

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No. HAC 9 of 2015

STATE

V

ROPATE DULUKOBAU

Counsels: Ms. A. Vavadakua for the State
Mr. I. Rakaria (L.A.C.) for the Accused.

Date of Trial : 19 September 2016
Date of Summing Up : 20 September 2016

SUMMING UP

[1] Ladies and Sir 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 have 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 of 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 or she 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 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] I have to direct you that in our law a man can rape his wife. It is not the case in some other countries and in some other cultures, but in Fiji NO means NO whether it is said by a girlfriend, a wife or even a sex worker. A woman has the right to say no.
- [10] The accused is also charged with one count of assault with intent to commit rape. This crime is self-explanatory; it is committed when the accused unlawfully assaults another with the intention to cower the victim into submitting to his invasion of her.
- [11] Now there is no dispute in this case that there was an act of sexual intercourse in the evening of the 2nd February last year but that is where agreement stops. She says that the accused assaulted her and forced himself on to her; he says that this

was but another act of sexual intercourse that the two were having in the course of a relationship as husband and wife.

- [12] That is all I wish to say about the Law at this point and I am now going on then summarise the evidence, first the Prosecution evidence and then the Defence evidence.
- [13] The evidence was heard yesterday in its entirety and I am sure it is fresh in your minds. It is however my judicial duty to summarise the evidence for you before you make your deliberations. I remind you that if I appear to stress some part of the evidence that you do not think is important then you do not have to agree with me and similarly if I appear to have omitted a part of the evidence that you think is important then you will give it the weight that you think fit.
- [14] The Doctor told us that he had examined the wife some 5 days after the incident was said to have happened. He found no injuries or bruises on her but on hearing the patient complain of neck pain he did note that the neck was restricted in its movement and that it was painful to the touch.
- [15] The wife Wainikiti told us of her version of events on the night of the 2nd/3rd February 2015. There was a women's welfare meeting being held in the village hall. Both husband and wife went to the meeting but only the wife entered, the husband going to an adjoining house to drink grog. After the meeting the wife went to her Aunt's house in the village before going home to sleep at around midnight. The husband returned home and ate his dinner before coming into the bedroom. He asked if they could have sex. She said no because she was tired and wanted to go to sleep. He then undressed her and punched her on the neck. She was scared. He then forced himself upon her invading her with his penis. She then saw that the youngest child, a 3

year old was watching them so she told her husband to get her back to sleep. The next morning they were not on good terms and the wife did not give any indication that she was going to report the matter because she was afraid of what he might do to her.

[16] She eventually reported the matter to the Seaqaqa Police 5 days later when she had gathered enough money to pay her fare.

[17] Well, that was the end of the prosecution case.

[18] You heard me explain to the accused what his rights in defence are and he elected to give sworn evidence. Now I must direct you that in giving evidence the accused does not have to prove anything. The fact that he gives evidence does not relieve the State from proving their case to you so that you are sure.

[19] Even if you don't believe a word he says does not make him guilty if the State have not proved their case beyond reasonable doubt.

[20] Ropate told us that they have been married for 11 years with 4 children.

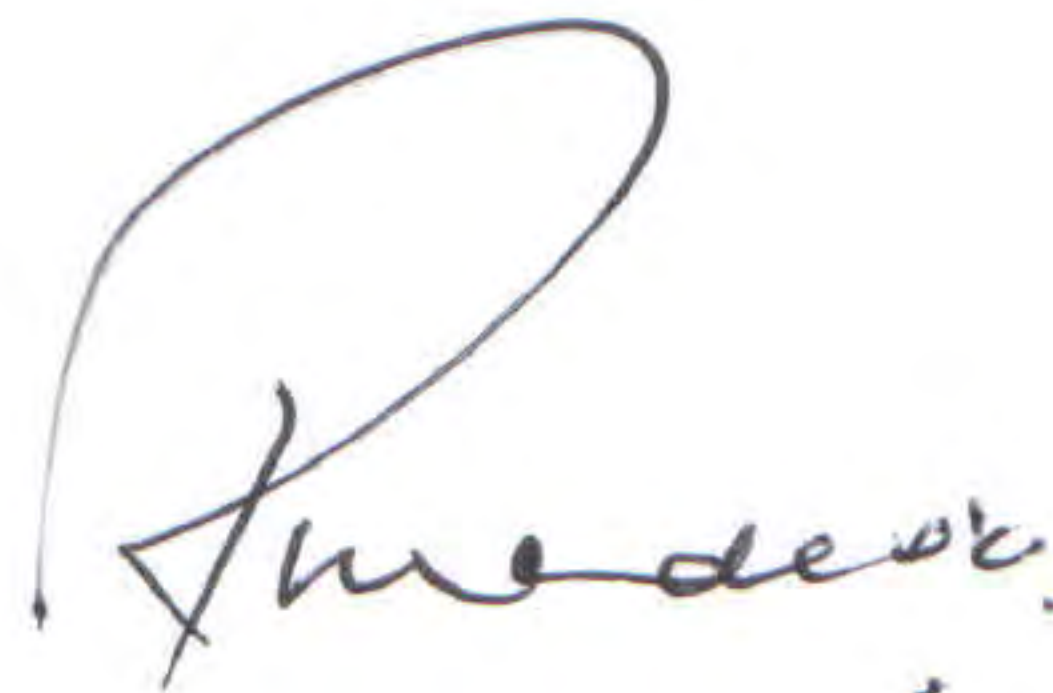
[21] He said he did intend to go to the meeting in the hall on February the second but the hall was full so he went to the house next door to see if he could hear what was going on in the meeting. The other men there were drinking grog and they forced him to drink it too. By the time he finished there the meeting was over so he went home. The first thing he did was to have a meal. He then washed his hands and went into the bedroom. He lay on the mattress on the floor next to his wife and they talked about the meeting. He asked her if they could have sex and she said yes. She undressed herself and they had sex. The youngest child, Julie, cried and the wife told him to get

her back to sleep. He did that then he returned to the mattress and they continued to have sex. When he had finished he got up and went to the bathroom to wash but before he reached the bathroom she stopped him and asked him to come back for more. They had further sex until she was satisfied and he then washed and went to sleep. He denied both charges. He never punched her. He loves her and she definitely gave consent to the sexual acts that night.

[22] Well Ladies and Sir, that was the end of all the evidence. The issue for you to decide is simple. There is no doubt that there was an act of sexual intercourse that night with full penetration. That satisfies part of the legal requirements for rape but the outstanding issue is the issue of consent. She says no consent. He says consent. It is for you to decide if the State has made you sure she was raped. If you think not or you are not sure then you must find him not guilty.

[23] You don't have to be all agreed on your opinions, but it would be desirable if you can. Please let a member of my staff know when you are ready and I will reconvene the Court. Just before you retire I am going to ask counsel if there is anything they may wish me to add to or change in this summing up.

[24] Counsel?



P. K. Madigan
Judge



At Labasa

20 September 2016