IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 160 of 2012

STATE

vs.

JOSEVA VUETI

Counsel: Mr. Y. Prasad and Ms. V. Prasad for State
Mr. W. Nainima and Mr. P. Tawake for Accused

Dates of Hearing: 13th July 2015

Date of Ruling: 14th July 2015

RULING

[ON CASE TO ANSWER]

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1. The accused is charged with the following offence:

Charge

Rape: Contrary to section 207 (1) and 207 (2) (a) of the Crimes Decree, No. 44 of 2009.

Particulars of Offence

JOSEVA VUETI between the 17th day of December 2011 and 18th day of December 2011 at Natogadravu Village, Nausori in the Central Division, had carnal knowledge of **SISILIA LEDUA** without her consent.

2. At the end of the prosecution case the court directed the Counsel for the prosecution and the defence to make submissions as to whether there is some evidence led by the prosecution on the element of penile penetration and therefore whether the accused has a case to answer.

3. Section 231 (1) of the Criminal Procedure Decree provides:-

> *"When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments which the prosecution or the defence may desire to submit, the court shall record a finding of not guilty if it considers that there is no evidence that the accused person (or any one of several accused) committed the offence."* *(Underlining mine)*

4. Referring to 'no evidence' mentioned in section 231 (1) of the Criminal Procedure Decree, in the case of **State v. Ratu Inoke Takiveikata**, Justice Goundar said:

> *"The phrase "no evidence" has been interpreted to mean that there is no evidence on an essential element of the charged offence (**Sisa Kalisoqo v State** Criminal Appeal No. 52 of 1984). If there is some evidence on the essential elements of the charged offence, the application for a no case to answer cannot succeed. The credibility, reliability and weight are matters for the assessors and not for the trial judge to consider at a no case to answer stage."*

5. One of the elements that the prosecution has to prove is that the accused had carnal knowledge of the victim. Carnal knowledge is the penetration of the vagina by the penis.

6. The defence counsel submitted that no evidence was led by the prosecution on carnal knowledge and no evidence was led on the penetration of the vagina with the penis.

7. However the State counsel submitted that there is a case to answer as the evidence of the complainant was that the accused forcefully had sexual

intercourse with her. State Counsel also submitted that the accused in his caution interview statement admitted having sex with the complainant.

8. The complainant in her evidence said that the accused who is her de-facto partner forcefully removed her clothes and had sex with her. She denied consenting to sex. In her evidence on the sexual act, the complainant never used the term 'sexual intercourse' or penetration of the penis but the word sex. Sex is a word with a general meaning that can mean any form of sex, not necessarily mean sexual intercourse or penetrating penis into the vagina. The state failed to elicit evidence on penile penetration from the complainant when she gave evidence in court, which is an important element to prove this charge of rape where the accused is charged for having carnal knowledge of the complainant. It is for the prosecution to adduce evidence that there was penile penetration. State counsel failed at least to ask the complainant what she meant by 'having sex' or what form of sexual act the accused committed. The Court cannot assume that there was penile penetration merely because the complainant said that the accused had sex with her and that the defence suggested that it was consensual sex.

9. The caution interview statement of the accused was produced in evidence with the agreement of both parties. In the caution interview statement the allegation put to the accused by the police officer was that he forcefully had sexual intercourse with the complainant by forcefully removing her clothes. However, in his caution interview statement to the police, the accused had not admitted that he had sexual intercourse or that he inserted his penis into her vagina. When the accused said in his statement that he had sex with the complainant, again the court cannot assume that it was penetration of the vagina with the penis.

10. The list of agreed facts is already with the assessors. Agreed fact No. 5 states;

> *'It is agreed that the accused charge statement dated 25/4/2012 be tendered by consent'*

11. In the charge statement which is disclosed, the accused admitted having sexual intercourse with the complainant. Therefore, the charge statement

being admitted in evidence there is evidence on penile penetration as the accused admitted having sexual intercourse.

12. It can be argued that the charge statement was not admitted in evidence by the prosecution. However, I am of the view that the agreed bundle of the documents, in this case the caution interview statement and the charge statement of the accused as agreed should be submitted to the assessors. Prosecution failed to tender this document in court to the assessors.

13. In this regard I wish to draw my attention to what is said in Archbold Criminal Pleading, Evidence and Practice 2009 at page 522;

> *"From time to time evidence of a formal nature, or clearly not capable of being the subject of dispute, which should have been adduced before the prosecution closed their case, is overlooked and submissions of no case to answer are accordingly made. The extent of the judge's discretion to allow the prosecution to repair the omission was examined in R. v. Francis, 91 Cr. App. R. 271, CA. The discretion is not limited to the two well-established exceptions.... There is a wider discretion, which is to be exercised judicially; it is more likely to be exercised in the prosecution's favour the earlier any application is made. It is a discretion which should be exercised outside the two established exceptions only on the rarest of occasions (at p. 275). For the facts in Francis, see post, 4-354.*
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> *In R. v. Munnery, 94 Cr. App. R. 164, CA, at the close of the case for the Crown, counsel for the appellant outlined the nature of the submission that he then proposed to make and the matter was adjourned to the next day. By the next morning the Crown had obtained evidence rectifying the alleged lacuna. Leave was given to re-open the prosecution case and adduce this evidence. Having reviewed the authorities, the Court of Appeal confirmed the existence of the general discretion to permit the Crown to re-open its case. A trial judge must be left with some degree of freedom to meet problems which might arise during a trial; but unless justice demands it, to*

depart substantially from the normal order of events is liable to cause confusion and hardship – the jurisdiction must be exercised with great caution; but it is justice that matters, both to the public as represented by the prosecution, as well as to the defence. As in Francis, the court pointed out that a defendant may be prejudiced if his advisers have identified a gap in the prosecution's evidence, and have drawn attention to it by a submission of no case, only to find that the judge gives leave to put it right; whereas if they had kept silent until the time to address the jury, the prosecution would have been too late, but the court held that no error could be detected in the way in which the judge had exercised the discretion."

14. No prejudice will be caused to the defence by submitting the charge statement at this stage to the assessors as it is an agreed document. The defence taken up by the accused is that he did not know that the complainant was sick. It is a matter for the assessors to decide what weight they would give to the evidence. Hence there is some evidence of sexual intercourse, as the accused has admitted that he had sexual intercourse in his charge statement.

15. Therefore I find that the accused has a case to answer.

Priyantha Fernando
Judge

<u>At Suva</u>
Office of the Director of Public Prosecutions for the State
Office of the Legal Aid Commission for Accused