

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No. HAC 70 of 2022

STATE

-v-

PHILIP FONG TOY

Counsel: Ms. E. Thaggard for the State
Mr. A. Kohli for the Accused

Date of Trial: 14 – 16 July 2025

Date of Judgment: 8 August 2025

JUDGMENT

1. Mr. Philip Fong Toy pleaded not guilty to a single count of raping his wife at the family home in Siberia, Labasa on 31 May 2022.

The prosecution case

2. The prosecution case rests entirely on the sworn evidence of the complainant.
3. The complainant testified that she was married to the accused for several years, and they had two daughters together. On 31 May 2022, they were still married, but living apart, having separated in November 2021. The marriage had soured, and they had each obtained standard non-molestation DVROs against each other. The accused was staying with his *de facto* partner at Nailawa. She was living with her daughters at their family home in Siberia.
4. On 31 May 2022, at around 4pm, the complainant knocked off work, picked her daughters up from school, and headed home. She saw the accused arrive at their

home by taxi. When she arrived home, the accused was on the verandah drinking beer. The complainant asked him what he was doing there, and he replied that he was drinking alcohol. She asked him to take his alcohol to his mother's place, about 50 metres away. He left briefly for his mother's place, and returned about 20 minutes later and resumed drinking on the verandah.

5. After some time, he came into the kitchen and said that he was taking the oven to grill chicken. He took the oven to the verandah. His nephew came and told him not to lift the oven as he was drunk, and it may fall. The accused returned the oven to the kitchen, then he went back to the verandah. He called to her asking what was for dinner. He was demanding for food. He was shouting loudly that he wanted food, so the complainant called her daughter to serve her father yam and eggplant.
6. After sweeping the house, the complainant went for a shower. The accused came to the bathroom door and slapped her face as she was leaving the bathroom. When she asked why he slapped her, the accused replied that he had been calling her for a long time, and she had not responded.
7. The complainant took her phone to the driveway and phoned the police. She reported that there was a DVRO, and the accused had come to her place drinking, and had slapped her. The police arrived about half an hour later, during which time she remained on the driveway. The accused told the police that he would leave after he finished his drinks. Then the police left. After they left, the accused hit his forehead on the main door grill two or three times, and there was blood dripping. He then left, saying that he was going to make a report to the police.
8. After the accused left, the complainant went back inside the house. As she was ironing school uniforms, she saw the police vehicle taking him to his mother's place. She had dinner with her daughters before they went to bed.
9. At around 9pm, the complainant was on the verandah when the accused returned. He told her that he wanted to have sex with her. She told him that he already had a partner, and she did not want a relationship like that with him. He then grabbed her hair and twisted her right arm from behind. He pushed her to the bedroom.

She told him to let go of her, and that she did not agree to what he was doing. The accused pushed her face-down on the bed and pulled off her tights and panty. He tore her cotton dress and removed it. He also removed her vest and bra. As she was naked and face-down on the bed, he spread her legs and inserted his penis into her vagina. She was crying. The complainant became emotional in the witness box as she gave that evidence. The accused turned her over, kissed her mouth, and made “love bites”. She pushed him, stood up, and started screaming. She then went for a shower. When she came back from the shower, the accused was not in the bedroom.

10. The complainant testified that she reported the matter to the police the following morning. She went to Namara Police Station, and was sent to the sexual offences unit at R C Manubhai. She made a statement there on the morning of 1 June 2022. She was then taken to Labasa Hospital, but was not examined that day because the doctor was not there. The following morning, the police took her back to Labasa Hospital, where she was medically examined.
11. In cross-examination, the complainant said that, despite his problems, she and the accused had a happy life together when he did not have a girlfriend.
12. When Mr. Kohli suggested that she and the accused were sat yarnning, and she was happy because he told her that he had left his girlfriend, the complainant disagreed. She then accepted that the accused had told her that he had left his girlfriend, but she did not trust him. She also accepted that she had said in her witness statement that she had forgiven him because he told her that he had left his girlfriend. She told the police this: *“because I am not very educated”*.
13. When asked why she did not scream when the accused grabbed her hair, the complainant said that she had screamed, but her daughters could not hear her because they were using their phones and had earpieces in. The complainant had earlier testified that she did not shout because she had already told the accused not to do such a thing because the children were sleeping.
14. When it was suggested to the complainant that, on the morning of 1 June 2022, the accused had asked her to “sponsor” beer, and she gave \$100 to Emanuel, the

complainant replied that the accused had taken \$100.00 from her purse and given it to Emanuel to buy beer. Emanuel returned with a carton of beer and stayed there drinking with the accused until around midday. The accused continued drinking beer.

15. When it was suggested to the complainant that, on 1 June 2022, after the accused told her that he had finished with his girlfriend, she took his hand and led him to the bedroom, the complainant said that she had not taken him. She denied that Mr. Kohli's gratuitously graphic description of consensual sex between her and the accused ever happened. She also denied asking the accused to make love bites on her neck and chest.
16. When asked why she had not reported the matter at the police station near her workplace on 2 June 2022, the complainant replied that she had already reported the rape on 1 June 2022. When questioned about the fact that her witness statement was dated 4 June 2022, the complainant said that she is not well educated, and cannot read. She maintained that she had made a statement on 1 June 2022, and a second statement on the day she was medically examined, 4 June 2022.
17. When asked whether she had seen the accused's girlfriend at his mother's house on 3 June 2022, the complainant said that she had not. She rejected the suggestion that she had requested the accused to drive her to work on 3 June 2022. When Mr. Kohli suggested that she had called the accused several times from the market, threatening to jump in the river, the complainant denied that. She also denied that she had made a report to the police on 4 June 2022 that the accused raped her because she was upset about him being back with his girlfriend and refusing to drive her to work.
18. The complainant said that she had told the police that her dress was torn during the rape, and the police did not ask her for her clothes, or ask to see the torn dress.
19. When Mr. Kohli suggested that the complainant had consensual sex with the accused in his car on several occasions after the alleged rape, she denied that.

20. In re-examination, the complainant confirmed that she had reported the matter to the police on the afternoon of 1 June 2022. She also confirmed that the accused and Emanuel were drinking beer together on the morning of 1 June 2022, which was purchased by Emanuel with the \$100 note that the accused took from her purse. The complainant said that she went to her uncle's market stall on 3 June 2022, and was crying because: *"I was crying, My Lord, because Philip had done all these stuffs, My Lord, and I wouldn't get justice for it."*
21. When the Court sought to clarify whether the complainant had signed anything when she reported the matter to the police on 1 June 2022, she said that she had not. Also, the statement she signed on 4 June 2022 was not written by her. She spoke to the statement taker in Hindustani, and the statement was recorded in the English language. She cannot read Hindustani or English. The statement was not read to her.
22. Being concerned that the first report may not have been disclosed, in fairness to the defence, I allowed the prosecution time overnight to make inquiries of the police.
23. On 15 July 2025, Ms. Thaggard informed the Court that there was no record of the complainant having made a complaint to the police on 1 June 2022. She called Corporal 5027 Salavatu of the Sexual Offences Unit to tender the investigation diary.
24. Cpl Salavatu explained that the purpose of the investigation diary is for the investigating officer to note everything that arises during the investigation. When a report is received, that is the first entry that will be made in the investigation diary. The first entry made in the investigation diary relating to this matter was made on 4 June 2022. The investigation diary was tendered as PE-1.
25. The parties agreed that the complainant had been medically examined on 4 June 2022, and that the specific medical findings were: *"Bruises (love bites) noted above chest along neck area, some are fading away. Nil injuries noted along vaginal introitus and vault. Hymen is not intact and patient has delivered twice."*

Defence case

26. The accused elected to give evidence in his case. He is a 42-year-old market vendor.
27. The accused started by stating that the rape allegation made by the complainant is not true.
28. His marriage to the complainant was dissolved in September 2024. They had been separated since December 2021. In February 2022, he started an affair with Fazilet. Sometimes he would return to the marital home in Siberia, but most of his time was spent with Fazilet.
29. At around 4.30pm to 5pm on 31 May 2022, he was drinking beer on his verandah when the complainant and the children returned home. Given that he and the complainant had cross DVROs, so as not to create any problems, he left with his beer. He sat drinking at his neighbour's driveway. He then went to his mum's place, which was nearby. His daughters arrived to do their homework with the assistance of his sister. They asked him to go home with them. He was reluctant, but his daughters insisted, so he went with them, together with his beer. He started drinking on the verandah, and asked the complainant to make chaser for him. When she replied that she could not make chaser, he told her that he was taking his oven back to his mum's place to roast a chicken. As he was removing stuff from the oven, his nephew told him that he might damage it as he was drunk. Perhaps sensing merit in his nephew's point, he did not take the oven. He returned to drinking on the verandah without a chaser.
30. He asked the complainant what she had cooked for dinner. She gave him yam, eggplant and rice with water, which he used for his chaser. About half an hour later, the complainant's phone started ringing. He tried to grab it, but the complainant pushed him, causing his head to collide with the door grill. He swore at her and said that he wanted to see who was calling her. The complainant took her phone to the driveway. After a while, the police came. The complainant complained to the police that he had sworn at her and slapped her. He told the police that he had not slapped her, that he just swore at her, and was only trying

to see who was calling her, as was his right as her legal husband. He confirmed to the police that there was a cross DVRO. He told the police that his head was swollen because the complainant had pushed him against the grill. The police officer told the complainant that if she made a report against him, he would do the same, and both of them would have to be charged. Then, the complainant asked the police to warn him. The police warned him and then departed.

31. The accused then went to the police station so that there was a diary entry, and he told the police to go to his house to warn the complainant not to do anything to him. The police took him home, and warned the complainant. When asked by Mr. Kohli whether the complainant had said anything to the police, he answered that she had told the police that she had forgiven and accepted him as he had told her that he had left his girlfriend. She further told the police that he could sit and drink, and then go to his mum's house.
32. At around 8pm to 8.30 pm, he went to get beer from the fridge, and he saw the complainant lying on the settee in the sitting room. He asked why she didn't go to the bedroom, and she told him that whenever she goes to the bedroom she misses him and cannot sleep. He went back outside to drink beer and, sometime later, he found that the door grill was closed. He was locked out, with his phone and charger inside the house. At around 10pm, he walked home to his mum's house and complained to her about being locked out. He slept at his mum's house that night.
33. The accused woke up at around 7am on 1 June 2022. He had tea and made a call to the complainant. He went down to his house and spoke with her. She said the younger daughter was sick and would miss school, and she was taking the day off work. He went to the fridge and took the last bottle of beer to the verandah. He saw his cousin, Emanuel, going to his mum's house and called out to him. After visiting the accused's father, Emanuel came to his place. He poured Emanuel a glass of beer. He then asked the complainant to sponsor a carton of beer. The complainant opened her purse and handed a \$100 note to Emanuel to buy beer. Emanuel went to buy a carton of beer, and they sat drinking together until around midday. After he left, the accused sat talking and joking with the complainant and his daughters.

34. At around 1.30pm to 2pm, the complainant called him to go into the bedroom. She told the children to play and not to come inside the house. He and the complainant went to their bedroom where they had consensual sex. She told him to make love bites on her neck and breasts, which he did. After sex, he showered and went to drink beer on the verandah. Then he went gambling. At around midnight, he returned home, but the house was closed. He went to sleep at his mum's house.
35. On 2 June 2022, he went to the market to look for his girlfriend. They had a fight on 30 May 2022, and she had taken his cards and cash.
36. On the morning of 3 June 2022, the complainant called him and asked him to collect her and take her to work. He speculated that she called him because his girlfriend had come to his mum's house that morning. The complainant came to his mum's house, and there was a confrontation outside. When she saw his girlfriend, the complainant pummelled his chest.
37. At around 9am to 9.30am, his market vendor colleagues started calling his phone, informing him that the complainant was sitting at the market crying, and trying to jump in the river. He told them to try to comfort her. Then, he called his taxi-driver uncle to arrange for him to collect the complainant and take her home.
38. On 4 June 2022, he returned with his girlfriend to the house they shared at Nailawa. He was arrested there on 29 May 2022, interviewed, charged, and remanded for a period of time before he was bailed.
39. In the following year, he and his girlfriend visited the complainant. They had a good relationship. The accused suggested that it was perhaps because he continued to have a sexual relationship with the complainant that he was able to visit his home in Siberia. He provided salacious particulars of their various trysts, which it is unnecessary for me to set out here. The last time that he had sex with the complainant was in December 2023, when he came to know that she had a taxi-driver boyfriend.
40. In cross-examination, it was suggested to the accused that he never had consensual sex with the complainant on or after 1 June 2022. He answered that the complainant allowed him to have sex with her on 1 June 2022, and later

occasions. When it was suggested that the complainant had not willingly given money to buy beer on 1 June 2022, the accused said that she gave the money to Emanuel to buy beer.

41. The accused said that he never discussed having sex with the complainant on the night of 31 May 2022, and did not rape her that night. The complainant is lying about that. He made the love bites on 1 June 2022.
42. Emanuel Vikash Chand testified that, as he was going to visit the accused's father on the morning of 1 June 2022, the accused called out to him to come and drink with him. After visiting the accused's father, he went to drink with the accused. After two glasses, the accused asked the complainant to "sponsor" him beer. The complainant then gave the witness a \$100 note from her purse. He went in a taxi to buy a carton of beer. When he returned, he gave the change to the complainant. He sat down and drank two bottles of beer before returning to Dreketi.
43. In cross-examination, Emanuel said that the accused is his first cousin. When asked whether he would do anything for the accused, he replied that he would not die for him. He would help him, but he would not lie for him. He was sure that the complainant had given him the money for beer because it was the first time she had given money for beer. The witness gave a detailed description of how the complainant had given him a \$100 note. She told him to bring her the change.

Closing submissions

44. I heard closing speeches on 16 July 2025, and I have considered everything advanced by both parties.
45. In summary form, Mr. Kohli submits that the complainant lied about making a report to the police on 1 June 2022. The investigation diary supports that the first report was made on 4 June 2022. Also, the complainant was wrong about being medically examined on the day after her report to police. It is an agreed fact that she was examined on 4 June 2022 – the same day that her witness statement was recorded. Mr. Kohli submits that the delayed reporting takes on particular significance in this case because of what transpired during the intervening period from 31 May 2022 to 4 June 2022. He makes the point that the complainant was

quick to complain to the police about the accused slapping her, so it is strange that she would not immediately report that she had been raped by the accused. Even as late as 3 June 2022, when she was crying at the market, the complainant had not reported to the police that the accused raped her.

46. The main thrust of the defence case is that the complainant made a false allegation on 4 June 2022 because she felt cheated, having taken the accused back on the understanding he had broken up with his girlfriend, only to realise, on 3 June 2022, that she was back on the scene. The complainant was heartbroken. Describing himself as being from what he termed "*the old school*", Mr. Kohli summed up his case pithily as: "*They said jealousy thy name is woman.*"
47. Mr. Kohli submits that the complainant's narration of the rape was unrealistic. She could have resisted. The accused could not have undressed her in the way she described. The torn dress was not adduced in evidence.
48. The complainant accepted that she had told the police that she had forgiven the accused. This supports the accused's evidence that they had consensual sex on 1 June 2022.
49. Ms. Thaggard submits that the police may have overlooked recording that the complainant had made a report of rape on 1 June 2022. Also, just because she immediately reported the slap, it does not follow necessarily that the complainant would immediately phone the police to report that she had been raped.
50. The prosecution theory as to why the accused would return to his house early in the morning of 1 June 2022 is that he wanted to give the impression of normalcy – that nothing untoward had occurred on 31 May 2022.
51. The love bites were made by the accused on 31 May 2022, in the manner described by the complainant, in order that the accused may claim that the sexual intercourse was consensual.

Legal Directions/Warnings

52. The prosecution must prove that the accused is guilty. The accused does not have to prove anything to me. The defence does not have to prove that the accused is

innocent. The prosecution will only succeed in proving that the accused is guilty if I have been made sure of his guilt. If, after considering all of the evidence, I am not sure that the accused is guilty, my verdict must be not guilty.

53. I remind myself that if the accused's denials are, or may be, true, I must find him not guilty. Even if I reject the accused's evidence, I must not find him guilty unless the prosecution has been made me sure of his guilt.
54. When the complainant gave evidence, she became emotional when recounting the alleged rape. I remind myself that I must not assume that the way she gave evidence is an indication of whether or not the allegation is true. Witnesses react to giving evidence about allegations of rape in a variety of ways. Some people will show emotion or distress. But other people will seem very calm or unemotional. The presence or absence of distress when giving evidence is not a good indication of whether the witness is telling the truth or not.
55. Since the defence has advanced jealousy as a motive for the complainant to have lied, I warn myself that the accused bears no onus to prove a motive to lie, and rejection of the motives asserted does not necessarily justify a conclusion that the complainant's evidence is truthful. A motive to lie or be untruthful may substantially affect the assessment of the credibility of a witness, but it would be wrong to conclude that the complainant told the truth because there is no apparent reason for her to lie. There might be a reason for her to be untruthful that nobody knows about.

Analysis and determination

56. The battle lines have been clearly drawn. The defence says that the allegations against the accused have been fabricated. They have explicitly advanced jealousy and the complainant's sense of having been cheated by the accused as motives for these allegations to have been fabricated. I shall return to these motives below.
57. Essentially, what it boils down to is whether I am sure that the complainant is a truthful and reliable witness whose evidence makes me sure that the accused is guilty as charged. Also, I must be sure that the accused's denials are untrue.

58. It follows that the prosecution case relies solely on my assessment of the complainant's reliability and credibility.
59. The complainant is a mature woman who was in a long-term relationship with the accused. The evidence reveals that their relationship was volatile. So much so that, by the time of the alleged rape, they had obtained cross DVROs. The accused had embarked on a *de facto* relationship, which also seems to have been volatile.
60. In these circumstances, it may be considered somewhat provocative, and ill-advised, for the accused to have gone to the marital home to drink beer on 31 May 2022. Having said that, his behaviour on that day was entirely in keeping with my impression of him as an egotistical, entitled and boorish man.
61. I agree with Mr. Kohli that the accused's testimony painted a singularly unattractive self-portrait. If his evidence about cheating on his girlfriend with his estranged wife is to be believed, the accused is bereft of scruples. He appeared to me to be rather too pleased with himself for living a degenerate lifestyle. I found his evidence to be too clever by half.
62. None of that, of course, makes him a rapist, or more likely than any other man to be a rapist. This is not a court of morality. In determining the central issue of whether the prosecution has met its burden, I must leave out of the reckoning any personal feelings of distaste I may have for the accused's degeneracy.
63. There is much common ground about the events of the evening of 31 May 2022. The accused was drunk. He demanded food. He was in the process of taking the oven until he thought better of it. He was given food. Nothing turns on whether it was his wife or daughter who actually served him yam, eggplant and rice. It is not in dispute that the complainant called the police, or that the police attended at the family residence, or that the complainant had reported to the police that the accused had slapped her. It is not disputed that the accused later went to the police station, before returning to the family home to continue drinking.
64. There is a conflict of evidence about the incident leading up to the complainant calling the police that evening. The complainant says that the accused slapped

her as she left the bathroom for failing to answer his repeated calls. This strikes me as entirely plausible in light of his boorish behaviour up to that point. On the accused's version, the complainant phoned the police after he had dashed to grab her phone, as he felt he was entitled to do, and he was injured in the process. The complainant says that the head injury was self-inflicted after the police left.

65. Whilst I can well believe that the accused felt entitled to grab his wife's phone, I reject his account of how he was injured. Whilst his behaviour in head-butting the door grill seems quite bizarre, it is precisely because it was so bizarre that I conclude that the complainant could not have made that up.
66. Ultimately, of course, I do not have to resolve the issue whether the accused slapped the complainant. He is not charged with assault.
67. The complainant's testimony about the rape is plausible. The accused plainly had the opportunity to rape her that evening. I reject Mr. Kohli's argument that it was not possible for the accused to have undressed the complainant in the manner she described.
68. Nevertheless, I am troubled by aspects of the complainant's evidence. She swears to have reported the rape to police on the afternoon of 1 June 2022, but that evidence is undermined by Cpl Salavatu's testimony that the first entry in the investigation diary was made on 4 June 2022.
69. It is a sad indictment of the quality of sexual offences investigations that Ms. Thaggard felt able to suggest that the Sexual Offences Unit may have simply overlooked making an entry recording a complaint made on 1 June 2022. I suppose that is possible, but I am left with a nagging doubt about whether the complainant told the truth about making a police report on 1 June 2022. This doubt is enhanced by the complainant's evidence that she was medically examined on the day after she first reported to police, namely 2 June 2022, whereas it was an agreed fact at trial that the complainant was medically examined on 4 June 2022.
70. This doubt is not trivial or peripheral to the central issue in the trial. If the complainant lied, or was mistaken, about reporting to the police on 1 June 2022,

the defence case that she delayed reporting until after she realised that the accused was back together with his girlfriend on 3 June 2022 may be true.

71. Whilst I am compelled to reject Mr. Kohli's antiquated stereotype that women are more prone to feelings of jealousy than men, a sense of betrayal and resentment would be a powerful motive to make a false allegation. The fact that the complainant told the police that she had forgiven her husband lends support to feelings of betrayal.
72. I am further troubled by the complainant's evidence that she went to her uncle's market stall on 3 June 2022, and was crying there because she felt that she would not get justice for what the accused had done to her. This does not make much sense to me. On her account, the wheels of justice were already turning – she had made a complaint to police on 1 June 2022, and was escorted for a medical examination on 2 June 2022. The defence case is that she was upset by the realisation, on the morning of 3 June 2022, that the accused was back together with his girlfriend.
73. My sense of the defence case is that it is highly contrived and, as I said earlier, too clever by half. However, I cannot be sure that the complaint to police on 4 June 2022 did not come about in the circumstances described by the accused.
74. I must therefore find the accused not guilty of rape and acquit him accordingly.



.....
Hon. Mr. Justice Burney

At Labasa

8 August 2025

Solicitors

**Office of the Director of Public Prosecutions for the State
Kohli & Singh for the Accused**