

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 041 OF 2012

BETWEEN : **STATE**

AND : **WAISEA RAMASIMA**

Counsel : Mr. Nath with Ms. Elo for the State

: Mr. Fesaitu for the Accused

Date of Hearing : 7th, 8th, 9th, and 10th April, 2014

Date of Summing Up : 11th April, 2014

SUMMING UP

[With the consent of the prosecution and the defence, it was ordered to suppress the name and the identity of the complainant.]

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

Madam Assessor and Gentlemen Assessors:

- (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 between 1st April 2011 to the 8th October 2011. 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 had had carnal knowledge with her without her consent. The accused, on the other hand totally denied this allegation. 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 whose 'word' you are going to accept, either the complainant's or accused's, a proper assessment of the credibility and the truthfulness of the witnesses is extremely 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 assessor and gentlemen assessors, please recall the 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 around 18 years when she faced the alleged acts. You cannot get emotionally disturbed over her childhood of growing without the love and care of a mother since the age of 3 years, being a single mother at the age of 19 or any other bitter experiences that she referred to. The accused is a father of four children. He said that the relationship he had with the complainant would be still continuing had she not got pregnant and Ms. Luisa was chased away from his house. You cannot be sympathetic towards the accused over such comments or any other aspect. Any of these factors should not distract you from the main objective. The duty of you madam assessor and gentlemen assessors is to base your opinion on the evidence presented in court and nothing else. Please don't speculate or presume anything apart from the evidence what you saw and heard during the trial.

2. THE BURDEN OF PROOF

- (i) The accused is presumed to be innocent until proven guilty. Even though the accused is charged with the offence of 'Rape', his innocence is presumed until otherwise decided 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 charges 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 Director of Public Prosecutions, on behalf of the State has charged the accused for the following counts of Rape.

First Count

[Representative Count]

Statement of Offence

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

Particulars of Offence

WAISEA RAMASIMA between the 1st day and 30th day of April 2011 at Vuci Road, Nausori in the Central Division, had carnal knowledge of **E.V.** without her consent.

Second Count

[Representative Count]

Statement of Offence

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

Particulars of Offence

WASEA RAMASIMA between the 1st day and 30th day of June 2011 at Vuci Road, Nausori in the Central Division, had carnal knowledge of E.V. without her consent.

Third Count

Statement of Offence

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

Particulars of Offence

WASEA RAMASIMA on the 20th day of July 2011 at Vuci Road, Nausori in the Central Division, had carnal knowledge of E.V. without her consent.

Fourth Count

[Representative Count]

Statement of Offence

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

Particulars of Offence

WAISEA RAMASIMA between the 1st day and 30th day of September 2011 at Vuci Road, Nausori in the Central Division, had carnal knowledge of E.V. without her consent.

Fifth Count

Statement of Offence

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

Particulars of Offence

WAISEA RAMASIMA on the 7th day of October 2011 at Vuci Road, Nausori in the Central Division, had carnal knowledge of E.V. without her consent.

Sixth Count

Statement of Offence

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

Particulars of Offence

WAISEA RAMASIMA on the 8th day of October 2011 at Vuci Road, Nausori in the Central Division, had carnal knowledge of E.V. without her consent.

4. ELEMENTS OF THE OFFENCE

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

- The accused, (Waisea Ramasima in this instance)
- had the carnal knowledge with the complainant (Ms. E.V. in this instance)
- without her consent.

(ii) Madam assessor and gentlemen assessors, you are well aware by now that the accused denies the allegations of rape and said all what he did were done with the full consent of the complainant. Thus, all the above mentioned elements are not disputed by the accused except the element of consent. It is the duty of the prosecution to prove beyond reasonable doubt that the complainant did not consent to have sexual intercourse with the accused in any of the charged instances. The term 'carnal knowledge' can be used in the same context of 'sexual intercourse'. The moment accused admits that his penis 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. The accused in this instance, expressly admitted that he had sexual intercourse with the complainant on the days reflect in charges.

(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. E.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 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. E.V., was around 18 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) In respect of 1st, 2nd and 4th charges, I have to tell you that those are called as 'representative counts'. The prosecution says that the unconsensual sexual intercourse alleged to have repeated for several times during the specified times in the above charges. In this type of a situation, the prosecution is not expected to prove, each and every single incident of sexual intercourse beyond reasonable doubt alleged to have taken place. It is more than enough for them to prove you beyond reasonable doubt that one incident of sexual intercourse took place during the stipulated period. Simply, if you are 'sure' of one incident of unconsensual sexual intercourse of the accused with the complainant during that time, 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.
- (vi) There are six charges laid down by the prosecution against the accused. All these charges should be proved beyond reasonable doubt or to your fullest satisfaction by the prosecution. That means the prosecution has to produce evidence to satisfy you on all the charges separately and you have to assess the evidence separately for each charge. Thus, it is practically possible for you to reach different opinions on different charges.

5. THE CASE OF THE PROSECUTION

- (i) Ms. E.V., the complainant told court that she came from Kadavu to Viti Levu in 2009 to attend Vunimono High School. She identified the accused as her uncle, who is married to her father's sister. After coming to Viti Levu, Ms. E.V. and her sister had stayed with her uncle, (the accused) aunt and four cousins. She recalled April 2011 and said that one day when she was sleeping with the cousins, the accused came inside the room and called her to come out. She had been pulled to the accused's room and pushed to the bed. After taking her clothes off, she said that he inserted his penis into her vagina. Her request to stop this act had been in

vein. Ms. E.V. claimed that it was the first time that she had sexual intercourse with a male and she started bleeding after the said act. She went on to say that the accused told her that if she tells this incident to anybody he will not support for their education. Ms. E.V. admitted that she did not tell this incident to anyone as she was clueless where to go with her sister, in case that she had to leave the accused's house.

- (ii) Referring to the 2nd occasion Ms. E.V. said that the accused had sexual intercourse with her for two times somewhere in June 2011 and told her that he will leave them (Ms. E.V. and her sister) if she tells those incidents to anybody. She said, that the accused further told her that there will be nobody to look after them and their education if he leaves them alone.
- (iii) On 20th of July 2011, Ms. E.V. said that around 8pm the accused told her to prepare dinner early and go to sleep with the cousins as her aunty went to the wharf to pick some cargo. While everybody was sleeping, the accused had called her to his room once again and had sexual intercourse. She said that though she wanted to shout, the accused held her mouth tightly by his hand and reminded her the 'support' given by him to her and her sister.
- (iv) She referred to two similar incidents, having sexual intercourse with the accused, in September 2011 and on 7th of October 2011 when her aunty was away from home. She said that she could not escape from the accused and could not raise alarm as she always thought what the accused said about the support to their education. Ms. E.V. said the experiences were painful and she was ashamed to tell this to anybody as the culprit is her uncle.
- (v) Ms. E.V., told court that her last sexual intercourse with the accused took place on 8th of October 2011 whilst her aunty was still in Ba. She said, that even though she was looking for an opportunity to share her experiences with any of her relatives, she did not tell anything to her aunty (accused's wife) when she returned from Ba as there is a possibility for her to take her husband's side.

- (vi) On 19th of December 2011, according to Ms. E.V., Aunty Luisa had suspected that she is pregnant and questioned her to that effect. Ms. E.V. had then told her what was happening with the accused and then she had been taken to Aunty Luisa's place to stay. Later the matter had been reported to police by Ms. E.V., accompanied by aunty Luisa. Finally Ms. E.V. said that the same aunty Luisa brought her a piece of paper and asked her to sign it to withdraw the complaint against the accused. She had subsequently delivered a baby and the baby had been given to another uncle to be adopted.
- (vii) Doctor Susana testified next. She confirmed examining Ms. E.V. on 10th January 2012. Tendering the Medical Examination Form of Ms. E.V. as Prosecution Exhibit No. 1, Doctor Susana said that she concluded Ms. E.V. is pregnant for 14 – 16 weeks. The history given to the doctor says that Ms. E.V. was molested by her uncle for 10 months and Doctor Susana said her medical findings are consistent with the given history.
- (viii) Detective Constable 3390, Lasaro Qauqau, the Interviewing Officer of the accused was the next witness of the prosecution. He said that the interview was started around 9.30am and finished at 3.30pm with three (3) breaks in between. The witness said that all the legal rights were offered to the accused and no threats or promises or inducements made to him during the cautioned interview. He said that the accused 'looked good' during the interviewing process and gave logical and consistent answers on his own free will.
- (ix) Woman Detective Corporal 2997 Susana Yawa, the witnessing officer of the accused's caution interview basically confirmed what D/C Lasaro said in court in relation to the interviewing process. The Caution Interview Statement was tendered to court marked as Prosecution Exhibit No. 2.
- (x) Since the defence did not challenge the Charge Statement of the accused, it was tendered to court with mutual consent of the parties marked as Prosecution Exhibit No. 3. This is the summary of the case of the prosecution. Then the court decided to call for the defence from the accused.

6. THE DEFENCE CASE

- (i) The accused opted to give evidence from the witness box, under oath and subject to cross examination. It was informed that another witness will be called on his behalf. Mr. Waisea Ramasima, the accused, said that there is a problem in questions and answers of No. 49, 67, 68, 69, 70, 71 and 72 of his caution interview as some questions were not asked from him and some answers are not reflected of what he said to D/C Lasaro. He urged not to consider those questions and answers in the caution interview statement when making the final decision of court.
- (ii) The accused told court that by the way Ms. E.V. behaving with him he knew that 'she wanted something' and therefore he told her to come to his room in a night somewhere in April 2011. He said Ms. E.V. simply consented to have sexual intercourse with him and they had 'sex' many a times after this first night in April. He had not noticed any bleeding from Ms. E.V. after their first sexual encounter.
- (iii) The accused confirmed having sexual intercourse with Ms. E.V. on 20th July 2011, and 7th October 2011 when his wife went to the wharf and Ba respectively, but said that he is not sure of the dates alleged to have had sexual intercourse with Ms. E.V. in June 2011 as they had 'sex' for number of times during this period. The witness said he never used to have grog before the sexual intercourse and therefore it is wrong to say that he had sex with Ms. E.V. after having grog. He said every time he spoke to Ms. E.V. nicely and she followed him to the bed room without any fear. He said their 'sessions' won't last 3-4 minutes and those were 'that much fast'.
- (iv) Referring to the report lodged at the police, the accused said that it was Luisa who initiated this as he chased her out of the house over some differences. He said that after revealing the pregnancy of Ms. E.V., he sought forgiveness from the aunts and uncles in the traditional way by offering Kava and they accepted the same. He admitted him making Ms. E.V. pregnant but refused to accept the allegation of 'rape' as according to him, it was with her full consent they had

sexual intercourse every time. Finally, he said that unless Ms. E.V. got pregnant and Luisa was not chased out of his house, he would still be having the relationship with Ms. E.V.

- (v) Ms. Luisa Adi testified next on behalf of the defence. She is the elder sister of accused's wife and Ms. E.V.'s father. She said that she looked after Ms. E.V. since her mother's death at the age of 3 years. She admitted that the accused asked her to leave his house as he did not like the way she tried to 'discipline' the children. She said that she reported Ms. E.V.'s pregnancy to the police as she was 'really angry', over that. She had taken Ms. E.V. to Vuci and brought back to accused's house to seek forgiveness from his wife. The wife of the accused had accepted the fact that Ms. E.V. is carrying her husband's baby. She said that they did not want the matter to be reported to the police, but one Saula Balu, a nephew of hers advised to lodge a complaint. Referring to the withdrawal letters, Ms. Luisa said that she wrote two letters and signed by her and Ms. E.V. to be given to the police in view of withdrawing the complaint. Finally she said that when she questioned Ms. E.V., she said that the allegations against the accused about rape are not true and she implicated him because she was afraid of Ms. Luisa.

7. ANALYSIS

- (i) The matter to be decided in this instance is rather straight forward. The complainant says that she had to surrender to the accused in all the stipulated occasions in the charges due to the authority he had over her life and did not consent to perform the sexual activities. She said that when the accused, being her uncle and a guardian who contributed to her living expenses and education, told her that he will simply abandon her if she divulges his conduct to anybody, she had to think not only about her future, but her sister's as well, before going against him. Until Ms. Luisa, her aunt found her to be pregnant on 19th of December 2011, she had not told her experiences to any third party. She said that she did not want to tell this to accused's wife, though she is also an aunt of her, as she thought that she will take her husband's side. Doctor Susana told that Ms. E. V. told her that she was sexually molested by her uncle over a period of 10

months and by the time the doctor examined Ms. E. V., she was 14 to 16 weeks pregnant.

- (ii) On the other hand, the defense argued that for all this time Ms. E. V. did not tell these alleged forceful sexual activities to anybody as she was a willing participant to all the acts. The accused said that every time he called her to have sexual intercourse, she came to him without any fear and everything happened with the consent of both. The accused once said that their relationship would be still continuing had Ms. E. V. did not get pregnant. Now madam assessor and gentlemen assessors you have to decide whether Ms. E. V. did actually surrender to the authority of the accused and maintained the secrecy of their relationship or she was compelled to put the blame on the accused after her pregnancy was revealed. Or else, you have to consider the belatedness in the part of Ms. E. V. to report her grievances to somebody is justified by the prosecution to your fullest satisfaction or not.

- (iii) The attempt to withdraw the complaint by Ms. E. V. and Ms. Luisa attracted a considerable amount of attention during the trial. Ms. E. V. said that she was pressurized by Auntie Luisa to sign the withdrawal letter to excuse the accused from his acts. Ms. Luisa said in her evidence that Ms. E. V. told her that she implicated the accused when questioned as she was scared of Ms. Luisa and did not force Ms. E. V. to sign the withdrawal letter. You might have to consider two things in coming to a conclusion over this issue. Firstly, the accused did not dispute him having a sexual relationship with Ms. E. V. and the paternity of her child. Secondly, Ms. Luisa admitted that she reported this incident to the police as she got angry with the accused over Ms. E. V.'s pregnancy and later she did not want this matter to come to court and disrepute the family. Now it is left to you madam assessor and gentlemen assessors to decide what version of narrations that you are going to accept.

- (iv) You would recall that the accused in his evidence said that he does not agree with questions # 67, 68, 69, 70, 71 and 72 and the respective answers in his caution interview. At one point the accused said that he was not threatened by the police during the caution interview. But, later he said that he was threatened and he did

not agree with the usage of the term 'forcefully' by the police as that word is very dangerous. Referring to question 96 of his interview statement, he said that he answered the questions put to him on his own free will. There was another dispute over the 'language' used during the caution interview. It was suggested to the interviewing officer by the learned defense counsel that though the accused wanted to interview him in English, he was questioned in I- Taukei language and written in English. The accused, in his evidence said that though he wanted the interview to be conducted in I- Taukei, it was done in English.

- (v) There is no legal bar for you to accept and act upon the caution interview of the accused if you are sure of two aspects. First, it has to be proved beyond reasonable doubt by the prosecution that the accused had made it to the police voluntarily or by his own free will without any unfair treatment. Secondly, you have to be satisfied with the truthfulness of the contents of the said statement. Madam assessor and gentlemen assessors, if you think that the caution interview statement of the accused does meet this criteria, as opposed to his challenge for certain questions and answers, you can place your reliance on that. If not, you can disregard prosecution exhibit # 02.

8. SUMMARY

- (i) Remember that you do not have to believe the Accused's version to find him 'NOT GUILTY'. It is still the responsibility of the Prosecution to prove the case against the Accused beyond reasonable doubt. If you have any reasonable doubt in Prosecution's case you still have to find him 'NOT GUILTY' to the charges.
- (ii) Accused is presumed to be innocent until proven guilty and he need not to prove anything, inclusive of his innocence. If you accept the sequence of events narrated by the Prosecution and you are satisfied beyond reasonable doubt so that you are sure of the Accused's guilt, you must find him guilty as charged. If you do not accept the Prosecution version and you are not sure of the Accused's guilt due to reasonable doubts, you must find him 'NOT GUILTY' to the charges.

- (iii) Your possible opinions in this instance are 'GUILTY' or 'NOT GUILTY' to all the charges of Rape.
- (iv) You may now retire to consider your opinions. When you are ready, you may inform one of the court clerks so that I will re-convene the court.
- (v) Before you retire, I would like to ask the Counsel of both parties if there is anything that they wish me to say in addition or want me to re-direct you on any matter.

Janaka Bandara
Judge

At Suva

Office of the Director of Prosecution for State

Office of the Legal Aid Commission for Accused