

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No. HAC 53 of 2014

STATE

V

KEN SINGH

Counsel: Ms W. Elo for the State
Mr A. Paka (L.A.C.) for the accused

Date of Trial : 11 April 2016
Date of Summing Up : 13 April 2016

SUMMING UP

- [1] Madam and Gentlemen assessors. It is now my duty to sum up to you. In doing so, I will direct you on matters of law which you must accept and act on. You must apply the law as I direct you in this case.
- [2] As far as the facts of this case are concerned, what evidence to accept, what weight to put on certain evidence, which witnesses are reliable, these are matters entirely for you to decide for yourselves. So if I express any opinion on the facts, or if I appear to do so it is entirely a matter for you whether you accept what I say or form your own opinions. In other words you are masters and the judges of facts.

- [3] Counsel for the prosecution and the defence had made submissions to you about how you should find the facts of this case. They have the right to make these comments because it is part of their duties as counsel. However you are not bound by what counsel for either side has told you about the facts of the case. If you think that their comments appeal to your common sense and judgment, you may use them as you think fit. You are the representatives of the community in this trial and it is for you to decide which version of the evidence to accept or reject.
- [4] You will not be asked to give reasons for your opinions, but merely your opinions themselves, and you need not be unanimous although it would be desirable if you could agree on them. Your opinions are not binding on me and I can assure you that I will give them great weight when I come to deliver my judgment.
- [5] On the issue of proof, I must direct you as a matter of law that the onus or burden of proof lies on the prosecution to prove the case against the accused. The burden remains on the prosecution throughout the trial and never shifts. There is no obligation upon the accused to prove his innocence. Under our system of criminal justice an accused person is presumed to be innocent until he is proved guilty.
- [6] The standard of proof is one of proof beyond reasonable doubt. This means that before you can find the accused guilty of the offence charged, you must be satisfied so that you are sure of his guilt. If you have a reasonable doubt about the guilt of the accused, then it is your duty to express an opinion that the accused is not guilty. It is only if you are satisfied so that you

feel sure of the guilt of the accused that you can express an opinion that he is guilty.

- [7] Your opinions must be based only on the evidence you have heard in the courtroom and upon nothing else.
- [8] The accused faces one charge of rape. In our law and for the purposes of this trial rape is committed when a person penetrates the vagina of another with a penis, a finger or any object and where the person doing that does not have the consent of the victim or is reckless to whether she was consenting or not.
- [9] Bear in mind that the State has charged the accused with one count of rape by finger and that is how Ms. Elo opened her case. As a result you are to judge this case only on evidence of finger or digital penetration. You must ignore the evidence Maria gave about penile penetration; the accused is not charged with that.
- [10] The main witness for the prosecution was Molly (not her real name) who was 15 at the time. She was staying with her aunt and the accused who is her aunt's husband.
- [11] At midday on the 6th June 2014 she was alone at home and did the washing. Her uncle the accused, then came back from the farm and she went to lie down. Whether she went to sleep or not is not clear; that will be a factual issue for you to decide.
- [12] The accused came into the room, looking for a T-shirt she thought. He drew the curtains and forced her to take her clothes off. He kissed her and touched her body. He touched her private parts and he "poked inside her vagina". Molly says she was frightened. They sat together on the bed and he told her not

to tell anybody. However she did go to the turaga-ni-koro and told him everything. The turaga took her to her aunty and they went to report to the Police. She was subsequently examined by a medical officer at hospital.

- [13] In cross-examination there was a much explored issue as to whether she was asleep the whole time or not. It is something for you to decide. She denied massaging the accused and she denied consenting to the activity.
- [14] She also told defence counsel that the accused only touched the outside of her vagina, contradicting her earlier testimony. Again this is a factual issue for you to decide.
- [15] Again I remind you Madam and Gentlemen to ignore any references to penile penetration. He is not charged with that.
- [16] The second witness for the prosecution was the lady Doctor who examined Molly the day after the incident. The good Doctor told us that apart from bite marks to both breasts, she was able to make a professional finding that there had been digital penetration but that her hymen was still intact. No other injuries were noted.
- [17] In cross-examination she was able to say that she could specify digital penetration by noting a slight enlargement of the vagina and opined that it was so slight it would have been the 5th finger. She agreed that she did not note the finding of enlargement given time constraints at the time.
- [18] Well Members of the Panel, that was the evidence for the State. You heard me tell the accused what his rights in defence are and he elected to remain silent. That is his right and you must

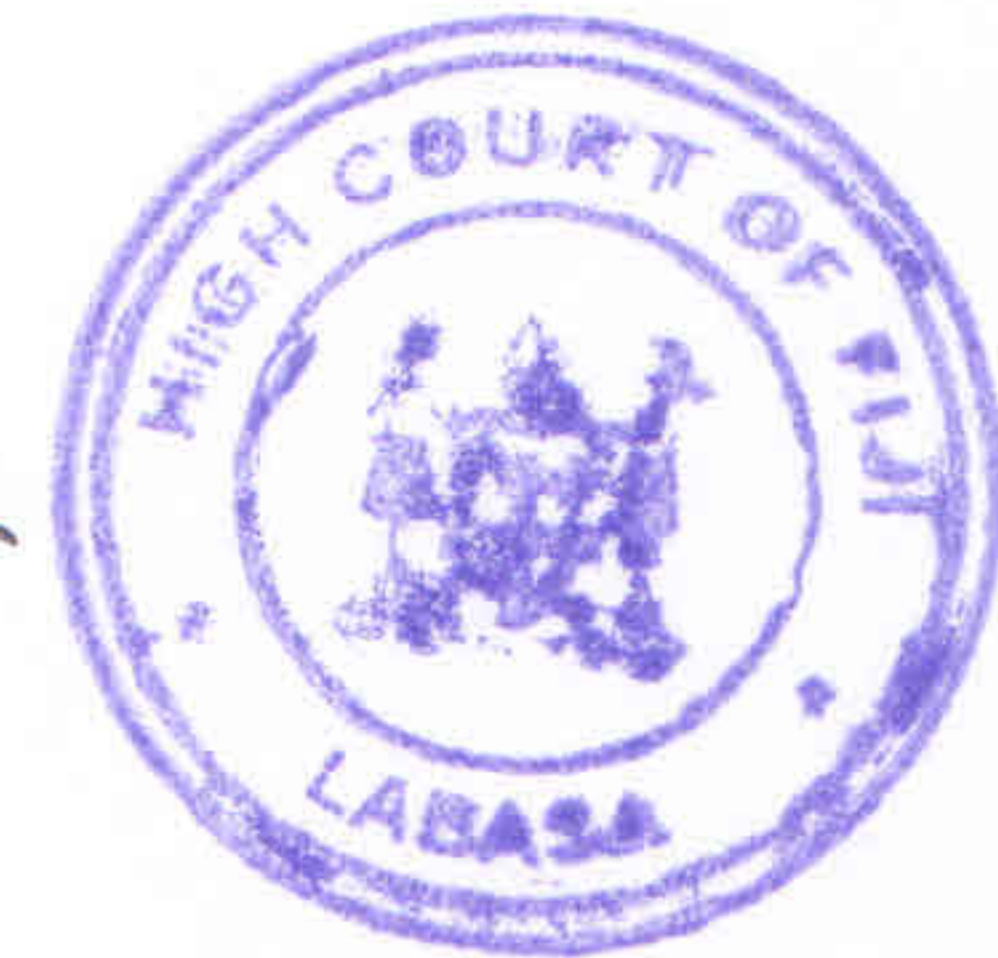
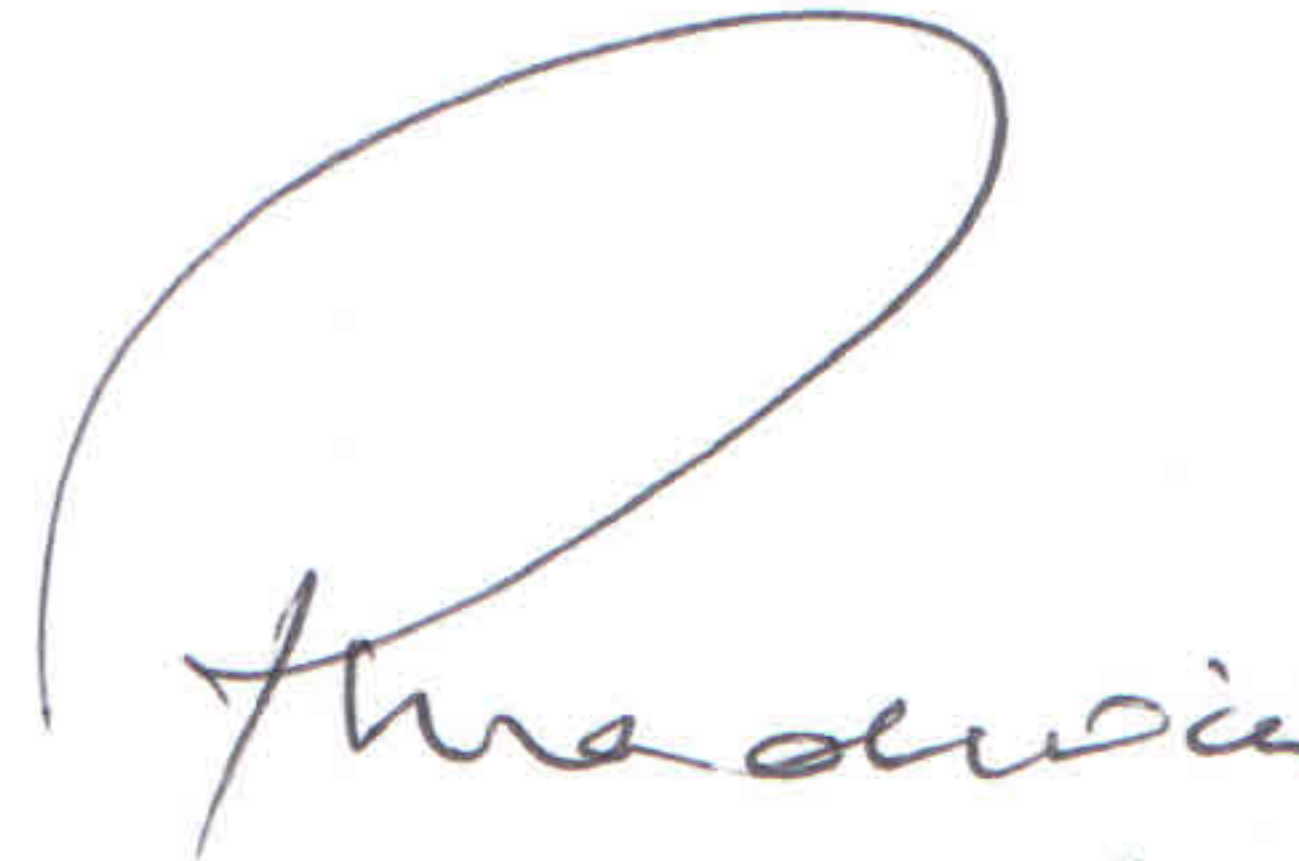
not think any less of the case against him just because he did not give evidence. The accused has nothing to prove. It is the State that must prove to you beyond reasonable doubt and so that you are sure that he committed this offence of digital rape.

[19] Well ladies and gentlemen, that is all I wish to say about the law and the evidence. It is now time for you to retire and consider your verdict. You may take as long as you wish. When you return you will be asked for your opinion on whether he is guilty or not guilty. You will not be asked for reasons for your opinion. It will be best if you can all be agreed but that is not strictly necessary if you cannot be.

[20] Please let a member of my staff know when you are ready and I will reconvene the Court.

[21] You may leave us now but just before you do I ask Counsel if they wish me to add or alter anything in this Summing Up.

[22] Counsel?



P.K. Madigan

Judge

At Labasa

13 April, 2016