

IN THE HIGH COURT OF FIJI
AT LABASA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 08 OF 2017

BETWEEN: **THE STATE**

AND: **MALAKI TUVALU**

Counsel: **Mr R Kumar for the State**
 Mr V Tuicolo for the Accused

Date of Hearings: **13 and 14 March 2018**

Date of Summing Up: **15 March 2018**

Date of Judgment **: 16 March 2018**

JUDGMENT

- [1] The Accused is charged with one count of digital rape contrary to sections 207(1) and (2) (b) of the Crimes Act 2009. The charge alleged that the Accused penetrated the vagina of Tealiki Vovo with his finger, without her consent. After a two-day trial, two assessors found the Accused not guilty while one assessor found him guilty. I direct myself in accordance with my summing up. Under our criminal justice system, the final decision on the facts rests with the trial judge and not the assessors. The assessors only aid the trial judge to arrive at the verdict of the Court by expressing opinions.

- [2] The defence case is one of denial of the charge. The Accused has elected to remain silent. The defence offered no evidence. I draw no adverse inference against the Accused for remaining silent or for not offering any evidence. The Accused carries no burden to prove anything. The prosecution carries the burden to establish the Accused's guilt beyond a reasonable doubt.
- [3] The resolution of the charge against the Accused depends on whether the complainant was a truthful and reliable witness. Her evidence was that she woke up in the middle of the night with a pain in her vagina. The Accused was on top of her. She felt his finger was inside her vagina. She pushed him away. He spoke to her. She recognised the Accused's voice. She had raised him since he was a child. She got off and left the bedroom. She did not return to the bedroom. She went to her friend, Ms Paki's home. Ms Paki observed that the complainant was distressed. The complainant slept at Ms Paki's home. The following morning the complainant told her friend that she did not like what the Accused did to her but she did not give details of the incident. Two days later, the complainant was medically examined. An abrasion was found on the vaginal wall.
- [4] The identification of the Accused is not an issue. The issue is whether the alleged crime was committed. When the complainant gave evidence, she struck me as an honest and reliable witness. There is consistency in her conduct. She left her home in the middle of the night in a distressed condition to her friend's home and remained there until the following morning. I feel sure that she was genuinely distressed as a result of the sexual act that had been committed on her. Her reluctance to immediately report the alleged sexual act is understandable. She could not come to terms that she was violated by someone she trusted like a son.
- [5] I accept the complainant is telling the truth when she said she woke up with a pain in her vagina and found the Accused on top of her in a compromising position. I accept her evidence that she recognised the Accused by his voice when he spoke to her. I feel sure that the only reasonable inference is that the Accused penetrated the complainant's vagina with his finger. I feel sure that the complainant had not consented to the sexual penetration because she was asleep at the time and that the Accused knew the complainant had not consented.

[6] I feel sure of the Accused's guilt on the charge. Accordingly, the Accused is convicted of rape as charged.



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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for State

Office of the Director of Legal Aid Commission for Accused