

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

**CRIMINAL CASE NO: HAC 315/2012**

**BETWEEN:**

**THE STATE**

**AND:**

**KINIVILIAME SOVALEVU**

**COUNSEL:** Ms L Latu for the State  
Ms V Tamanisau for the Accused

**Dates of Trial:** 24-25/02/2014

**Date of Summing Up:** 28/02/2014

**Date of Judgment:** 03/03/2014

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

**JUDGMENT**

[01] KINIVILIAME SOVALEVU has been charged with the following charges on information dated 12<sup>th</sup> day of October, 2012.

**The First Count**

**Statement of Offence**

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

### **Particulars of Offence**

Kiniviliame Sovalevu on the 13<sup>th</sup> July 2012 at Nabua in the Central Division had unlawful carnal knowledge of T.K, without her consent.

### **Alternative Count**

### **Statement of Offence**

**DEFILEMENT OF PERSON BETWEEN 13 AND UNDER 16 YEARS OF AGE:** Contrary to Section 215(1) of the Crimes Decree No. 44 of 2009.

### **Particulars of Offence**

Kiniviliame Sovalevu on the 13<sup>th</sup> July 2012 at Nabua in the Central Division had unlawful carnal knowledge of T.K, a young girl of the age of 15 years.

- [02] After trial on the charges, the assessors returned unanimous opinion of not guilty against 1<sup>st</sup> count and the alternative count. Their findings are merely their opinions based on their views of the facts of the case. They have no power to try and convict the accused. Their duty is to offer their opinions which might assist the trial judge. The trial judge has the power to accept or reject their opinions.
- [03] I direct myself on my own summing up and on looking at the evidence in its entirety I accept the assessors' majority opinion on count number 01. However, as the trial judge I reject the assessors' unanimous opinion on the alternative count. I find the opinion of the assessors on the alternative count appears to be perverse.
- [04] According to the victim on 13/07/2012, her parents had gone for a funeral in the village leaving her with her Aunt. The accused who was her neighbour came to her house and gave his phone to her to watch some video clips. After some time he called her to his house which is about 5 meters away from her house. She had gone to the accused's house and watch video clips in the mobile. The accused then came behind, put her on the floor and closed her mouth with a pillow. He then took off her skirt, lay on top of her, removed his  $\frac{3}{4}$  pants and put his private part in to her private part. She could not either shout or resist as the accused was too strong. He had performed sexual intercourse about  $\frac{1}{2}$  an hour. She never consented for sex at that time.

- [05] She did not tell anybody about the incident until the accused had told her Aunt Fane about the incident. Fane had told her mother and after interrogation, her mother had then reported the matter to the police. She was in class 08 when this incident happened. After reporting the matter to the police, she was subjected to a medical examination.
- [06] The victim had given two statements to police. 1<sup>st</sup> one was made one month after the incident and 2<sup>nd</sup> one was made two months after 1<sup>st</sup> one. In her statement victim said that incident happened in her house and the accused closed her mouth with his hand and fondled her breast and her vagina. She further said in her statement that the accused had sex with her for about 5 minutes. She admitted that the accused had told her aunt about the incident. Until such time she had kept it secret.
- [07] When Elesi Naicuvacuva mother of the victim, had inquired the incident from the victim, she had told her that the accused after calling the victim to his flat put a pillow over her mouth and attempted to have sex with her.
- [08] Dr. Unaisi Tabua had examined the victim at Colonial War Memorial Hospital on 15/08/2012. She is a medical officer and currently reads for her masters in Gynaecology. Consent for medical examination was obtained from victim's mother. In the history to doctor, victim had said that when she was at home alone in July, both parents had gone to the village, a guy by the name of Kiniviliame had asked her to come to his flat to watch movie with him. She did went but during the movie the accused started kissing her and lay her down and had sex with her-penetrating sex. Hymen remnant noted without laceration or tear. According to her sexual assault cannot be excluded. Her findings are consistent with the history given by the victim.
- [09] Accused in his caution interview given to D/Cpl 2929 Setoki Taveta, admitted that he had sexual intercourse with the victim with consent. In his evidence he denied rape but he admits that he had sexual intercourse with consent. The matter came to light after he told this to the victim's Aunt Fane.
- [10] In this case the accused is charged for rape Contrary to Section 207 (1) and (2) (a) of the Crimes Decree No: 44 of 2009. Alternatively he has been charged for defilement of person between 13 years and 16 years of age contrary to Section 215(1) of the Crimes Decree No: 44 of 2009.

- [11] The victim contradicting her position taken in her examination in chief, she had told police that the incident happened in her house for about five minutes. The accused in his caution interview statement as well as his evidence before this court admitted that he had sexual intercourse with the victim with consent. Victim was 15 years old at the time of the offence.
- [12] Considering all the materials presented before the court, I find the accused is not guilty to the charge of Rape and I acquit him accordingly.
- [13] Further, I find that the Prosecution had established a prima facie case against the accused on the alternative charge of Defilement of person between 13 years and 16 years of age.
- [14] Accordingly, I convict the accused on the alternative charge of Defilement of person between 13 years and 16 years of age Contrary to Section 215(1) of Crimes Decree No: 44 of 2009.
- [15] This is the Judgment of the Court.

P Kumararatnam  
**JUDGE**

At Suva  
03/03/2014

