

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 55 of 2014**

**STATE**

**V**

**SAMUELA NAVUNISARAVI**

**Counsel** : Mr. S. Seruvatu with Ms. S. Kiran for the State.  
: Ms. P. Chand with Mr. R. Goundar for the  
Accused.

**Dates of Hearing** : 22 to 25, 28 August, 2017.  
**Closing Speeches** : 29 August, 2017.  
**Date of Summing Up** : 30 August, 2017.

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**SUMMING UP**

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*(The names of the complainants are suppressed they will be referred to as “AB” also known as “EAB” and “GM” respectively).*

Madam and Gentlemen Assessors

1. It is now my duty to sum up this case to you.

**ROLE OF JUDGE AND ASSESSORS**

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as

reliable, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused is guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case.
6. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
7. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.
8. During the closing speeches the learned Defence Counsel told you that both the complainants were caught cheating during an exam by the accused and therefore the allegations against him. I direct you in accordance with the evidence that at no time were both the complainants caught cheating during any exam. According to the accused they were caught cheating in scoring which is a type of self-assessment undertaken

by the students in the class. You are to disregard the assertion that the complainants were caught cheating during any exam.

**BURDEN OF PROOF AND STANDARD OF PROOF**

9. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on 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 proven guilty.
10. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
11. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
12. You must decide the facts without prejudice or sympathy to either the accused or the complainants. Your duty is to find the facts based on the evidence without fear, favour or ill will.
13. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

**INFORMATION**

14. The accused is charged with two counts of rape involving two different complainants. You must consider each count separately and you must not assume that because the accused is guilty of one count that he must be guilty of the other. (A copy of the amended information is with you).

**COUNT ONE**

**REPRESENTATIVE COUNT**

*Statement of Offence*

**RAPE:** Contrary to Section 149 and section 150 of the Penal Code, Cap 17.

*Particulars of Offence*

**SAMUELA NAVUNISARAVI** between the 1<sup>st</sup> day of October, 2006 and the 30<sup>th</sup> day of November, 2006 at Nadi, in the Western Division, had carnal knowledge of “**AB**” also known as “**EAB**” an 8 year old child without her consent.

**COUNT TWO**

**REPRESENTATIVE COUNT**

*Statement of Offence*

**RAPE:** Contrary to Section 149 and section 150 of the Penal Code, Cap 17.

*Particulars of Offence*

**SAMUELA NAVUNISARAVI** between the 1<sup>st</sup> day of October, 2006 and the 30<sup>th</sup> day of November, 2006 at Nadi, in the Western Division, had carnal knowledge of “**GM**” an 8 year old child, without her consent.

15. You will note that both counts are representative counts which covers a period between the 1<sup>st</sup> day of October, 2006 and the 30<sup>th</sup> day of November, 2006. By a representative count the prosecution alleges that several offences as described in the amended information were

committed during the period specified in the counts. The law says that it shall be sufficient for the prosecution to prove that between the specified dates in the counts at least one offence was committed.

16. To prove counts one and two the prosecution must prove the following elements of the offence of rape beyond reasonable doubt:
  - (a) The accused;
  - (b) Had carnal knowledge of both the complainants **“AB”** and **“GM”**;
  - (c) Without their consent;
  - (d) The accused knew or believed that the complainants **“AB”** and **“GM”** were not consenting or didn't care if they were not consenting at the time.
17. Carnal knowledge is the penetration of the vagina by the penis commonly known as sexual intercourse. It is not necessary for the prosecution to prove that there was ejaculation or full penetration of the vagina by the penis.
18. The slightest of penetration of both the complainants' vagina by the accused's penis is sufficient to satisfy the act of penetration.

#### **AMENDED ADMITTED FACTS**

19. In this trial the prosecution and defence have agreed to certain facts which have been made available to you titled as amended admitted facts.
20. The admitted facts are as follows:
  - “1. *In the year 2006, Mr. Samuela Navunisaravi was 28 years old and resided at Quanville Estate, Nasoso, Nadi.*
  2. *In the year 2006, Mr. Samuela Navunisaravi was teaching at Nadi Christian Community School at Nasoso, Nadi.*

3. *The first named victim in this case is “AB” and is also known as “EAB”.*
4. *In the year 2006, the first named victim was 8 years old and was a class 3 student of Nadi Christian Community School at Nasoso, Nadi.*
5. *The second named victim in this case is “GM”.*
6. *In the year 2006, the second victim was 8 years old and was a class 3 student of Nadi Christian Community School at Nasoso, Nadi.*
7. *In the year 2006, Mr. Samuela Navunisaravi was the class teacher of the first and second named victim.*

**Documents to be tendered by consent:**

8. *Medical report of “AB”.*
9. *Medical report of “GM”.*
10. *Birth certificate of “AB”.*
11. *Birth certificate “GM”.*
21. From the admitted facts you will have no problems in accepting the above as proven beyond reasonable doubt and you can rely on it.
22. The first element of the offence is concerned with the identity of the person who allegedly committed the offences.
23. The second element is the act of penetration of both the complainants vagina by the accused with his penis.
24. In respect of the third element that is of consent, you should bear in mind that consent means to agree freely and voluntarily and out of her own free will. If consent was obtained by force, threat, intimidation or

fear of bodily harm or by exercise of authority, then that consent is no consent at all.

25. In this case both the complainants were 8 years of age at the time of the alleged offending and the accused was their teacher both the complainants were children and not adults. You must decide whether both the complainants had the capacity to give consent to sexual intercourse. You decide whether "AB" and "GM" had sufficient understanding and knowledge to decide whether to consent or resist at the age of 8 years. If you decide that they did not have the capacity to consent as mentioned above, the absence of consent need not be proved by the prosecution. However, if you decide that they had the capacity to consent then you decide whether the element of absence of consent is proved in evidence beyond reasonable doubt.
26. If you are satisfied that the accused had penetrated the vagina of both the complainants with his penis and they had not consented to any of the acts of the accused, you are then required to consider the last element of the offence. That is whether the accused knew or believed that both the complainants were not consenting or did not care if they were not consenting at the time.
27. You will have to look at the conduct of both the complainants and the accused at the time and the surrounding circumstances to decide this issue.
28. In this trial the accused has denied all the elements of the offences of rape he has been charged with. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had penetrated the vagina of both the complainants with his penis without their consent and the accused knew or believed that both complainants were not consenting or didn't care if they were not consenting at the time.
29. If you are satisfied beyond reasonable doubt that the prosecution has proved beyond reasonable doubt that the accused had inserted his penis

into both the complainants vagina without their consent then you must find the accused guilty of the offences of rape. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the two offences of rape, then you must find the accused not guilty of either or both the offences.

30. As a matter of law, I have to direct you that offences of sexual nature as in this case do not require the evidence of both the complainants to be corroborated. This means if you are satisfied with the evidence given by both the complainants and accept it as reliable and truthful you are not required to look for any other evidence to support the account given by both the complainants.
31. I will now remind you of the prosecution and defence cases. In doing so it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your minds. I will refresh your memory and summarize the salient features. If I do not mention a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your opinion in this case.

### **PROSECUTION CASE**

32. The prosecution called four (4) witnesses to prove its case against the accused.
33. The first witness for the prosecution was the complainant "GM". In the year 2006 she was 8 years of age and a class 3 student at a primary school in Nadi. The witness is now 19 years of age.
34. The accused was her teacher at that time. In the classroom there were cubicles when seated in the cubicles one could not see outside or be seen from outside. One cubicle at the end of the classroom was always empty.



35. There was another classroom next door which was separated by a sliding door. The witness recalled that between 1<sup>st</sup> October 2006 and 30<sup>th</sup> November, 2006 it was the fourth term of the school.
36. The accused took the witness to the last cubicle she had some errors in her book. The accused made the complainant sit on his lap and he opened her legs with his legs thereby spreading her legs apart. The accused would ask her questions from her book and if the answer given was not correct then the accused would pinch the side of her vagina.
37. Whilst "GM" would be sitting on the lap of the accused facing the other side he would pull the side of her underwear and insert his penis inside her vagina. The accused would always wear a sulu.
38. According to this complainant at the time the accused inserted his penis into her vagina she did not do anything because she did not know what was going on. When the accused inserted his penis into her vagina the complainant felt his penis and it was painful. This happened more than once.
39. The complainant stated that she did not consent to what the accused had done to her. She did not tell anyone about what the accused was doing to her because she didn't know at that time what he was doing was right or wrong. The other complainant namely "AB" found out what the accused was doing to her. The complainant does not know who reported the matter to the Police, however, she was medically examined at the Nadi Hospital.
40. In cross examination the complainant agreed that the sides of the cubicles were arch shaped which were less than one meter in height when one stands up in the cubicle he or she could see the other students in the other classroom. The cubicle had a table which could fit one

student and it was possible to hear noise from outside the cubicle. Furthermore the complainant stated if the students in the classroom rocked their chair back they could see the other students.

41. The complainant agreed that the teacher in the other classroom could see the last cubicle. Anything happening in the last cubicle can be seen by the other students if they moved their chairs back. The complainant clarified that when she said the accused used to pinch her vagina meant he would squeeze the side of her vagina by putting his hand inside her dress.
42. The complainant agreed that it was not possible to fit two people into the small cubicle. The accused would spread his legs apart while she is seated on his lap thereby spreading her legs as well. He would slightly move his chair back that is how two people could fit in the cubicle.
43. The complainant agreed if the accused had made her sit on his lap the other teacher would be able to see that. She also agreed if the accused had done something to her she would have been uncomfortable and would have made some sort of noise. Any noise made by the witness would have been heard by the others.
44. The complainant maintained that the accused would pull her underwear first and then pinch the side of her vagina by putting his hand underneath her dress.
45. When the accused inserted his penis into her vagina it had penetrated halfway it was painful but she did not cry out since she was biting her lips the whole time. The accused was a strict teacher who was not liked by a lot of the students. The complainant agreed that if what she had told the court did happen than it would have been seen by the other

teacher or the other students. To the suggestion that the incidents did not happen the complainant maintained that it did happen.

46. The second prosecution witness was complainant "AB" in the year 2006 she was 8 years of age, a class 3 student at a primary school in Nadi. The witness is now 19 years of age.
47. The accused was her teacher. In the year 2006 there were 7 to 8 students in her class with 10 cubicles, 3 of which were not occupied. The cubicles had a table each which was fixed since the cubicles had walls on both sides while seated one could not see outside.
48. Between 1<sup>st</sup> October, 2006 and 30<sup>th</sup> November, 2006 the accused would take the complainant to the last cubicle and make her sit on his lap with the book in front of them. The accused would ask questions and if she did not answer correctly he would pinch her private part meaning her vagina. According to "AB" the accused would pinch on the top layer of her vagina.
49. After doing this, the accused would ask another question he would try to shift her panty to one side since her panty was too tight he would pull it down to her ankle. Whilst sitting on his lap she would be facing the other side. The accused would rock her back and forth by holding her waist with his hands whilst rocking she could feel his penis on the top layer of her vagina and it would be on her vagina. The complainant would feel scared but she did not say anything. This happened more than once.
50. The complainant did not agree to what the accused had done to her. The other complainant's father had reported the matter to the Police and she was immediately examined by a Doctor at the Nadi Hospital.

51. In cross examination the witness agreed that the cubicle had space for one student and that the other complainant occupied the first cubicle. The witness stated that the accused would put his hand in front of her and ask questions whilst she would be seated on his lap and then pinch her private part. By pinching her private part she meant the accused was squeezing her clitoris by moving her panty to the side. The complainant agreed that whilst the accused was rocking her back and forth she could feel his penis on the top layer of her vagina which was her clitoris. According to the witness clitoris was in the middle of the vagina.
52. The witness agreed that there was no penetration of her vagina because she only felt his penis in the top layer of her vagina. However, she maintained that whatever she told the court did happen.

Madam and Gentlemen Assessors

53. Victims of sexual offences may react in different ways to what they may have gone through. As members of the community, it is for you to decide whether it was acceptable for both the complainants of 8 years to not complain or resist what was been done to them. Some in distress or anger may complain to the first person they see. Some due to fear, shame or shock or confusion, may not complain for some time or may not complain at all. A victim's reluctance to complain in full as to what had happened could be due to shame or shyness when talking about matters of sexual nature.
54. The third prosecution witness was Dr. Elvira Ongbit who graduated with a Doctor of Medicine Degree from the Philippines in 1981 she also received residency training in the Department of Obstetrics and Gynecology. Dr Ongbit has more than 31 years' experience as a Medical Practitioner.
55. On 28 November, 2006 Dr. Ongbit was based at the Nadi Hospital and she examined both the complainants. The medical report of complainant

“AB” was tendered and marked as prosecution exhibit no. 1 and the medical report of the complainant “GM” was tendered and marked as prosecution exhibit no. 2.

56. The specific medical findings for both the complainants were that their hymen was intact. The hymen been intact meant there was no injury on the hymen.
57. According to the Doctor an erected penis has an average diameter of around 3.5 centimeters so if the erected penis was able to touch the clitoris of the complainant “AB” it was possible that the penis made contact with the vaginal opening because of the close proximity of the clitoris to the vaginal opening.
58. The size of the vaginal opening of an 8 year old girl is only around 0.4 centimeters so an erected penis with a diameter of at least 3.5 centimeters will find it hard to go through the vaginal opening but it was possible for the glans penis which was the tip of the penis to have contact with the vaginal opening. In the opinion of the Doctor this meant there was penetration although not full penetration.
59. Since the accused was sitting less force was applied into the vaginal opening that is why there was no hymnal laceration.
60. In respect of the complainant “GM” the Doctor’s opinion taking into account the complainant’s evidence was that the penis had contact with the vaginal opening although it wasn’t full penetration because the hymen was intact. If there was full penetration the Doctor would have expected to see hymnal lacerations.
61. In cross examination the Doctor stated that if there was full penetration into the vagina of an 8 year old girl it would be painful and hymnal

lacerations would be seen. However, if only the tip of the glans penis was inserted it was not possible to cause hymnal lacerations.

62. In respect of the complainant "AB" the Doctor maintained that the penis coming in contact with clitoris was a form of penetration due to the close proximity of the clitoris to the vaginal opening. When suggested that the complainant had stated that there was no penetration of her vagina meant that the accused did not penetrate the vagina at all the Doctor disagreed and stated that the complainant was not a Medical Doctor and could not make such a medical opinion and will also not be able to differentiate mild penetration and full penetration. The Doctor maintained that since no hymnal lacerations were seen did not mean there could be no penetration.
63. The Doctor further explained that if a person was rocked back and forth and the penis was already on the vaginal opening and force was exerted then there would be lacerations but if it was just a mild rocking and there was no thrusting force by the penis into the vagina there won't be any lacerations on the hymen.

Madam and Gentlemen Assessors

64. You have heard the evidence of the Doctor who was called as an expert witness on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that you should see it in its proper perspective. The Medical Reports of the complainants are before you and what the Doctor said in her evidence as a whole is to assist you.
65. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the Doctor.

When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the Doctor you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the Doctor.

66. You should remember that the evidence of the Doctor relate only to part of the case, and that whilst it may be of assistance to you in reaching your opinions, you must reach your opinion having considered the whole of the evidence.
67. The final witness for the Prosecution was Shane Pickering. In the year 2006 the witness was in the same class as the two complainants, between 1<sup>st</sup> October, 2006 to 30<sup>th</sup> November, 2006 the witness saw the complainant "GM" sitting on the lap of the accused in between his legs. They were sitting inside the last cubicle of the classroom. He saw the two when he went to give his attendance book to the accused. The witness did not see anyone else other "GM" sitting on the lap of the accused.
68. In cross examination the witness agreed that both the complainants were his good friends. On the day he saw the complainant "GM" sitting on the lap of the accused in the cubicle he had put the Union Jack flag up on his cubicle as was the procedure when the assistance of the teacher was required. The accused had not come to him so he walked over to the accused. The witness was referred to line 4 of his police statement dated 21 February, 2007 which was *"I wanted to ask my teacher a question with regards to my pace."*
69. The witness agreed that he approached the accused to ask question regarding his pace and not to show his attendance book. Further the witness stated that the version he had given to the Police was true.
70. The witness in further cross examination informed the court that he did not see "AB" sitting on the lap of the accused the witness was again

referred to line 6 of his police statement which was *"I always see Ashley and Gabriella sit on his lap and not the other girls."* The witness agreed that the version given to Police and his evidence in court were two different versions.

Madam and Gentlemen Assessors

71. The learned counsel for the accused in this regard was cross examining the witness about some inconsistencies in the statement he gave to the Police after the incident when the facts were fresh in his mind with his evidence in court. I will now explain to you the purpose of considering the previously made statement of the witness with his evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witness is believable and credible. However, the police statement itself is not evidence of the truth of its contents.
72. It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
73. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such a witness.
74. This was the end of the prosecution case.

Madam and Gentlemen Assessors



75. At the end of the prosecution case you heard me explain to the accused his options. He has these options because he does not have to prove anything. The burden to prove his guilt beyond reasonable doubt remains with the prosecution at all times.
76. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination and also called a witness.

### **DEFENCE CASE**

77. The accused informed the court that he graduated as a primary school Teacher from South Pacific Christian Teacher's College in the year 2004.
78. In the year 2006, the accused was teaching both the complainants. The accused denied all the allegations made against him by both the complainants he also denied what Shane Pickering (PW4) had told the court. Furthermore the accused was not sure why such allegations were made against him, his view was because of his strictness as a Teacher.
79. The accused, however, admitted that he had pinched both the complainants on their stomach and thighs from on top of their uniforms but not as the complainants had stated in court. The reason why he pinched them was because the complainants had cheated during scoring.
80. In cross examination the accused agreed the students sat on chairs which were small normal sized wooden chairs on which adults could sit as well. He disagreed if the chair was moved slightly to the back an adult and an 8 year old child could sit on it in the cubicle.
81. The accused agreed he had pinched the thighs and the stomach of both the complainants. He further agreed there was no need to pinch them

on their thighs and stomach and that he could have pinched on their hand and that his action in this regard was inappropriate.

82. The accused disagreed that to pinch on the thighs and stomach he had to lower himself because it happened when he called them to his table, he was sitting while they were standing. The accused agreed from his experience as a Teacher an 8 year old would have almost zero knowledge about sexual activity.
83. The defence witness Penina Takobe informed the court that in the year 2006 she was teaching the class adjacent to the classroom of the accused. She was able to see the accused's classroom through the glass.
84. Furthermore she stated that in one cubicle one student could fit in and it was not possible for two people to be seated inside the cubicle. At no time had she seen the complainants sitting on the accused's lap. The witness could see the accused from waist level up when he walks around in his classroom.
85. In cross examination the witness stated that when she said she was able to see the accused waist upwards it was in fact chest upwards. The glass wall that divided the classrooms was half way up.
86. If the accused was sitting in one of the cubicle's she could only see the top of his head and if he would be sitting with a student on his lap she will not be able to see the student. The witness agreed if the chair was slightly shifted back the cubicle could fit an adult and a student.
87. In re-examination the witness clarified that if a student sat on the lap of the accused and the chair was slightly put back the other students would see.
88. This was the defence case.

## **ANALYSIS**

### Madam and Gentlemen Assessors

89. You heard the evidence of all the witnesses. If I did not mention a particular piece of evidence that does not mean it's unimportant. You should consider and evaluate all the evidence in reaching your opinion.
90. The prosecution alleges by amended information that between the 1<sup>st</sup> day of October 2006 and the 30<sup>th</sup> day of November, 2006 the accused had carnal knowledge of both the complainants more than once with his penis without their consent.
91. The prosecution called four (4) witnesses to prove its case against the accused and the defence called two (2) witnesses. Both the complainants in the year 2006 were 8 years of age and class 3 students at a primary school in Nadi. The accused was their class teacher.
92. The layout of the classroom was such that an individual student would occupy a cubicle also called an office. When seated in the cubicle one could not see outside or be seen from outside. One cubicle at the end of the classroom was always empty.
93. There was another classroom which was separated by a wall which was half way up. In this case there are two complainants namely "GM" and "AB".
94. In her evidence "GM" told the court between 1<sup>st</sup> October 2006 and 30<sup>th</sup> November 2006 the accused took the witness to the last cubicle she had some errors in her book. The accused made the complainant sit on his lap and he opened her legs with his legs thereby spreading her legs apart. The accused would ask her questions from her book and if the

answer given was not correct then the accused would pinch the side of her vagina.

95. Whilst "GM" would be sitting on the lap of the accused facing away he would pull the side of her underwear and insert his penis inside her vagina.
96. According to this complainant at the time the accused inserted his penis into her vagina she did not do anything because she did not know what was going on. When the accused inserted his penis into her vagina the complainant felt his penis and it was painful. This happened more than once.
97. The complainant did not consent to what the accused was doing to her.
98. The second complainant "AB" informed the court that between 1<sup>st</sup> October, 2006 and 30<sup>th</sup> November, 2006 the accused would take the complainant to the last cubicle and make her sit on his lap with the book in front of them. The accused would ask questions and if she did not answer correctly he would pinch her private part meaning her vagina. According to "AB" the accused would pinch on the top layer of her vagina.
99. After doing this the accused would ask another question he would try to shift her panty to one side since her panty was too tight he would pull it down to her ankle. Whilst sitting on his lap she would be facing the other side. The accused would rock her back and forth by holding her waist with his hands whilst rocking she could feel his penis on the top layer of her vagina that is her clitoris. The complainant would feel scared but she did not say anything. This happened more than once.
100. The complainant did not agree to what the accused was doing to her.

Madam and Gentlemen Assessors

101. If you have a reasonable doubt about the elements of the offence of rape then you should proceed to consider the lesser or alternative offence of indecent assault. The accused is guilty of indecent assault if he unlawfully and indecently assaulted both the complainants. The word "*unlawfully*" simply means without lawful excuse. An act is indecent if right minded persons would consider the act indecent. You have heard the evidence of both the complainants that the accused was pinching their vagina.
102. The accused on the other hand denied what both the complainants have alleged but stated that he pinched their thighs and stomach only.
103. Consider the evidence from both the complainants and the accused and then decide whether the actions of the accused were indecent or not. You will have to consider what right minded persons would think of this act. Were the acts so offensive to current standard of modesty and privacy to be indecent?
104. During the cross examination of the accused by the State Counsel the accused stated that apart from the two complainants he also used to pinch another student. You are to only concentrate on what the two complainants have stated in evidence and to disregard the fact that the accused had pinched another student other than the two complainants or draw any adverse inference against the accused in this regard.
105. Doctor Ongbit who had examined both the complainants on 28<sup>th</sup> November, 2006 informed the court that the specific medical findings for both the complainants were that their hymen was intact. The hymen been intact meant there was no injury on the hymen.
106. The Doctor's opinion was that on the evidence of both the complainants there was penetration by the glans penis of the accused through mild force exerted into the vagina of both the complainants.

107. The final witness was Shane Pickering who informed the court that he was a student in the same class as the two complainants, between 1<sup>st</sup> October, 2006 to 30<sup>th</sup> November, 2006 he saw the complainant "GM" sitting on the lap of the accused in between his legs.

Madam and Gentlemen Assessors

108. I now draw your attention to the evidence adduced by the defence during the course of the hearing. The accused elected to give evidence on oath and also decided to call a witness in his defence. The accused is not obliged to give evidence. He is not obliged to call any witnesses. He does not have to prove his innocence in effect he does not have to prove anything.

109. However, the accused decided to give evidence and also to call a witness on his behalf. You must then take into account what the accused and his witnesses adduced in evidence when considering the issues of fact which you are determining.

110. It is for you to decide whether you believe the evidence of the accused and his witnesses. If you consider that the account given by the defence through the evidence is or may be true, then you must find the accused not guilty of either or both counts.

111. The accused informed the court that in the year 2006, he was teaching both the complainants. The accused denied all the allegations made against him by both the complainants he also denied what Shane Pickering (PW4) had told the court. Furthermore the accused was of the view that his strictness towards his students prompted such allegations to be made against him.

112. The accused, however, admitted that he had pinched both the complainants on their stomach and thighs from on top of their uniforms but not as the complainants had stated in court.

113. The second defence witness Penina Takobe informed the court that in the year 2006 she was teaching the class adjacent to the class of the accused. She was able to see the accused's classroom through the glass. She also stated that at no time she saw the complainants sitting on the accused's lap.
114. The defence says that the allegations made by both the complainants did not happen and it was not true since it was not possible for two people to sit in the cubicle in the manner described by the complainants. If the chair is slightly shifted back to accommodate the accused and a complainant sitting on his lap the other students would have seen this.
115. If what the complainants have said was true then they would have made noise to get the attention of the others. The accused was a strict teacher and therefore the complainants have made up a story to implicate him.

Madam and Gentlemen Assessors

116. You have seen the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
117. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthwith and truthful and which were not. Which witnesses were evasive or straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.
118. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether

a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.

119. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt.

120. In this case, the accused is charged with two (2) counts of rape, you should bear in mind that you are to consider each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.

121. Your possible opinions are:-

Count One:           **RAPE**: GUILTY OR NOT GUILTY

Count Two:           **RAPE**: GUILTY OR NOT GUILTY

If the accused is not guilty –

Count One:           **INDECENT ASSAULT**: GUILTY OR NOT GUILTY

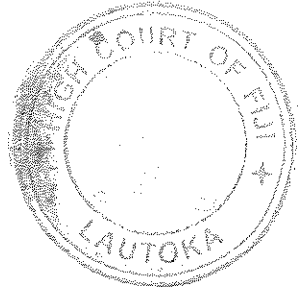
Count Two:           **INDECENT ASSAULT**: GUILTY OR NOT GUILTY


Madam and Gentlemen Assessors

122. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of my staff so that the court can be reconvened.



123. Before you do so, I would like to ask Counsel if there is anything they might wish me to add or alter in my summing up.



  
**Sunil Sharma**  
**Judge**

**At Lautoka**

30 August, 2017

**Solicitors**

**Office of the Director Public Prosecutions for the State.**

**Office of the Legal Aid Commission for the Accused.**