

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 034/2013

BETWEEN : **THE STATE**

AND : **ESEROMA VAKACEGU**

COUNSEL : **Ms L Latu for the State**
: **Ms N Nawasaitoga for the Accused**

Dates of Trial : **03-05/03/2014**

Date of Summing Up : **06/03/2014**

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

SUMMING UP

Madam and Gentlemen Assessors,

[01] 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 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.

- [02] 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.
- [03] 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.
- [04] 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.
- [05] 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 the accused person is presumed to be innocent until he is proved guilty. This is the golden rule.
- [06] 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.
- [07] 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.
- [08] The caution interview statement of the accused person is in evidence. What an accused says in his caution interview is evidence against him. I will direct you shortly on how you should consider that evidence.

[09] 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.

- (i) That the complainant in this matter is U.T.
- (ii) That the complainant at the time of the offence was a Form 6 student of Suva Grammar High School.
- (iii) That the accused in this matter is Eseroma Vakacegu, also known as Xavier Tikomailomai.
- (iv) That the alleged incident occurred on the 18th January, 2013.
- (v) That on the 18th January, 2013, the accused was at Extreme Internet Cafe, where the complainant was using the internet.
- (vi) That the accused is a friend of the complainant on Facebook.
- (vii) That the accused was chatting with the complainant on his Facebook account.
- (viii) That after the internet session, the accused asked the complainant to accompany him to the Flee Market to meet a friend.
- (ix) That after meeting the friend at the Flee Market, the accused asked the complainant to accompany him to the Ministry of Education to pick up his certificates.
- (x) That the complainant followed the accused until they reached the Sunset Apartment, Suva where the alleged offence took place.
- (xi) That the accused was interviewed under caution by CPL 1339 Marika Kaufuti in English Language on the 22nd of January, 2013.

(xii) That the accused was formally charged by DC 4318 Viliame Laliniqavoka in the English Language on the 22nd of January, 2013.

Agreed Statement To Tender By Consent:

1. Medical Report of the complainant.
2. Record of interview of Eseroma Vakacegu.
3. Charge Statement of Eseroma Vakacegu.

[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.

FIRST COUNT

Statement of Offence

ABDUCTION OF YOUNG PERSON: Contrary to Section 285 of the Crimes Decree 44 of 2009.

Particulars of Offence

ESEROMA VAKACEGU, on the 18th day of January 2013 at Suva in the Central Division, unlawfully took U.T, being under the age of 18 years, out of the possession and against the will of the father.

SECOND COUNT

Particulars of Offence

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

ESEROMA VAKACEGU, on the 18th day of January 2013 at Suva in the Central Division penetrated the mouth of U.T, with his penis, without her consent.

THIRD COUNT

Particulars of Offence

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

ESEROMA VAKACEGU, on the 18th day of January 2013 at Suva in the Central Division had carnal knowledge of U.T, without her consent.

[13] In order to prove the offence of Abduction of Young Person the prosecution has to prove following elements beyond reasonable doubt.

1. The accused,
2. Unlawfully,
3. Took the victim who is under the age of 18 years,
4. Out of the possession of her father.

[14] In order to prove the 2nd count of Rape the prosecution has to prove the following elements beyond reasonable doubt.

1. It was the accused,
2. Who had sexual intercourse with the victim or that he sexually abused the victim by invading her with his penis,
3. Penetrated the mouth of the victim to some extent, by inserting his penis,
4. Without her consent.

[15] In order to prove the 3rd Count of Rape the prosecution has to prove the following elements beyond reasonable doubt.

1. The accused had carnal knowledge of the complainant,
2. without her consent,
3. He knew or believed that she was not consenting or did not care if she was not consenting.

[16] 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.

[17] As far as the element of consent is concern, in our law, a child is under the age of 13 years is incapable of giving consent. In this case victim was 16 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.

[18] 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.

[19] Now let's look at the evidence led by the prosecution in this case.

[20] At present victim U.T is an undergraduate of Fiji National University. Last year she was a Form 6 student at Suva Grammar School. On 18/01/2013, she had gone to Suva City with her parents. After lunch, with her parents' permission, she had gone to Extreme Internet Cafe. While chatting on Facebook with her friends, Xavier Tikomailomai name popped up and she started chatting with him. He then came to internet cafe and was standing behind her. His name popped up again and he sent a message "I love you" with some roses. She then replied "I am not interested". After that both kept chatting for some time. She knew Xavier Tikomailomai through his brother. His brother

studied in the same school. He then came behind and requested her to accompany him to Flee Market. Trusting him she went with him to Flee Market and met two of his female cousins. From there he requested her to accompany him to "Marela House" to collect his marks sheet. Before going to "Marela House" Xavier Tikomailomai told her that he has to go to "Sunset Motel" to drop a plastic bag which he was carrying at that time. After meeting the receptionist both had gone to room 01. As she entered the room she had seen two ladies lying on the bed and a male sleeping on a mattress on the floor. Xavier Tikomailomai gave the plastic bag to the boy. She had seen two "Atlas" (alcoholic drink) and a juice bottle in the plastic. The boy then opened one of the "Atlas" can. Xavier Tikomailomai then insisted her to drink the same. Due to angry mood of Xavier Tikomailomai she consumed "Atlas". Thereafter, Xavier Tikomailomai went out to collect his marks sheet from "Marela House". But he came back very quickly. After his arrival the victim wanted to go home but was not allowed.

- [21] Xavier Tikomailomai then went to the bathroom to have a wash. At that time he was wearing only a towel. After he came out from the bathroom, he was standing between bath room and the toilet. He then called her to the room. Saying no, when the victim went to the wash room, Xavier Tikomailomai, pushed her inside the washroom and closed the door. He then put the victim on the floor, pulled down her dress, fondled her breasts and forcibly inserted his penis into her mouth. Thereafter he had inserted his penis in to her vagina. She could not resist as she was very weak at that time. He then threw a towel and went away laughing. She then stayed in the bathroom crying and washed off her blood and some watery fluid. Victim said that she never consented for vaginal sex or oral sex.
- [22] Xavier Tikomailomai then called her to go to town. While going, he told her to wait for a while until he returns from MacDonnell. Using this opportunity victim crossed the road, ran to MHCC and went to the bus stand. At the bus stand, though she met two of his friends, she did not tell anybody about the incident. She then got into the Cunningham bus and reach home after six o'clock. Though her parents inquired why she was late, she lied to them as she did not had the courage to tell them what had happened. On Sunday, after she came from church, she told her father about the incident. She did not tell her

mother as she is a sickly person. After reporting the matter to police, she was medically examined by a female doctor. She identified her birth certificate in open court and was marked as P1 by the prosecution. She identified the accused as Xavier Tikomailomai in open court.

[23] In the cross examination the victim denied that she went with the accused to MHCC to buy two cans of "Atlas". According to the victim, she doesn't know where is Totogo Police Station. Also she doesn't know where the bank, Wesley Church or Marela House. According to victim when the accused went out to collect his mark sheet, he locked the room door. She could not get help as the occupants of the room had gone out. Victim denied that she was seated on the toilet pan until accused had his shower. Victim said that she knew the accused since she was in Form 05 and she got to know him through Facebook.

[24] Isireli Tamanitoakula father of the victim corroborated what she said in her evidence.

[25] Dr. Elvira Ongbit had examined the victim at Medical Services Pacific Clinic. She has 15 years experience as a medical doctor. She has qualified in Obstetrics and Gynaecology in Philippines. She had examined the victim on 22/01/2013 at the Medical Services Pacific Clinic. In her history to doctor, victim said that Xavier requested her to accompany him to Sunset Motel to drop some stuff to his friends. While inside the room, Xavier forced her to drink beer, after locking the door. Inside the room, three Fijian girls and one Fijian boy drunk and sleeping but Xavier woke them up. Victim had tried to go out but was prevented by the Xavier and three Fijian girls. Fijian boy did not bother. When the victim went inside the toilet to relieve herself, Xavier followed her inside and locked the door. Then he had sex with her against her will. The doctor had noted fresh hymeneal laceration at 6 o'clock position. Her last menstrual period was on 16/01/2013. According to her findings are consistent with the history given by the victim. Medical report was marked as P2.

[26] CPL/1339 Marika Kaufuti had recorded the accused's Caution Interview Statement on 22/01/2013. The Caution Interview Statement of the accused was marked as P3.

[27] DC/4318 Viliame Lalaniqavoka was the charging officer. The accused was charged on 22/01/2013. The charge statement was marked as P4.

- [28] State counsel marking P1-P4 closed the case for the prosecution. Copies of all the exhibits are given to you.
- [29] When the defence was called and explained rights of the accused he elected to give evidence from witness box and called a witness.
- [30] Accused giving evidence corroborated the evidence of the victim with great extent. But he denied raping the victim. Though he requested for sex, she refused as she was having her monthly period. But both kissed each other. They had some chicken and ice cream in the room. When he came out from the motel to drop her, he had met a police officer by the name of Sakaraia. After speaking to him he then went to drop the victim at the bus stand. He denied that he forced her to drink "Atlas". He admits that he came to know the victim through Facebook in the name of Xavier Tikomailomai.
- [31] Sakaraia gave evidence on behalf of the accused. According to him on 18/01/2013, at about 4.00pm when he was going to Totogo Police Station he met the accused with a girl. The girl seemed to be normal.

Analysis of the Evidence

- [32] Madam and Gentlemen assessors, in this case the victim gave evidence first. According to her, the accused had oral and vaginal sex against her will. She clearly narrated the ordeal she encountered on 18/01/2013. She admitted that she went to Sunset Motel on the request of the accused. But she never consented for sex. She could not escape from the accused when he went to Ministry of Education as he had locked the door. She doesn't know where Totogo Police Station is situated. Also does not know where Wesley Church and the bank are situated. She only informed the incident to her father after she returned from church on Sunday. The doctor had noted fresh hymeneal laceration at 6 o'clock position in her vagina. In her history to the doctor, she had narrated the same. As assessors and judges of facts you have to consider her evidence with great care.
- [33] The accused corroborated the victim's evidence in great extent. Also agreed in his agreed facts and in his caution interview statement that he accompanied the victim to Sunset Motel. He also admitted that he asked for sex from the victim. The victim refused as she was having her monthly period. As per the medical

report her last menstrual period was on 16/01/2013. As Assessors and Judges of facts you have to consider this evidence very carefully.

- [34] Madam and gentlemen assessors, as I told you earlier, the caution interview statement of the accused person is in evidence. In his caution interview he admitted that he met the victim on 18/01/2013 at Extreme Internet Cafe and took her to Sunset Motel. He admits that he asked for sex but he denied raping the victim.
- [35] Madam and gentlemen assessors, in this case the accused opted to give evidence from the witness box and called a witness. That is his right. He has nothing to prove to you.
- [36] In this case the accused is charged for Abduction and Rape (two counts) Contrary to Sections 285, 207(1), 207(2) (a) and (c) of the Crimes Decree No: 44 of 2009. I have already explained to you about the charges and its ingredients.
- [37] You have heard all the prosecution 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.
- [38] 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.
- [39] Madam and gentlemen 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.
- [40] 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.

[41] 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.

[42] Any re-directions

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

P Kumararatnam
JUDGE

At Suva
06/03/2014

