

IN THE HIGH COURT OF FIJI
AT SUVA

CRIMINAL JURISDICTION
CRIMINAL CASE NO.: HAC 114 of 2012

BETWEEN: **THE STATE** **COMPLAINANT**

A N D: **MOHAMMED MUSTAFA HAKIM** **ACCUSED**

Counsel : Mr. Nath with Ms. W. Elo for the State
 : Mr. Fesaitu for the Accused

Hearing : 5th and 6th February 2014

Summing Up : 7th February 2014

SUMMING UP

1. ROLE OF THE JUDGE AND ASSESSORS.

Madam Assessor and Gentlemen Assessors:

- (i) You had the privilege of hearing all the evidence led in this trial, both by the Prosecution and the Defence. You have heard both the Learned Prosecutor and the Learned Defence Counsel making their closing addresses to you. The final step remaining in this case is the Summing Up address from me before you retire for your deliberations. In my Summing Up, I will direct you on matters of Law, which you must accept as correct and act upon it. You must apply the law as I direct you, as throughout the trial, "*the law*" has been my area of responsibility.

- (ii) In as much as I am entrusted with the responsibility of the area of "*Law*", Madam Assessor and Gentlemen Assessors, you hold the responsibility of the "*facts*". You are Judges of the facts. It is you who should decide whose evidence is to be relied upon, what evidence is to be accepted, what weight is to be put on a particular piece of evidence, etc.
- (iii) Therefore, if I express any particular view or opinion or if I appear to do so about the facts of this case in my summing up it is solely a matter for you to decide whether to accept what I say. You can either agree with my contention or ignore the same and formulate your own opinions. In the same vein, Counsel for the Prosecution and Defence have already addressed you on the facts, but once again, you need not adopt their views of the facts, unless you do agree with their contention and analysis. The Counsel have a right to make such comments when performing their roles and duties. If you strongly think that those comments and analysis do appeal to your common sense and judgment, you are free to use them as you see fit. But, when I direct you on the Law and legal principles, you have to accept that as true and accurate and should act upon that. In the same vein, I might overlook or omit certain evidence, which in your analysis, is important. You can formulate your own opinions by giving due consideration to any piece of evidence as you think necessary.
- (iv) You will take into account all of the evidence both oral and documentary. You can accept all of what a witness says or reject all or accept a portion of it and reject the rest. As judges of facts, you are the masters of what to accept from the evidence placed before this court. You will not at any time be asked to give reasons for your opinions. Your opinions need not be unanimous. But it would be desirable if you three can agree upon on the final decision. As the Judge who is presiding in this case, your opinions are not binding on me, but, I assure you that I will give your opinions full weight when I decide the final judgment of the Court.
- (v) It is of utmost importance that you must judge or reach to a decision of this case solely based on the evidence that you heard and seen in this court room and nothing else. There will be no more evidence. You may have read or seen about this case in the printed or electronic media or elsewhere before or

during the trial. You must totally disregard those. It is your duty to apply the law or the legal principles, which I am going to explain to you in a short while in respect of the evidence you have heard and seen within the four corners of this court house.

2. THE BURDEN OF PROOF

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

Statement of Offence

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

Particulars of Offence

MOHAMMED MUSTAFA HAKIM on the 10th day of March, 2012, at Mana Street, Narere in the Central Division had carnal knowledge of **YASMIN NISHA**, 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, (Mohammed Mustafa Hakim in this instance)
 - had carnal knowledge of Yasmin Nisha,
 - without her consent.
- (ii) 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.
- (iii) Carnal knowledge or sexual intercourse is proved when the penis of the Accused has penetrated the complainant's vagina. In the eyes of law, even a slightest penetration of the complainant's vagina by the penis of the Accused is sufficient to establish "*sexual intercourse*". Ejaculation is irrelevant and not essential in proving the "*penetration*". In this instance, 'penetration' is not a contested issue, as both parties have agreed on that.
- (iv) If the complainant agrees freely and voluntarily out of her own free will, she is said, to have '*consented*' to the alleged sexual act. But, if that '*consent*' was obtained by force or threat or intimidation or putting her in fear of bodily harm, that is not a "*free and voluntary*" consent on the part of the complainant.
- (v) At the same time, the Accused must know that the complainant was not consenting to have sex at the time in issue or that he was reckless in having sexual intercourse with her without knowing whether she was consenting to the act or not. The issue you have to answer in this instance is "**Did the Accused rape the complainant on 10th of March 2012?**"

5. **AGREED FACTS**

(i) The following facts are been agreed between the prosecution and the defence under the provisions of Section 135 of the Criminal Procedure Decree.

- It is agreed that Yasmin Nisha is the Complainant in this matter.
- It is agreed that the alleged incidents took place on the 10th of March 2012.
- It is agreed that Yasmin Nisha was residing at Mana Street at the time of the alleged incident.
- It is agreed that Yasmin Nisha was 40 years old at the time of the alleged incident.
- It is agreed that Yasmin Nisha is the acting Manager of New Zealand Overseas Trading Corporation, Suva Street,
- It is agreed that Yasmin Nisha has a 15 year old son in Form 4 attending Ahamadiya College from her first de-facto husband.
- It is agreed that Mohammed Mustafa Hakim was caution interviewed by D/CPL 1571 Daveta Tuiraviravi on the 12th of March 2012. There is no dispute between the State and the Defence about the authenticity, content and admissibility of his caution interview.
- It is agreed that Mohammed Mustafa Hakim was charged by D/Cpl 2914 Tautu on the 15th of March 2012. There is no dispute between the State and the Defence about the Authenticity, content and admissibility of the Charge Statement.

6. **CASE OF THE PROSECUTION**

- (i) The Prosecution called 4 witnesses to prove the allegation of Rape against the accused. Ms. Yasmin Nisha, the complainant, was the first to take the stand. She is a single mother who is having one son. She recalled 10th of March 2012 and said that she came home after closing the shop at 1.00pm. She had been residing with the accused in Narere, 8 miles during this period.
- (ii) There had been nobody at her apartment, apart from the accused. He had been complaining of a chest pain. She had applied some balm on his chest. Then he had slapped her face for no reason and told her that he is going to 'rape' her. Then he had brought a bottle of beer and forced her to drink it.
- (iii) Then he had started punching her head, chest, back and arms. She claimed that though she shouted for help, neighbours could not hear her as the accused opened the stereo very loudly. She identified Prosecution Exhibit No. 1 a piece of cloth/towel, and said it was used to tie her legs during the forceful sex.
- (iv) She said that she had to do oral sex as he was forcing her to do so and she was scared over his demands. The accused had touched her breasts, vagina and then had sex on various 'positions' she told in court. After the said sexual activities, her son had come home and she had behaved as if nothing had happened. Then she had reported the matter to the police on the following day.
- (v) Dr. Kitone Waqanisau, a medical practitioner in Gynecology and Obstetrics, was the 2nd witness of the prosecution. He described the injuries he noted on the body of the complainant, when he examined her on 12th March 2012 as reflected in the Medical Examination Form marked as Prosecution Exhibit No. 2. His conclusion was that the physical injuries are compatible with some force been applied to the complainant. But, he told that he cannot express any opinion over the 'rape' as he did not find any evidence to say so. He explained this further by telling that it is really difficult to see any such evidence from a woman when she is having 'regular sex'.

- (vi) Detective Constable 1877 Daveta Tuiraviravi was the Interviewing Officer of the accused. He said that he interviewed the accused under caution in English language after offering all the rights to the accused. D/C Daveta tendered the Cautioned Interview Statement of the accused as Prosecution Exhibit No. 3. Defence did not dispute the contents of the cautioned interview. D/C Daveta read question No. 53 of the Cautioned Interview Statement and the answer given by the accused to the same.
- (vii) Police Constable 2914 Tautu was the Charging Officer of the accused. PC/Tautu said that he offered all the rights to the accused and cautioned before the accused been charged. The charge statement was tendered to court marked as Prosecution Exhibit No. 4. The defence informed court that they are not challenging the contents of the charge statement as well.
- (viii) The prosecution closed its case after calling the above 4 witnesses. Then the court decided to call for the defence from the accused.

7. THE DEFENCE CASE

- (i) The Accused opted to come to the witness box and give evidence under oath, subject to cross examination. He said that he had been living together with the complainant for about 4 months by the time of the alleged incident. He claimed that it is he who met all the household expenses during this period. He went on to say that both of them had sexual intercourse for 2 – 3 times a day throughout this time.
- (ii) The accused did admit having sexual intercourse for 3 times with the complainant on 10th of March 2012. He described the way he had ‘sex’ with the complainant. Then, according to the accused, both of them had gone to the bathroom for a shower and the complainant had slipped and fallen on the bathroom floor.
- (iii) He said that he slapped the complainant once on her cheek as she was having a beer when he returned from the washroom before they had the narrated sexual encounter. He stressed that, since he is a devoted Muslim, he never consumes alcohol or smoke and therefore he got angry and slapped her once.

He assumes that the reason for the complainant to lodge a complaint against him is this 'slap'.

8. **ANALYSIS**

Madam assessor and gentlemen assessors.

- (i) The 'issue' that you have to deliberate is quite straight forward. The complainant says that she did not consent to have sexual intercourse with the accused on 10th of March 2012. The accused in his evidence expressly admitted that he had sexual intercourse with the complainant on the date in issue but that is with her full consent. The fact in 'issue' now is the 'consent' of the complainant. If you are fully satisfied that the complainant did not 'consent' to have sexual intercourse with the accused, you must return with an opinion of 'Guilty'. But, if you have a doubt, which has to be quite a reasonable one, whether she 'consented' or not to perform the sexual intercourse in issue, your opinion should be 'Not Guilty'.
- (ii) You would recall that the complainant said that the accused tied her legs with the towel (Exhibit No. 1) and told that he 'will rape her' on that day. She said after that she was forced to do oral sex and drink his sperms. Then she said that they had sex in '69' position and from the backside as well. But, she claimed that she had to do all these because she was scared of his threats. She had not received any assistance from neighbours though she was screaming as the stereo was put in high volume. When her son came home, she had behaved normally and reported the matter to the police on the following day. She claimed that she was threatened by the accused not to tell this 'incident' to anybody including her son or family members. You panel of assessors, now have to decide using your day to day practical life experience whether you are going to accept this version of the complainant or not.
- (iii) You heard the doctor telling that the injuries he observed on the complainant's body would have occurred within 72 hours of his inspection. The defence argues apart from the injuries sustained due to the fall and the slap, other injuries, such as several 'bruises' could have been self-inflicted. The complainant said that she was slapped on her face and punched on her head, chest, backside, arms and the stomach. Now you have to assess the

nature of the injuries of the complainant and decide whose explanation you are going to accept and believe.

- (iv) The medical evidence suggests that the 'injuries' could occur due to various reasons. You would see the doctor had observed several 'bruises'. A bruise is an injury in which the skin is intact with the released blood from the damaged vessels remains under surface. The doctor opined that those 'bruises' would have caused by a 'blunt' object. He agreed with the prosecution that though he did not see any positive remark for 'vaginal penetration' of the complainant, after analyzing the narrated history of 'forceful sex' by her and the existed injuries, he concluded that it would have been a 'forceful sexual intercourse'. On the other hand, the doctor did not over rule the possibility of sustaining most of these injuries if fallen on the floor. Therefore, it is now open to you madam assessor and gentlemen assessors, to assess these two versions and decide what attracts you most.

- (v) The prosecution suggested that the accused told about his 'slap' to the complainant for the first time in court almost after 2 years of the incident. The accused admitted that he did not mention this to the police when he was interviewed under caution as he did not 'assault' the complainant as questioned by the police. You may now decide whether the explanation of the accused over his 'slap' to the complainant is acceptable to you or not.

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 opinion.
- (v) Any re-directions or additions to what I said in my summing up Mr. Nath and Mr. Fesaitu?

Janaka Bandara
Judge

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