

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

**Criminal Case No. 14 of 2016**

**STATE**

**v**

**TAUSIA FUATA FABIANO**

**Counsels:** Ms A. Vavadakua for the State  
Mr. I. Rakaria with Miss M. Kumar  
(L.A.C.) for the accused

**Date of Hearing** : 18, 19 April 2017

**Date of Summing Up** : 19 April 2017

**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 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 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 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. As you are aware, in this case the Defence have admitted that there was an act of intercourse perpetrated on Doreen on the day in question by the accused so the only issue for you to decide in this case is whether Doreen was consenting to this act or not. If you find that she was not consenting, then you will find the accused guilty. If however you find as a fact that she was consenting, or you cannot be sure, then you will find the accused not guilty.
10. This has been a very brief case and I am sure that the evidence is still fresh in your minds. However it is my duty to remind you of the main points of it.
11. The prosecution called three witnesses to prove their case (whether they have proved it or not is a matter for you). The Police Sergeant told us that he interviewed the accused under caution and you have seen the record of the interview with its

questions and answers. The defence have no complaint about this interview and it becomes therefore evidence to assess in the normal way. There is no suggestion that the answers Tausia gives in the interview are not his so your role in dealing with the evidence of this interview is to decide whether the answers are true or not. You will treat the answers as normal evidence, evidence that you may or may not find is true.

12. The two remaining witnesses for the prosecution were Doreen, the alleged victim and her mother.
13. Doreen's mother gave us a little background to the state of her daughter's mental impairment, describing to us the difficulty that she had with her education and now with her participation in day to day living. She described her moods and her total reliance on her mother for everything in life.
14. The mother told us that she became aware of "trouble" between Doreen and Tausia, the accused, when Doreen complained of being left alone with her cousins in the house and they had done "bad things" to her. When asked further about this she would not divulge anything more apart from saying that it was Tausia who was involved. The mother went to see Tausia and he said that nothing had happened. A few days later Doreen felt more at ease relating the affair to her Aunt in the "Crimes Committee" of the village and it was this committee that reported the matter to the Police.
15. I now turn to the evidence of Doreen, which is the crucial evidence for the Prosecution. Despite Mr. Rakaria's doubts it was very obvious that Doreen was intellectually challenged. I do not need to tell you why I say that; it is a matter for you to find as a fact whether or not that is the case.

16. Doreen told us Tausia had raped her when she and he were the only ones at home. He forced her to "do this bad thing" in the room. He had called her into the room and closed the door. He told her to lie down and he took off her clothes. He used his arms to push her down and kissed her over her face. He was naked. He lay on top of her and "did the bad thing". She told him not to do it but he kept on doing it. She felt weak. Mum came home but she didn't tell her but Doreen didn't tell her what happened because she felt nervous and threatened. She couldn't run away because he was holding her down.
17. You will recall that in cross-examination Doreen was contradictory and it seemed to me at least that she was having trouble understanding the defence Counsel's questions. She said yes and no to the same questions. But Madam and Gentlemen, it is a matter for you what you make of her evidence and at this stage it is not a matter for me.
18. You will decide whether her evidence proves to you so that you are sure that she was not consenting to this activity.
19. Well, that was the end of the prosecution case.
20. 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.
21. Even if you don't believe a word he says does not make him guilty if the State has not proved their case beyond reasonable doubt.

22. Tausia told us that at the relevant time in March last year he had just turned 19. He was living with Doreen and her family at the time.
23. You have heard a couple of references to his waiting for a Court case to be heard, but I am directing you now to put that information aside. Another case has nothing to do with this case and you must not regard Tausia in a bad light just because he might be involved in another case. We don't know anything about that case and what happened to it in the end so we are all going to ignore it.
24. Tausia said that on the day in question, his aunty (Doreen's mum) had gone to town with her granddaughter leaving him, his little brother Thomas and Doreen alone in the house. Thomas went to the village leaving just him and Doreen. He was on the porch resting after doing some farming work when Doreen came out of the house and told him that she wanted to have sex with him. He ignored the request but she persevered for about 20 minutes before pulling him up and taking him into the room. She lay down and pulled up her skirt. She was not wearing underwear. Tausia undressed and proceeded to penetrate her. It lasted for about 5 minutes and during this time Doreen told him that it was nice, she liked it. When it was finished each went back to their respective resting places, Tausia the porch and Doreen the sitting room.
25. Well that was Tausia's evidence and the case for the Defence. You are to analyse Tausia's evidence in this way. If you think that what he has told us is true or may be true then you will find him not guilty; this is because it will cast a reasonable doubt on the State's case. If you don't believe him, then you must still find that the State has proved to you so that you are

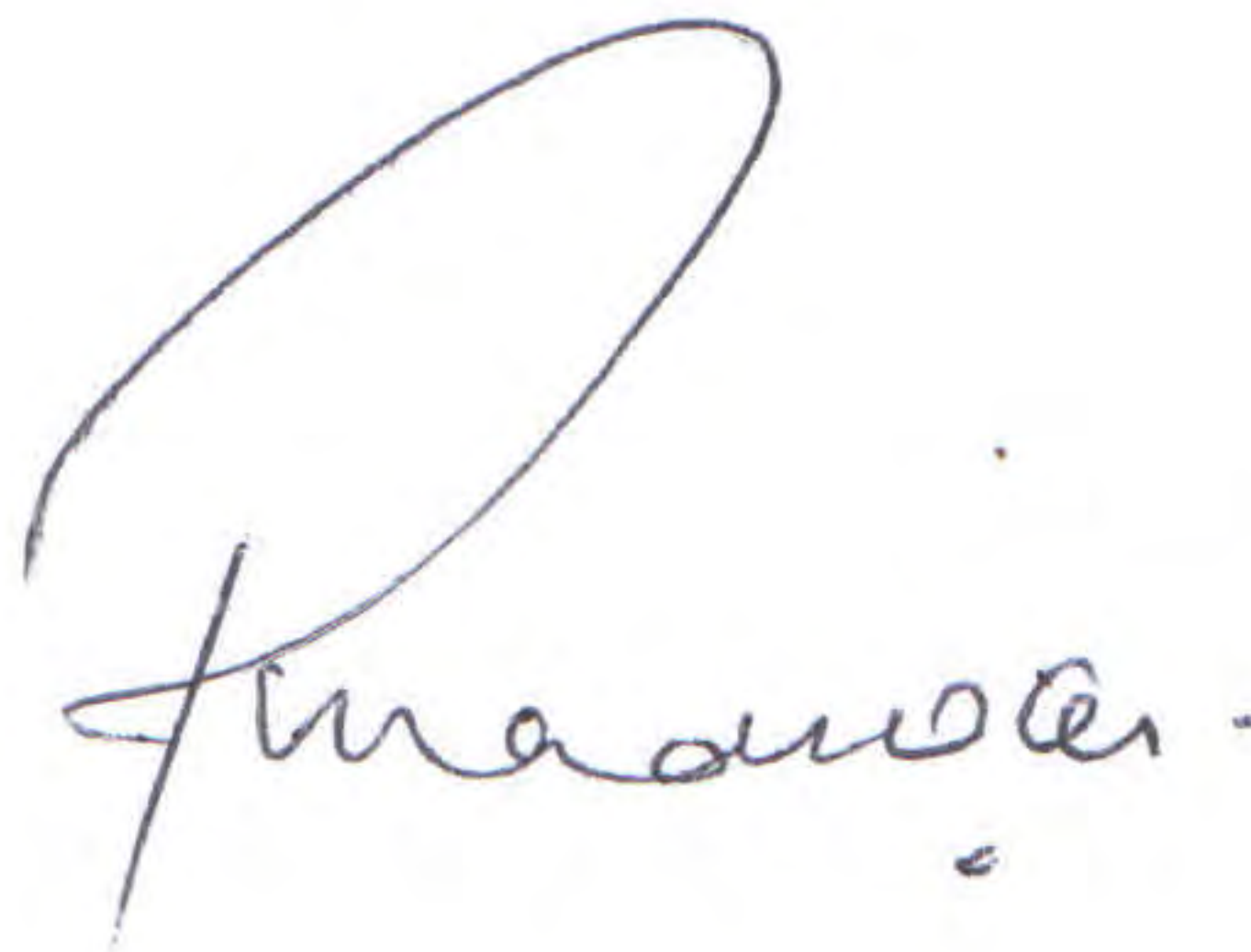
sure that there was a lack of consent on the part of Doreen to this sexual activity.

26. So this then is the process you should adopt:  
First decide whether the State has proved to you so that you are sure that there was no consent to this sexual encounter. If you so find, then you will find Tausia guilty of rape and that is the end of the matter.
27. If however the evidence of Tausia causes you to have a reasonable doubt about the prosecution case, then you will find him not guilty of rape.
28. I have now another direction in law to give you if you were to find that Tausia is not guilty of rape.
29. Our law says that if you cannot find an accused person guilty of a sexual offence as charged then it is open to you to consider any other sexual offence that the facts may prove.
30. In this case if you were to find Tausia not guilty of rape then it would be open to you to find him guilty of the lesser offence of defilement of a mentally impaired person. To find this offence proved you must find;
  - 1) that the accused had sex with the victim
  - 2) that the victim was mentally impaired, and
  - 3) that the accused knew that she was mentally impaired.
31. It is an agreed fact that there was sex. There is no medical evidence before the Court that she was mentally impaired but it is open to you to make that finding, having seen and heard her.

Tausia admitted to the Court in cross-examination that he knew she was mentally impaired and had always known that.

32. Therefore in your deliberations your steps will be:
1. Decide whether Doreen gave consent to this sexual activity or not. If no, then the accused is guilty of rape.
  2. If yes then the accused is not guilty of rape, but go on to consider whether he is guilty of defilement of a mentally impaired person or not.
  3. If you find she is impaired and Tausia knew it then he is guilty of this lesser offence.
  4. Otherwise you will find him not guilty of anything.
33. Well Madam and Gentlemen, that is all I wish to say in this Summing Up. You may now retire and consider your opinions. Please let a member of my staff know when you are ready and I will reconvene the Court. You may take as little or as much time as you wish.
34. However just before you start your deliberations I am asking Counsel is there is anything they would have me change or add to this Summing Up.

35. Counsel?



**P. K. Madigan**  
**Judge**



At Labasa

19 April, 2017