him several love letters as well and it was confirmed by his wife. Nevertheless, any of these letters were produced in court as evidence.
- (viii) Madam assessors and gentleman assessor, you have to decide whether or not you are going to accept the explanation given by the complainant for the belatedness in reporting these incidents to police. It was revealed in evidence that the accused left the hostel and the school in June 2011. That means, without the presence of the accused in close vicinity, the complainant had carried the 'secret' with her for almost 17 months. Apart from she been challenged by the verses of the Holy Bible, no other reason or motive was unearthed or elicited for her to report this to her teacher. Now, madam assessors and gentlemen assessor, you have to decide whether you are going to accept this explanation of the complainant over her belatedness in reporting the incidents as justifiable or not. It is a matter for you to conclude whether this belatedness was a sign of 'consent' as suggested by the defence.
- (ix) You heard Dr. Elvira Ongibit giving evidence in court. She formulated an opinion that the given history of the complainant is compatible with her observations of the lacerations on the hymen. In law, she can be

considered as a medical expert and thus, she can formulate her own opinions about a given scenario. Nevertheless, being judges of the facts, it is entirely up to you to decide whether you are going to accept that opinion or not. Anyway, in a context where both the prosecution and the defence do not dispute the alleged 'sexual acts' and especially penetration of accused's penis to complainant's vagina, the opinion of the doctor supports the point of 'penetration'.

- (x) Finally, I must direct you as a matter of law about the evidence of the accused's wife. In law, there is no prohibition or barrier for a spouse to testify in favour of the other. Nevertheless, he or she is obviously an interested witness. Being a relative or the spouse of the accused is not a ground to reject their evidence. It is, however, always safer to scrutinize their evidence with the existing circumstances. If their testimony is probable and inspires your confidence with credibility, there is no reason to disbelieve their evidence. You might have to consider that Ms. Sereima Maria told that she saw 5 letters alleged to have written by the complainant. The so called letters did not produce in court as evidence, nor those were given to the police during the investigation process. In this background, it is your duty to decide the weight that you are going to attach to the evidence of the accused's wife.

8. **SUMMARY**

- (i) I remind you once again that the accused need not to prove anything to show his innocence. The fact you do not believe his version, does not necessarily mean that he is guilty of the charge. The prosecution still must prove the charge beyond reasonable doubt or to your fullest satisfaction over the guilt of the accused. If you have any reasonable doubt on the case of prosecution, you have to find the accused 'NOT GUILTY'.
- (ii) Finally, I recall the instruction I gave you in my opening address. I hope you approached this case with an open mind. The accused is presumed to be innocent until proven guilty by a court of law. Thus, if you are satisfied beyond reasonable doubt or for sure that the prosecution has proved its case, you must find the accused guilty to the charge of Rape. If you are not sure of the guilt of the accused after having analyzed the evidence of the prosecution, you must find him '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 opinion.
- (v) Any re-directions or additions to what I said in my summing up Ms Koto and Mr. Vere?

Janaka Bandara
Judge

At Suva
Officer of the Director of Prosecution for State
Nawaikula Esq. for the Accused