IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 011 OF 2014LAB

STATE

vs

1. **URAIA CAUCAU**
2. **SERU TUKANA**

Counsels : **Ms. W. Elo for State**

Ms. S. Dunn for 1st Accused

Mr. M. Fesaitu for 2nd Accused

Hearing : **16 February, 2016**

Ruling : **16 February, 2016**

RULING ON NO CASE TO ANSWER

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1. The prosecution had closed it's case after calling the complainant herself (PW1).

2. The law, at this stage is Section 231 (1) and (2) of the Criminal Procedure Decree 2009, which reads as follows:

> ***(1) 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.***

(2) When the evidence of the witnesses for the prosecution has been concluded, the court shall, if it considers that there is evidence that the accused person (or any one or more of several accused persons) committed the offence, inform each such accused person of their right —

(a) to address the court, either personally or by his or her lawyer (if any); and

(b) to give evidence on his or her own behalf; or

(d) to call witnesses in his or her defence.

3. If there is direct or circumstantial evidence, touching on all elements of the offence, the weight and value of those evidence, are not for the court but the assessors to decide, there is a case to answer.

4. Both defence counsels had submitted that the prosecution had not touch on the 2nd and 3rd element of rape, while eliciting evidence from the complainant. Both said the prosecution failed to ask the complainant whether or not she consented to the two accuseds inserting their penis into her vagina at the material time. They also said, she failed to elicit evidence that both accuseds knew she was not consenting to sex at the material time. They asked for the case to be dismissed against their clients on the ground there is no case to answer.

5. Prosecution said there was a case to answer against both accuseds. She said, PW1 said both accuseds inserted their penis into her vagina at the material time (1st element of rape). She said, PW1 said she pushed Accused No.1 down when he attempted to insert his penis into her vagina. As such, she said there was a case to answer against Accused No.1. As for Accused No.2, it appeared she submitted nothing on the 2nd and 3rd element of rape, that is, the consent issue and that Accused 2 knew PW1 was not consenting at the time.

6. Given the above, I find there is a case to answer against Accused No.1 and he is called upon to make his defence. Options put to Accused 1.

7. As for Accused 2, I find there is no case to answer by him. The prosecution had established that Accused 2 penetrated PW1's vagina with his penis at the material time. However, the prosecution led no evidence on whether or not PW1 consented to the same and whether or not Accused 2 knew she was not consenting to sex, at the material time. The first element of rape was established (that is, penial penetration of PW1's vagina). The second element of rape (i.e. non-consent by PW1) and the 3rd element (i.e. knowledge by Accused 2 that PW1 was not

consenting to sex at the time) were not established by the prosecution, at the close of their case. The prosecution therefore had not made out a prima facie case against Accused No.2 and he is found not guilty as charged and acquitted accordingly.

Salesi Temo

JUDGE

Solicitor for the State : Office of the Director of Public Prosecution, Labasa.
Solicitor for the Accuseds : Office of the Legal Aid Commission, Labasa