

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 159 of 2022

STATE

V

NAZIR ALI

Counsel : Ms. Sheenal Swastika for the State
Ms. Nimita Sharma with Ms. Deepal Prasad for the Accused

Dates of Trial : 20-21 May 2025
Closing Submissions : 17 June 2025
Judgment : 13 November 2025

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "CJJ".

JUDGMENT

[1] As per the Information filed by the Director of Public Prosecutions (DPP), the accused above-named is charged with the following offences:

FIRST COUNT

Statement of Offence

ASSAULT WITH INTENT TO COMMIT RAPE: Contrary to Section 209 of the Crimes Act 2009.

Particulars of Offence

NAZIR ALI, on the 18th day of September 2022, at Lautoka, in the Western Division, assaulted **CJJ**, with intent to commit Rape.

SECOND COUNT

Statement of Offence

BREACH OF BAIL CONDITION: Contrary to Section 26 (1) & (2) of the Bail Act 2002.

Particulars of Offence

NAZIR ALI, on the 18th day of September 2022, at Lautoka, in the Western Division, whilst being released on bail by the Lautoka Magistrates' Court vide CF 566/22, without reasonable cause, breached his bail condition by re-offending when ordered by Court not to re-offend.

THIRD COUNT

Statement of Offence

BREACH OF DOMESTIC VIOLENCE RESTRAINING ORDER: Contrary to Section 77 (1) (a) of the Domestic Violence Act 2009.

Particulars of Offence

NAZIR ALI, on the 18th day of September 2022, at Lautoka, in the Western Division, having notice of the Domestic Violence Restraining Order number 566 of 2022, by which he was bound, without reasonable excuse, contravened the said order by physically assaulting and sexually abusing CJJ, a protected person.

FOURTH COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) of the Crimes Act 2009.

Particulars of Offence

NAZIR ALI, on the 18th day of September 2022, at Lautoka, in the Western Division, penetrated the anus of CJJ with his finger, without her consent.

FIFTH COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (c) of the Crimes Act 2009.

Particulars of Offence

NAZIR ALI, on the 18th day of September 2022, at Lautoka, in the Western Division, penetrated the mouth of **CJJ** with his penis, without her consent.

SIXTH COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) of the Crimes Act 2009.

Particulars of Offence

NAZIR ALI, on an occasion other than that referred to in the fourth Count, on the 18th day of September 2022, at Lautoka, in the Western Division, penetrated the anus of **CJJ** with his finger, without her consent.

SEVENTH COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

NAZIR ALI, on the 18th day of September 2022, at Lautoka, in the Western Division, had carnal knowledge of **CJJ**, without her consent.

EIGHTH COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) of the Crimes Act 2009.

Particulars of Offence

NAZIR ALI, on an occasion other than that referred to in the fourth and sixth Count, on the 18th day of September 2022, at Lautoka, in the Western Division, penetrated the anus of **CJJ** with his finger, without her consent.

- [2] The accused pleaded not guilty to the charges and the ensuing trial was held over 2 days. Thereafter, the Learned Counsel for the State and Defence made their closing submissions.

The Burden of Proof and the Standard of Proof

[3] Section 14 of the Crimes Act No. 44 of 2009 (Crimes Act) states as follows:

In order for a person to be found guilty of committing an offence the following must be proved –

(a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt;

(b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element.

[4] Section 57 of the Crimes Act provides that the prosecution bears a legal burden of proving every element of an offence. The Section reads as follows:

(1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

(2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

(3) In this Decree (Act)—

"legal burden", in relation to a matter, means the burden of proving the existence of the matter.

[5] Section 58 (1) of the Crimes Act stipulates that a legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

Legal Provisions and the Elements of the Offences

[6] As could be observed the accused is charged with one count of Assault with Intent to Commit Rape, contrary to Section 209 of the Crimes Act, one count of Breach of Bail Condition, contrary to Section 26 (1) and (2) of the Bail Act No. 26 of 2002 (Bail Act), one count of Breach of Domestic Violence Restraining Order, contrary to Section 77 (1) (a) of the Domestic Violence Act No 33 of 2009 (Domestic Violence Act), and five counts of Rape, contrary to Section 207 (1) of the Crimes Act.

[7] Since the accused is charged with five counts of Rape, I will first deal with those charges [Counts 4 to 8].

[8] The fourth, sixth and eighth counts against the accused are charges of Rape, contrary to Section 207 (1) and (2) (b) of the Crimes Act.

[9] Section 207(1) of the Crimes Act reads as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

[10] Section 207(2) of the Crimes Act is reproduced below:

(2) A person rapes another person if —

(a) the person has carnal knowledge with or of the other person without the other person's consent; or

(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or

(c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

[11] Section 207 (2) (b) makes reference to a person penetrating the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent. In the instant case, the accused has been charged in Counts 4, 6 and 8, for penetrating the anus of the complainant with his finger.

[12] Therefore, in order to prove the fourth count of Rape against the accused, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this instance on the 18 September 2022);
- (iii) At Lautoka, in the Western Division;
- (iv) Penetrated the anus of the complainant CJJ, with his finger;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[13] Similarly, in order to prove the sixth count of Rape against the accused, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;

- (ii) On the specified day (in this instance on the 18 September 2022), but on occasion other than that referred to in the fourth count;
- (iii) At Lautoka, in the Western Division;
- (iv) Penetrated the anus of the complainant CJJ, with his finger;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[14] Similarly, in order to prove the eighth count of Rape against the accused, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this instance on the 18 September 2022), but on occasion other than that referred to in the fourth and sixth count;
- (iii) At Lautoka, in the Western Division;
- (iv) Penetrated the anus of the complainant CJJ, with his finger;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[15] The fifth count against the accused is a charge of Rape, contrary to Section 207 (1) and (2) (c) of the Crimes Act.

[16] Section 207 (2) (c) makes reference to a person penetrating the mouth of the other person, to any extent, with his penis, without the other person's consent.

[17] Therefore, in order to prove the fifth count of Rape against the accused, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this instance on the 18 September 2022);
- (iii) At Lautoka, in the Western Division;
- (iv) Penetrated the mouth of the complainant CJJ, with his penis;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[18] The seventh count against the accused is a charge of Rape, contrary to Section 207 (1) and (2) (a) of the Crimes Act.

[19] Section 207 (2) (a) makes reference to carnal knowledge, which is an archaic legal euphemism (synonym) for sexual intercourse. In layman's terms, having carnal knowledge with or of the other person, as stated in Section 207 (2)(a), means having penile-vaginal sexual intercourse with that other person or having sexual intercourse whereby the man penetrates his penis into the vagina of the woman.

[20] In terms of Section 206 (5) the term carnal knowledge is said to include sodomy or anal sexual intercourse as well.

[21] Therefore, in order to prove the seventh count of Rape against the accused, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this instance on the 18 September 2022);
- (iii) At Lautoka, in the Western Division;
- (iv) Penetrated the vagina/anus of the complainant CJJ, with his penis;
- (v) Without the consent of the complainant; and
- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.

[22] To further elaborate upon these elements in respect of the said counts of Rape [Counts 4 to 8]. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the said offence.

[23] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.

[24] In respect of Counts 4, 6 and 8, the fourth element involves the penetration of the complainant's anus, with the accused's finger. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent. Therefore, to establish this element, the prosecution

should prove beyond reasonable doubt that the accused penetrated the anus of the complainant with his finger to any extent.

[25] In respect of Count 5, the fourth element involves the penetration of the complainant's mouth, with the accused's penis. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the mouth of the complainant with his penis to any extent.

[26] In respect of Count 7, the fourth element involves the penetration of the complainant's vagina/anus, with the accused's penis. It must be noted that, in law, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the vagina/anus of the complainant with his penis to any extent.

[27] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused penetrated the complainant's anus, with his finger, without her consent (In respect of Counts 4, 6 and 8); and that the accused penetrated the complainant's mouth with his penis, without her consent (In respect of Count 5); and that the accused penetrated the complainant's vagina/anus with his penis, without her consent (In respect of Count 7).

[28] It should be borne in mind that in terms of Section 206 (1) of the Crimes Act consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance alone shall not constitute consent. Section 206 (2) of the Crimes Act provides that a person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:

- (a) by force; or
- (b) by threat or intimidation; or
- (c) by fear of bodily harm; or

- (d) by exercise of authority; or
- (e) by false and fraudulent representations about the nature or purpose of the act; or
- (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

[29] Apart from proving that the complainant did not consent for the accused to penetrate her in the aforesaid manner, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who Court believes, whilst bearing in mind that it is the prosecution who must prove this beyond any reasonable doubt.

[30] A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was 22 years at the time of the alleged incidents of Rape, and therefore, she had the mental capacity to give consent.

[31] The first count against the accused is a charge of Assault with Intent to Commit Rape, contrary to Section 209 of the Crimes Act. Section 209 of the Crimes Act reads as follows: *"Any person who assaults another with intent to commit rape commits an indictable offence (which is triable summarily)."*

[32] Therefore, in order to prove the first count of Assault with Intent to Commit Rape against the accused, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this instance on the 18 September 2022);
- (iii) At Lautoka, in the Western Division;
- (iv) Assaulted the complainant CJJ;
- (v) With the intention to commit Rape.

- [33] To further elaborate upon these elements in respect of the said count of Assault with Intent to Commit Rape. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the said offence.
- [34] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.
- [35] The term 'assault' has not been defined in the Crimes Act. In common parlance assault means to make a physical attack to another person or to cause an unwanted physical contact to another person. To establish the fourth element of the offence the prosecution should prove beyond reasonable doubt that the accused assaulted the complainant CJJ.
- [36] With regard to the final element which concerns the state of mind of the accused, the prosecution should prove beyond reasonable doubt that the accused assaulted the complainant with the intention to commit Rape on her. It is not possible to have direct evidence regarding an accused's state of mind as no witness can look into the accused's mind and describe what it was at the time of the alleged incident. However, Court can deduce the state of mind of the accused from the facts and circumstances that it would consider as proved. Intention of an accused can be inferred based on relevant proven facts and circumstances.
- [37] Section 19 (1) of the Crimes Act provides that a person has intention with respect to conduct if he or she means to engage in that conduct. In order for Court to conclude that the accused assaulted the complainant with the intention to commit Rape on her, Court should be sure that by his conduct the accused intended to commit Rape on the complainant. Court will have to consider all the evidence and draw appropriate inferences to ascertain whether the accused had that intention for this charge to be proved.

[38] It must also be noted that in terms of Section 129 of the Criminal Procedure Act No 43 of 2009 (Criminal Procedure Act), it is stated that no corroboration of the complainant's evidence is necessary to prove an offence of a sexual nature. Rape and Assault with Intent to Commit Rape are obviously considered as offences of a sexual nature. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.

[39] The second count against the accused is a charge of Breach of Bail Condition, contrary to Section 26 (1) and (2) of the Bail Act. Section 26 of the Bail Act [as amended by Bail (Amendment) Act No. 28 of 2012] is re-produced below:

26.-(1) A person who has been released on bail and who fails without reasonable cause to surrender to custody, or otherwise without reasonable cause, breaches any condition of bail imposed by Court, commits an offence and is liable on conviction to a fine of \$2000 or 12 months imprisonment, or both.

(2) The burden is on the defendant to prove that he or she had reasonable cause for failing to surrender to custody or for breach of his or her bail conditions.

[40] Therefore, in order to prove the second count of Breach of Bail Condition against the accused, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this instance on the 18 September 2022);
- (iii) At Lautoka, in the Western Division;
- (iv) Whilst being released on bail by the Lautoka Magistrates' Court in Case No CF 566 of 2022;
- (v) Without reasonable excuse;
- (vi) Breached his bail condition by re-offending when ordered by Court not to re-offend.

[41] To further elaborate upon these elements in respect of the said count of Breach of Bail Condition. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the said offence.

- [42] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.
- [43] The fourth element is that the accused was released on bail by the Lautoka Magistrates' Court in Case No CF 566 of 2022. The prosecution should prove this element beyond reasonable doubt.
- [44] The fifth and sixth elements are that the accused without reasonable excuse, breached his bail condition by re-offending when ordered by Court not to re-offend. The prosecution should prove these facts beyond reasonable doubt.
- [45] The third count against the accused is a charge of Breach of Domestic Violence Restraining Order, contrary to Section 77 (1) (a) of the Domestic Violence Act. Section 77 (1) of the Domestic Violence Act is re-produced below:

77.-(1) Any person who, having notice of a domestic violence restraining order by which they were bound, without reasonable excuse contravenes the order or part of the order, is guilty of a criminal offence and is liable on conviction -

(a) subject to paragraph (b), to a fine of \$1,000 and a term of imprisonment of 12 months;

(b) if the person has previously been convicted of an offence of breach of a domestic violence restraining order, to a fine of \$2,000 and a term of imprisonment of 12 months.

- [46] Therefore, in order to prove the third count of Breach of Domestic Violence Restraining Order against the accused, the prosecution must establish beyond reasonable doubt that;
- (i) The accused;
 - (ii) On the specified day (in this instance on the 18 September 2022);
 - (iii) At Lautoka, in the Western Division;
 - (iv) Having notice of the Domestic Violence Restraining Order No 566 of 2022 by which he was bound;
 - (v) Without reasonable excuse;
 - (vi) Contravened the said order by physically assaulting and sexually abusing CJJ, a protected person.

[47] To further elaborate upon these elements in relation to the third count. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

[48] The second element relates to the specific date on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.

[49] The fourth element is that the accused had notice of the Domestic Violence Restraining Order No 566 of 2022 by which he was bound. The prosecution should prove this element beyond reasonable doubt.

[50] The fifth and sixth elements are that the accused without reasonable excuse, contravened the said order by physically assaulting and sexually abusing CJJ, who was a protected person as per the said order. The prosecution should prove these facts beyond reasonable doubt.

The Agreed Facts

[51] Section 135 of the Criminal Procedure Act deals with "Admission of Facts". The Section is reproduced below:

135. — (1) An accused person, or his or her lawyer, may in any criminal proceedings admit any fact or any element of an offence, and such an admission will constitute sufficient proof of that fact or element.

(2) Every admission made under this section must be in writing and signed by the person making the admission, or by his or her lawyer, and—

(a) by the prosecutor; and

(b) by the judge or magistrate.

(3) Nothing in sub-section (2) prevents a court from relying upon any admission made by any party during the course of a proceeding or trial.

[52] Accordingly, the prosecution and the defence have consented to treat the following facts as "Agreed Facts":

1. THAT NAZIR ALI is charged with one count of Assault with Intent to Commit Rape, contrary to Section 209 of the Crimes Act 2009, one count of Breach of Bail

Condition, contrary to Section 26 (1) and (2) (a) of the Bail Act 2002, one count of Breach of Domestic Violence Restraining Order, contrary to Section 77 (1) (a) of the Domestic Violence Act 2009 and five counts of Rape, pursuant to the Crimes Act 2009.

2. THAT the alleged incidents occurred on the 18th of September 2022 at Velovelo, Lautoka.
3. THAT NAZIR ALI was 21 years old at the time of the alleged incident.
4. THAT the complainant in this matter is CJJ.
5. THAT the complainant was 22 years old at the time of the alleged incident.
6. THAT NAZIR ALI and CJJ were in a de-facto relationship.
7. THAT in May 2022, NASIR ALI and CJJ decided to be in a live-in relationship which lasted till 19th September 2022.
8. THAT on the 18th of September 2022, NASIR ALI and CJJ were living together at Velovelo Road, Lautoka.

[53] Since the prosecution and the defence have consented to treat the above facts as “*Agreed Facts*” without placing necessary evidence to prove them, the above facts are proved beyond reasonable doubt.

Case for the Prosecution

[54] The prosecution, in support of their case, called the complainant (CJJ), Dr. Salome Daunivalu, the Medical Officer who had conducted her medical examination and Woman Corporal 3961 Meredani Naba, the Investigating Officer in the case.

[55] The prosecution also tendered to Court the Interim Domestic Violence Restraining Order (DVRO) as Prosecution Exhibit PE1 and the Medical Examination Report of the complainant as Prosecution Exhibit PE2.

[56] Evidence of the complainant CJJ

- (i) *The complainant’s evidence was recorded in a ‘closed court’.*
- (ii) *The complainant testified that she is currently 25 years old. She is residing at Tavakubu, Lautoka together with her mother, her two children and her de-facto*

- partner. Her children are 4 years old (a son) and 1 year and 8 months old (a daughter).
- (iii) Her de-facto partner's name is Daniel Ram. He is the biological father of her two children.
 - (iv) She is a Police Officer by occupation and currently based at the Lautoka Police Station. She has been a Police Officer for the past 6 years. During this entire period she is serving at the Lautoka Police Station.
 - (v) The complainant testified that in the month of September 2022, she was residing at Velovelo, Lautoka with the accused Nazir Ali, his mother and younger brother.
 - (vi) The witness said that she had first met the accused in May 2022. After a few days she started a de-facto relationship with him. The relationship was good at the start and everything was going well. Then in June 2022, she was interdicted for having an extra-marital affair (she was on half salary but not working).
 - (vii) The witness testified that she is a divorcee. Her first husband Kishan Pillai went and reported at Police Internal Affairs Department that she was having an extra-marital affair with Nazir Ali. At the time she was separated from her husband and about to get a divorce.
 - (viii) It is an Agreed Fact that Nazir Ali and the complainant were in a de-facto relationship (Paragraph 6 of the Agreed Facts). It is further agreed that in May 2022, Nazir Ali and the complainant decided to be in a live-in relationship which lasted till 19 September 2022 (Paragraph 7 of the Agreed Facts).
 - (ix) The witness testified that then the accused had started assaulting her. She had lodged a complaint at the Lautoka Police Station (Around July 2022). The Police had charged the accused in the Magistrate's Court of Lautoka with Assault Causing Actual Bodily Harm. The Magistrate's Court of Lautoka case number was CF 566 of 2022.
 - (x) On 19 July 2022, an Interim Domestic Violence Restraining Order (DVRO) was issued in this case in terms of Section 27 of the Domestic Violence Act (Standard Non-molestation Conditions). The order was issued against the accused Nazir Ali, with the complainant named as the protected person. A copy of the said Interim Domestic Violence Restraining Order (DVRO) was tendered to Court as Prosecution Exhibit PE1.
 - (xi) As per the Interim DVRO, the next date of the Magistrate's Court of Lautoka case has been stated as 20 September 2022. The complainant said that even at the time the Interim DVRO was issued, she was residing at Velovelo, Lautoka with the accused.
 - (xii) The complainant testified to the events which took place on 18 September 2022 (which was a Sunday). Around midday (12.00 noon), she was at Velovelo, Lautoka, in Nazir Ali's house. The accused, his mother and his younger brother were at home at the time.

- (xiii) *She said she was sitting in the porch at first. The accused had come and taken her to the bedroom. He had just asked her to come to the bedroom as he wanted to talk. So the complainant had walked to the bedroom.*
- (xiv) *The witness said that the assault case was coming up in two days' time (on 20 September 2022). The accused had wanted her to withdraw the case. The complainant had told the accused that she will be withdrawing the case. When asked why she wanted to do so, she said: "Because he improved after what happened the last time. After that incident-he never assaulted me after that case."*
- (xv) *The accused had told her that he was not supposed to be charged and asked her how did he get charged for that case. The complainant had told him that it was on the instructions of the Crime Officer after the evidence in the case was received. At this stage, the accused became angry – he started getting furious. He started accusing the complainant of having an affair with her boss – the Inspector Administration of the Lautoka Police Station – because the said Inspector had taken her to his office to give a statement about the incident of assault (in July 2022).*
- (xvi) *The complainant had told the accused that the Inspector was her boss and that he was an old man and that she was not having any affair with him. The witness said that the accused had not been satisfied with her answer and started referring to her past. He had started slapping her (on her face) and pushed her onto the bed with his hands. She had been seated on the bed in the bedroom at the time. The complainant demonstrated as to how the accused had pushed her onto the bed with his hands.*
- (xvii) *Thereafter, the accused had used his four fingers and put it in her mouth. The witness said it had been very painful. She was crying and asking him not to do it. However, the accused had continued. He had been furious. She couldn't stop him.*
- (xviii) *The complainant testified further that the accused used to keep a glass jar in the bedroom. It is like a vase and he used to keep marbles in it. The accused had brought that glass jar and urinated (peed) into it. He had asked her to describe how she had slept with other people in the past – if not he will make her drink that urine. The witness said that she was forced to comply.*
- (xix) *The complainant continued: "Then when I stopped he made me lie down on the bed. He climbed on top of me and sat down on my chest. Then he placed his knees on my two hands to prevent me from moving (the witness demonstrated how this took place). Then he had the jar of urine in his hand with one hand he made me open my mouth. With the other hand, he made me drink the urine."*
- (xx) *The witness said that she felt disgusted. This had gone on for a while. Then the accused got up and asked her again about how she slept with other men and again made her drink his urine. This happened a multiple times.*
- (xxi) *Thereafter, the accused had brought a metal clothes hanger. He had opened it to make it long. He used that hanger to beat the complainant. While doing so*

he would stop at times and ask the complainant about her past. He had beat the complainant on her thighs and her back with the said metal hanger. The witness said that it was painful and she was crying. She was asking for help. However, nobody had come to help her. She had asked the accused to stop it as it hurts.

- (xxii) The complainant testified that after assaulting her on her thighs and her back, the accused had forcefully taken off her clothes. She was wearing a t-shirt and pants at the time. The witness said she cannot clearly recall what she was wearing or whether she was wearing any under clothes at the time. The accused had forcibly pulled off her pants and her t-shirt. He had pulled off her clothes fully (entirely). He had been very aggressive. The complainant had continued crying.
- (xxiii) At this time, the complainant had informed the accused that she wanted to go to the washroom. The accused had given her a cocoa can and asked her to urinate in it. If not he had threatened to further assault her with the hanger.
- (xxiv) Therefore, the complainant was compelled to urinate into the said cocoa can. After she had done so, he took the can and mixed her urine with his urine which was in the glass jar. The accused had then forcefully made the complainant drink the mixed urine. The witness said it was disgusting and she felt helpless.
- (xxv) At this stage his mother had come and told him to stop as he already had an on-going case. The witness said that the bedroom only has a curtain and no doors. His mother had moved the curtain and spoken to him from outside the room. The accused had told his mother to go away and if the Police asked to tell them that she (the mother) wasn't at home. So his mother had just left the room.
- (xxvi) The complainant said that at the time the accused's mother had come and spoken to him, she (the complainant) was on the bed and the accused was standing in front of her.
- (xxvii) The witness testified that the accused had then used his finger and inserted it into her anus. At the time, the complainant was already on the bed. The accused had come onto the bed and inserted his finger into her anus. She said: "I was crying. I told him to stop as it was painful. But he did not listen."
- (xxviii) When asked how she felt, the complainant said it was painful and she did not feel good. She felt disgusted. She couldn't recall as to which hand the accused had used or as to how long the accused had inserted his finger into her anus.
- (xxix) Thereafter, the accused had asked her to perform oral sex on him. The witness said: "He put my mouth in his dick and made me suck it." She continued: "I did it because he was aggressive – because if I didn't do it, he would assault me and ask me to drink his urine again. So I had to comply."
- (xxx) The witness said she did not want to perform oral sex on the accused. When asked as to how she felt when performing oral sex, the witness said that if she stopped he would have assaulted her so she just continued. This had gone on

- for a few minutes till the accused was erected. The witness said that the accused was fully naked at the time.*
- (xxxii) When asked what happened after that, the complainant said: "He was standing and I was on the bed. He was still standing by the bed. He turned me around. He put me in a position – I was facing down. Then with his erected penis, he inserted it in my vagina and then in my anus. When he did that, I pushed him with my hand and asked him to stop. I told him don't do it. But he did not stop. He used to keep a knife under his mattress. So he warned me if I push him again, he will beat me with it (with the knife)."*
- (xxxiii) The complainant continued that the accused inserted his erected penis in her vagina and anus until he ejaculated. He had ejaculated in her vagina. When he was inserting his penis in her vagina and anus, it was painful and she was feeling uncomfortable and disgusted.*
- (xxxiv) After ejaculating, the witness said that the accused started acting normal. His aggressiveness was gone. He went and threw the leftover urine out of the window and then he went and brought food for her to eat. The complainant was hungry as she hadn't eaten anything since morning. So the accused had fed her with his hands and she had eaten.*
- (xxxv) When asked how she felt at the time, the witness said: "It was like finally everything was over." Then the witness had gone to sleep. At the time, Nazir Ali was still in the house.*
- (xxxvi) The complainant testified that on the next day (Monday 19 September 2022), she and the accused had gone to withdraw the assault case. She had first gone to the Police Prosecutions Office in the Lautoka Magistrate's Court premises. The accused had accompanied her. She had gone inside the office, while the accused remain standing outside. She had informed the officers there that she wanted to withdraw the assault case.*
- (xxxvii) When asked why she wanted to withdraw the assault case after all what had happened to her, she said: "I didn't want to withdraw – but I wanted to come out of the house".*
- (xxxviii) The witness continued that as she entered the Prosecutions Office, she saw her colleagues there-two lady Police Officers namely Sgt. Sulio and Sgt. Mereisi. She had informed them of what had happened to her. The accused had tried to come into the office. However IP Arvind, the Prosecution Officer, Lautoka, pushed him out of the office.*
- (xxxix) Thereafter, they had contacted the Lautoka Police Station and a fleet of Police vehicles were sent to pick her up and take her to the Police Station. The complainant was then taken to the Sexual Offences Unit, Lautoka Police Station. Her statement had been recorded and she was taken to the doctor for Medical Examination. Thereafter, she went back to her house at Tavakubu, Lautoka – to stay with her mother.*
- (xl) The complainant testified that after the original assault case was instituted, the accused was granted bail. After obtaining bail, he was living in Velavelo,*

Lautoko. After the initial case of assault, the witness had stayed a few days at her mother's place (in Tavokubu, Lautaka). Thereafter, she had gone back to stay at the accused's place in Velovela, Lautaka.

- (xl) When asked why she went back to stay with him at the time, the complainant said: "Because he said he will not assault me again. He made a promise. That is why I wanted to withdraw the case."
- (xli) The witness said that this incident (which allegedly took place on 18 September 2022) has affected her significantly. She said: "It has affected me. I have gone through a lot. I was to do a Constable qualifying course-but I couldn't finish it. Everyone knew about it. I did run away from that course. I was so lonely. Even the Police Officers in the Police Station were not conversing well (with her). So that's when I went on absent without official leave (AWOL). I went to Nadi to stay with one of my relatives-away from everyone, including my mum. The relationship with my mum was also not good after this incident.... She remained on AWOL for two weeks. Thereafter, she resumed work again."
- (xlii) The complainant identified Nazir Ali as the accused in the dock.
- (xliii) When asked to explain the position she was in at the time the accused inserted his penis into her vagina and anus, the complainant said: "I was on my knees (I was not lying flat). My chest was on the bed. I was facing down. That is when he put his erected penis in my anus and vagina."
- (xliv) The complainant was cross examined at length by the defence. The defence also put several suggestions to the complainant in line with their case theory.
- (xlv) The complainant agreed that she was a trained Police Officer by profession and had served in the Fiji Police Force for 6 years. She agreed that the training involved combat training, physical strength training and in self-defence as well.
- (xlvi) The witness was asked as to why she went back to reside with the accused after the initial case of assault was filed, she said that she thought the accused will stop assaulting her again.
- (xlvii) It was suggested to the complainant that on the day of the alleged incident, she and the accused never had any conversation about the assault case coming up on 20 September 2022. She denied this suggestion and said they did have a conversation.
- (xlviii) It was put to the complainant that on the day of the alleged incident, she could have easily escaped from the room, when the accused started assaulting her and asking about her past. The witness said that she could have-but she did not because she knew how aggressive the accused becomes.
- (xlix) It was put to the witness that when the accused had inserted his four fingers in her mouth, she did not act in self-defence to stop him. She agreed with the suggestion, but explain that the accused was stronger than her and more aggressive. He could have done anything to her. She said even the knife was under the mattress. So what could she have done at that stage?
- (l) It was put to the complainant that as a trained Police Officer and having training in self-defence that she should also have known how to tackle a person

where a weapon is used. The witness said: "In Fiji Police I was only taught 18 techniques of self-defence. I believe that was not enough to save myself or protect myself."

- (li) The complainant agreed that at the time the accused was urinating into the glass jar, her movements were not restricted in anyway. It was then suggested to her that she could have easily escaped from the room at that time. The witness agreed that she could have but did not do so.
- (lii) It was also put to the witness that during the course of investigation into this case, the glass jar was not recovered by the Police.
- (liii) It was suggested to her that the accused never urinated into the glass jar and that he never made her drink his urine. The witness denied the suggestion and said that he did.
- (liv) The complainant re-iterated that the accused was furious and that she could not stop him/control his behaviour. It was suggested to the witness that during her job as a Police Officer, she deals with such situations every day (dealing with people with furious/aggressive behaviour). The witness replied: "I believe suspects are different than de-facto partners".
- (lv) It was suggested to the witness that as a trained Police Officer she would have more physical strength than a lay person. The witness replied: "Trained Police Officer but also a woman."
- (lvi) It was put to the complainant that the accused was never furious on the day of the incident and she did not have to stop him since the alleged incident never happened. The witness categorically denied this suggestion and stated that the incident did take place in which she was not able to stop him.
- (lvii) The complainant was asked why she did not shout and call for help of the neighbours or other family members in the house or tried to escape from the house. The witness said: "I asked her (accused's mother) to call the Police. She did not do so. I asked her to stop him. She did not do so. I was already naked, where could I have run."
- (lviii) It was suggested to the witness that the accused's mother never came to the room as the alleged incident never took place and she was never raped. The witness said that the alleged incident did take place and that she was tortured and raped by the accused.
- (lix) It was also suggested that the accused's mother gave a statement to the Police only because she had threatened her to do so. The complainant denied this suggestion.
- (lx) It was suggested to the complainant that on the day of the alleged incident, she had consensual sexual intercourse with the accused. It was further suggested that during the course of this sexual intercourse, she was rubbing her clitoris and indicating to the accused that she had consented to the sexual intercourse and that she was enjoying it. The complainant categorically denied all these suggestions.

- (lxi) It was further suggested that on the day of the incident she had consented to have anal sex with the accused and to have vaginal sex with the accused and consented for the accused to penetrate her anus with his finger. The complainant denied these suggestions. It was also suggested that on that day she did not perform any oral sex on the accused. The complainant denied the suggestion and said, she did perform oral sex on him.
- (lxii) It was suggested to the witness that she had acted in a manner making it known to the accused that she was enjoying the whole act. The witness denied this suggestion.
- (lxiii) The witness admitted that her statement had been recorded by the Police on 20 September 2022.
- (lxiv) The defence highlighted one inconsistency in the complainant's evidence vis a vis her statement made to the Police. During her testimony in Court the witness said that she had not acted in any manner indicating that she was enjoying the sexual acts. However, in her statement to the Police, it is recorded as follows: "I had to act as if I was enjoying just to make him release and become calm."
- (lxv) The witness explained that this was not in respect of the whole act. This was only in respect of the vaginal intercourse. She had seen the accused was enjoying-so she acted as if she was enjoying to make him ejaculate inside her vagina. The complainant explained further that at the beginning she already tried to stop the accused but he did not stop. Later on she had to act in such a way to make it finish.
- (lxvi) It was suggested to the witness that there was no knife under the mattress as indicated by her. The witness denied this suggestion and said there was a knife under the mattress.
- (lxvii) The complainant agreed that she and the accused used to have sexual intercourse on a regular basis. It was suggested to her that she would have both anal and vaginal sex with the accused. The witness denied this suggestion and said she only consented to have vaginal sex.
- (lxviii) It was suggested to her that on the day of the incident she and the accused had consensual sex like every other day. The witness denied this suggestion.
- (lxix) It was further suggested that she and the accused used to have intense sex (rough sex) on a regular basis and she was actively involved and enjoyed it. The witness agreed to this suggestion, but categorically stated it was not for anal sex but only vaginal sex. Also she did not agree to be hit or beaten.
- (lxx) It was suggested to the complainant that she was never assaulted by the accused with the intent to commit Rape on her. The witness denied this suggestion and reiterated that the accused had assaulted her with a hanger and also slapped her.
- (lxxi) It was put to the witness that although she said that accused had hit her with a hanger on her thighs and her back she had sustained no injuries in those areas of her body. The witness agreed that she had not sustained any visible injuries.

- She also stated that at the time the accused had assaulted her with the hanger, her clothes had been on.*
- (lxxii) It was suggested to the complainant that all the allegations made against the accused are not true. The witness categorically denied this suggestion and said all the allegations were true.*
- (lxxiii) The complainant agreed that she had written to the Office of the DPP requesting them to withdraw the charges against the accused. She also agreed that she had on one occasion verbally informed Court that she wanted to withdraw the charges against the accused. However, she categorically denied that she did so because the allegations were false.*
- (lxxiv) The complainant agreed that despite being aware of the accused's bail conditions, she had gone to the accused's mother's residence in Velevele to celebrate his birthday (on 11 February 2023). It was suggested to the witness that she had visited the accused's work place several times, after he had obtained bail, so much so that the accused had to report it to the Lautoka Police Station. She agreed visiting him at his work place, but was unaware of any complaint made to the Police by the accused.*
- (lxxv) The witness agreed that after the accused had obtained bail for this case, she had tried to contact him and also had sexual intercourse with him on multiple occasions.*
- (lxxvi) As per the case record it is depicted that the accused had been granted bail by this Court on 5 January 2023.*
- (lxxvii) It was suggested to the witness that after she had complained about the alleged incident and the accused was taken into custody and held at the Lautoka Cell Block, she had come to meet him in her Police uniform. The complainant said she cannot recall this happening. However, she denied the suggestion that she had sexual intercourse with the accused at the cell block that day when she had visited.*
- (lxxviii) It was further suggested to the complainant that if the incident as alleged by her had taken place, she would not have maintained any contact with the accused. The witness answered: "The alleged offences did happen. After he came out on bail he took me to a church and promised me that he won't be repeating the same mistakes again and if I withdraw the case he will marry me."*
- (lxxix) It was finally suggested to the complainant that since she had maintained contact with the accused, so that makes her story unbelievable and false. The witness said that although she did contact the accused, the alleged incidents are true and it happened.*
- (lxxx) Several questions were put to the complainant in re-examination, to clarify certain matters that arose during her cross-examination.*
- (lxxxi) The complainant explained that at the time of the alleged incident in 2022, she was only 22 years of age (she turned 23 on 21 September 2022) and had served in the Fiji Police Force for only 3 years.*

- (lxxxii) She stated that the idea for her to go back to the accused's place after she made the complaint of assault against the accused in 2022, was made by both the accused and herself.
- (lxxxiii) She explained that on the day of the alleged incident, she could not use any self-defence methods to stop the accused because he was very aggressive. She had thought that the accused would do something worst to her.
- (lxxxiv) She also explained that she knew about the knife the accused had kept under the mattress because they used to sleep on the same bed during their relationship. She had seen the knife herself.
- (lxxxv) When asked to explain what she meant when she had said in her Police Statement that she acted as if she was enjoying, the complainant said that this was only in relation to the time the accused was penetrating her vagina with his penis (only during the time of vaginal intercourse). She said she stopped crying at that time and remained calm until the accused had ejaculated.
- (lxxxvi) When asked to explain why she had written to the Office of the DPP requesting to withdraw the charges against the accused, the witness said that after the accused was bailed out, he asked for forgiveness and wanted to get back to her. [From the Court Record it is revealed that the accused was granted bail by this Court on 5 January 2023].
- (lxxxvii) When asked whether she wanted to be with the accused again, the complainant said: "I had no option. Because after he was remanded I became pregnant with my current partner. But after my current partner came to know why the accused was remanded, we got separated.... My current partner got into another relationship. I was pregnant. I informed the accused about the pregnancy. He was willing to accept me and my baby after the withdrawal. He wanted me to withdraw the case first.... I was homeless after my mum came to know I was pregnant."
- (lxxxviii) The witness said that the last time she had met the accused was in February 2023, the day on which they celebrated the accused's birthday.
- (lxxxix) The complainant agreed that after the accused was bailed out, she had visited the accused several times at his work place and had sexual intercourse with him multiple times. She said she did so because the accused promised her that he won't be repeating his actions again. So she was willing to get back to him. She further testified that she had no other source of support. She said: "I was still on half salary. I was staying at the accused's house. Even while in remand, I was staying at his place with his mother, because my mother got to know I was pregnant and my current partner got to know about this case."
- (xc) When asked in re-examination as to why she was in Court to give evidence today, the complainant said: "In February 2023, we were celebrating his birthday. After all the celebrations he contacted my current partner Daniel Ram. Then accused wanted me to abort the baby and wanted me to tell my current partner that (that she is aborting the baby). I told my current partner. He (my current partner) heard me crying. So he called the Police to Velovelo.

And the Police came. By the time the Police Officer came, the accused ran away from the house. From that night I realized that he would not be improving. He will continue to assault me, torture me. And that is the reason I am here today (to give evidence)."

- (xci) The complainant clarified that the time period she had visited the accused several times at his work place and had sexual intercourse with him multiple times was between 5 January 2023 (the day the accused was granted bail) and the accused's birthday in February 2023. She reiterated that she has not tried to contact the accused in any manner after that date.*
- (xcii) When questioned by Court as to why she wanted to get back to the accused after all what she alleged he did to her, the complainant said she was a divorcee, single mother, pregnant, no support from family and accused promised to reform. However, she realized that the accused only wanted her to withdraw the case/to give a letter of withdrawal. After the withdrawal letter was given, the accused had again treated her like before.*

[S7] Evidence of Dr. Salome Daunivalu

- (i) The Doctor testified that she is currently based at the Medical Services Pacific (MSP) Lautoka. She is 41 years of age. She is a General Practitioner (GP).*
- (ii) She had graduated with an MBBS Degree from the Fiji School of Medicine in 2010. Thus, she has been practicing as a Medical Officer for the past 14 years. She obtained a Post-Graduate Diploma in Public Health from the University of Roehampton in London, in 2020.*
- (iii) The doctor testified that she was first employed under the Ministry of Health. After completing her internship at CWM Hospital in 2011, she was posted to the Maternity Unit Sub-Divisional Hospital in Nausori in 2012. She served at Nausori Hospital until 2016.*
- (iv) Thereafter, she served at the Rural Sub-Divisional Hospital in Naitasiri from 2016 to early 2020. From early 2020 to 2021, she served as Principal Medical Officer at the Valelevu Hospital.*
- (v) She has been serving at MSP Lautoka since 15 March 2021, which is a period of over 4 years. The doctor testified that the MSP provides one stop shop services- medical services, psycho-social support services (Counselling) and legal services.*
- (vi) The witness testified that in September 2022, she had been serving at the MSP Lautoka. She confirmed that she had conducted the medical examination of the complainant, at the MSP Lautoka, on 19 September 2022, commencing at 2.06 p.m. The complainant had been referred to her by WDC 5175 Preetika, from the Sexual Offences Unit (SOU) of the Lautoka Police Station.*
- (vii) Doctor Daunivalu had prepared a Medical Examination Report based on her examination of the complainant. The said Medical Examination Report was tendered to Court by the witness as Prosecution Exhibit PE2.*

- (viii) *The doctor testified that she had first done counselling to the complainant. As to the initial impression of the complainant, it is recorded in column D11 of the Medical Examination Report that she was in shock and pain. Thereafter, the doctor had examined her from head to toe.*
- (ix) *The Doctor testified as to the specific medical findings as noted in column D12 of the Medical Examination Report.*
- *D12 (a) – General appearance – emotional while eliciting history. The doctor said that the complainant appeared emotional while trying to recall all what had happened to her. Her vitals were all stable (blood pressure, pulse, temperature).*
 - *D12 (b) – HEENT (Head, Eyes, Ears, Nose, Throat) – no suction marks and no facial bruising or abrasions found. Chest – fully developed breast.*
 - *D12 (c) – Abdomen – upon touching abdomen felt soft.*
 - *D12 (d) – Genitalia – a white, odourless discharge noted from vulva. There is an abrasion on the vaginal woll (base) and posterior fouchette, meaning there is an abrasion at the bottom of the hymen and below the hymen base (more inferior). There was also a tear on the hymen at the 7 o'clock position and the hymen was not intact. The anal – perianal appeared red at the 7 o'clock position. The perianal is the folding structure before entering the inside of the anus – folded skin at the mouth of the anus.*
 - *The doctor observed that the tear on the hymen was a fresh injury (acute). She noted further that all injuries in the genital area (by their appearance) were injuries which had occurred within the past 24 hours.*
- (x) *At Appendix 1 in the Medical Examination Report, the Doctor has drawn a sketch to depict the above specific medical findings.*
- (xi) *The Doctor confirmed that the injuries shown in the genital area were possible by penetration of a penis into the vagina and anus. The injuries found in the anal area was possible due to penetration of a finger into the anus.*
- (xii) *As to her Professional Opinion as depicted in column D14, the doctor has noted 24 hours post-injury.*
- (xiii) *The doctor also testified as to the Clinical Management she had prescribed to the complainant, as depicted in column D15.*
- (xiv) *Under Summary and Conclusions at column D16 of the Medical Examination Report the Doctor has recorded: "22 years indo-Fijion female claims to be sexually abused by her partner yesterday. There is evidence of injury on examination which can be consistent with the history (given by the patient)."*
- (xv) *The medical examination of the complainant had concluded at 2.39 p.m.*
- (xvi) *In cross-examination it was suggested to the Doctor whether the injuries she has noted in the genitalia could have occurred as a result of consensual and passionate sexual intercourse. The doctor answered that it was possible. However, she stated that the injuries shown in the report points more towards non-consensual sexual intercourse – due to the internal injuries on the vagina.*

- (xvii) *The doctor testified that if the complainant was assaulted by a clothes hanger on her thighs and back there is a possibility of injuries occurring on her body. However, she has not observed nor recorded any such injuries on the complainant in this case. The doctor explained further that the appearance of injuries on the body depends on the force and gravity of force used and the sharpness of the object.*
- (xviii) *In re-examination, the doctor said that if assaulted by a clothes hanger whilst the complainant was wearing clothes (assaulted on top of the clothes), there is a possibility of the complainant not having any injuries at the time of examination.*

[58] Evidence of Woman Corporal 3961 Meredani Naba

- (i) *The witness testified that she is 43 years of age and currently serving at the Lautoka Police Station.*
- (ii) *She has been serving in the Fiji Police Force for the past 17 years. She has served at Sigatoka Police Station for 10 years and at Ba Police Station for 4 years. In July 2022, she was posted to the Lautoka Police Station. At the Lautoka Police Station she is attached to the CID Unit and specifically to the Sexual Offences Unit of the Lautoka Police Station.*
- (iii) *The witness testified that in September 2022, she was serving at the Lautoka Police Station – attached to the Sexual Offences Unit. She was appointed by the Crime Officer as the Investigating Officer in this case.*
- (iv) *The witness testified to the investigations conducted by her in this case. During the course of her investigations, she had compiled all the documents into the Police Docket – including the complainant’s statement and all other witness statements, the Medical Report of the complainant and Bail Undertaking for the accused. She was also the Witnessing Officer during the recording of the accused’s Caution Interview Statement.*
- (v) *The Bail Undertaking in Lautoka Magistrate’s Court Case Number 566 of 2022 was shown to the witness. The Officer confirmed that it was a Bail Undertaking in respect of Nazir Ali, the accused in this case. It was a case of Assault Causing Actual Bodily Harm.*
- (vi) *The witness read out the conditions under which the accused had been granted bail in the said case. One of the conditions was that he should not re-offend while on bail. The witness stated that the accused has not complied with his Bail Undertaking, specifically his undertaking not to re-offend.*
- (vii) *The witness testified that as per the Bail Undertaking, it is recorded therein that an Interim Domestic Violence Restraining Order (DVRO) in terms of Section 27 of the Domestic Violence Act has been issued for the protection of the complainant.*
- (viii) *The Officer identified Nazir Ali as the accused in the dock.*

[59] At the end of the prosecution case this Court decided that there was no relevant or admissible evidence to establish that the accused had committed the offences of Rape of which he is charged with in Counts 6 and 8. Accordingly, the accused was found not guilty and acquitted of the said two charges. The reasons for this decision will be further elaborated upon later in this judgment.

[60] However, this Court decided to call for the defence in respect of the remaining six counts-Counts 1 to 5 and Count 7. The accused was then explained his legal rights. I explained to him that he could address Court by himself or his Counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. I explained to the accused that he need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[61] The accused exercised his right to remain silent. He also opted not to call any witnesses on his behalf.

Analysis

[62] As stated before, the prosecution, in support of their case, called the complainant (CJJ), Dr. Salome Daunivalu, the Medical Officer who had conducted her medical examination and Woman Corporal 3961 Meredani Naba, the Investigating Officer in this case. The accused exercised his right to remain silent. He also opted not to call any witnesses on his behalf.

[63] The burden of proving each ingredient of the charges rests entirely and exclusively on the prosecution and the burden of proof is beyond a reasonable doubt. Therefore, it is incumbent on the prosecution to prove all the elements of the charges beyond reasonable doubt. Earlier in this judgment, I have made reference to the elements that the prosecution has to prove beyond a reasonable doubt in respect of each of the eight counts.

[64] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as Agreed Facts without placing necessary evidence to prove them. Therefore, those facts are considered as proved beyond reasonable doubt.

- [65] Based on the said Agreed Facts it is admitted that Nazir Ali is the accused in the case and that the alleged incidents occurred on the 18 September 2022, at Velovelo, Lautoka.
- [66] It is also agreed that the accused and the complainant were in a de-facto relationship; and in May 2022 decided to be in a live-in relationship, which lasted until 19 September 2022. It is also agreed that on 18 September 2022, the accused and the complainant were living together at Velovelo Road, Lautoka.
- [67] I have summarized the evidence of all witnesses led during the trial.
- [68] The complainant testified as to how the accused had committed the alleged offences on her on the 18 September 2022. The complainant, who was a Police Officer by occupation, had first met the accused in the month of May 2022. The two became involved in a de-facto relationship and began living together. However, very early in their relationship, problems had surfaced and the accused had allegedly began to assault the complainant.
- [69] This resulted in a complaint being made by the complainant against the accused at the Lautoka Police Station, in July 2022. The Police had charged the accused in the Magistrate's Court of Lautoka with Assault Causing Actual Bodily Harm. The Magistrate's Court of Lautoka case number was CF 566 of 2022.
- [70] On 19 July 2022, an Interim DVRO was issued in this case in terms of Section 27 of the Domestic Violence Act (with Standard Non-molestation Conditions). The order was issued against the accused Nazir Ali, with the complainant named as the protected person. A copy of the said Interim DVRO was tendered to Court as Prosecution Exhibit PE1. As per the Interim DVRO, the next date of the Magistrate's Court of Lautoka case has been stated as 20 September 2022. The complainant said that even after she had made this complaint of assault against the accused she was residing at Velovelo, Lautoka with the accused.
- [71] The testimony of the complainant, with regard to the events which allegedly transpired on 18 September 2022, has to be taken in the backdrop of the aforesaid assault case which was coming up 2 days later.
- [72] Around mid-day on 18 September 2022, the complainant said she was sitting in the porch when the accused had come and taken her to the bedroom. He had just asked her to come to the bedroom as he wanted to talk. The complainant had complied with his request and gone to the bedroom with him. The topic of discussion was about the assault case which

was coming up on the 20 September 2022. The accused had wanted the complainant to withdraw the said case. The accused had told her that he was not supposed to be charged and alleged that he was only charged because the complainant was having an affair with her boss at the Lautoka Police Station.

[73] This discussion led to the accused losing his temper. The complainant testified that the accused became angry and furious. He had slapped her on her face and pushed her onto the bed with his hands. Thereafter, the accused had used his four fingers and put it in her mouth. The complainant said it had been very painful. She was crying and asking him not to do it. However, the accused had continued. He had been violent. She could not stop him.

[74] The complainant testified further that the accused used to keep a glass jar in the bedroom. It is like a vase and he used to keep marbles in it. The accused had brought that glass jar and urinated into it. He had asked her to describe how she had slept with other people in the past – if not he will make her drink that urine. The witness said that she was forced to comply and drink his urine.

[75] When the complainant had wanted to go to the washroom to urinate, the accused had compelled her to urinate into a cocoa can. After she had done so, he took the can and mixed her urine with his urine which was in the glass jar. The accused had then forcefully made the complainant drink the mixed urine. The complainant said it was disgusting and she felt totally helpless.

[76] The accused had also brought a metal clothes hanger and opened it to make it long. He used that hanger to beat the complainant. While doing so he would stop at times and ask the complainant about her past. He had beat the complainant on her thighs and her back with the said metal hanger. The witness said that it was painful and she was crying.

[77] Thereafter, the complainant testified in graphic detail as to how the accused had committed the alleged sexual acts on her.

[78] The complainant testified that after assaulting her on her thighs and her back, the accused had forcefully taken off her clothes. She said she was wearing a t-shirt and pants at the time. She could not clearly recall what she was wearing inside or whether she was wearing any under clothes at all at the time. The accused had forcibly pulled off her pants and her

t-shirt. He had pulled off her clothes fully (entirely). She was fully naked. He had been very aggressive. The complainant had continued crying.

[79] The complainant testified that the accused had used his finger and forcibly inserted it into her anus. At the time, the complainant was already on the bed. The accused had come onto the bed and forcibly inserted his finger into her anus. She said: *"I was crying. I told him to stop as it was painful. But he did not listen."*

[80] Thereafter, the accused had asked her to perform oral sex on him. The complainant said: *"He put my mouth in his dick and made me suck it."* She continued: *"I did it because he was aggressive – because if I didn't do it, he would assault me and ask me to drink his urine again. So I had to comply."*

[81] In respect of the charge of carnal knowledge, the complainant said: *"He was standing and I was on the bed. He was still standing by the bed. He turned me around. He put me in a position – I was facing down. Then with his erected penis, he inserted it in my vagina and then in my anus. When he did that, I pushed him with my hand and asked him to stop. I told him don't do it. But he did not stop. He used to keep a knife under his mattress. So he warned me if I push him again, he will beat me with it (with the knife)." The complainant continued that the accused inserted his erected penis in her vagina and anus until he ejaculated. He had ejaculated in her vagina. When he was inserting his penis in her vagina and anus, it was painful and she was feeling uncomfortable and disgusted. After ejaculating, the complainant said that the accused started acting normal and his aggressiveness was gone.*

[82] When analysing the evidence of the complainant it is clear that she testified to the effect that the accused had used his finger and forcibly inserted it into her anus only on a single occasion. She made no reference to the accused penetrating his finger into her anus on any other occasion. This is the reason that at the end of the prosecution case this Court decided that there was no relevant or admissible evidence to establish that the accused had committed the offences of Rape of which he is charged with in Counts 6 and 8. Accordingly, the accused was found not guilty and acquitted of the said two charges.

[83] Having analysed all the evidence in its totality, it is my considered opinion that the complainant's evidence, can be accepted as truthful, credible and reliable in respect of all the other charges. The complainant withstood the rigorous cross examination by the

Defence and remained consistent throughout her evidence, in relation to the material particulars of this case.

[84] The accused totally denies all the allegations made against him by the complainant. As to the allegations set out in Counts 4 and 7 his defence is one of consent.

[85] As stated previously, in terms of Section 206 (1) of the Crimes Act consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance alone shall not constitute consent. Section 206 (2) of the Crimes Act provides that a person's consent to an act is not freely and voluntarily given if it is obtained by force; or by threat or intimidation; or by fear of bodily harm; or by exercise of authority.

[86] It is clear from the complainant's testimony that she was not consenting freely and voluntarily to any of the sexual acts that the accused perpetrated on her on the day of the alleged incident. The aggressive manner in which the accused was conducting himself that fateful day undoubtedly pointed to the fact that he had threatened and intimidated the complainant and subjected her to the fear of bodily harm. The fact that the complainant was a Police Officer had absolutely no bearing. At the time of the alleged incident the complainant was not acting as a Police Officer, but acting merely as a woman, who was being subjected to abuse. It must also be borne in mind, that at the time, the complainant was the de-facto partner of the accused.

[87] The defence attempted to impeach the credibility of the complainant by highlighting one inconsistency in her statement made to the police, in comparison to the testimony given by her in Court. I have identified and made reference to the said inconsistency when summarizing her evidence. To reiterate during her testimony in Court the complainant said that she had not acted in any manner indicating that she was enjoying the sexual acts. However, in her statement to the Police, it is recorded as follows: *"I had to act as if I was enjoying just to make him release and become calm."*

[88] The complainant explained that this was not in respect of the whole act. This was only in respect of the vaginal intercourse. She had seen the accused was enjoying-so she acted as if she was enjoying to make him ejaculate inside her vagina. The complainant explained further that at the beginning she already tried to stop the accused but he did not stop. Later on she had to act in such a way to make it finish.

[89] In *Sivoinatoto v. State* [2018] FJCA 68; AAU0049.2014 (1 June 2018); the Fiji Court of Appeal discussed as to how a Court should deal with issues arising out of contradictions and omissions. His Lordship Justice Gamalath held as follows:

*[9] When a court is dealing with the issues arising out of "contradictions", "omissions", it is necessary for the Court to carefully examine the impact that such discrepancy could have on the total credibility of evidence of a witness. As decided in the case of **Appabhai v. State of Gujarat**, AIR 1988, S.C. 694, (1988 Cri.L.J.848) (a decision of the Indian Supreme Court).*

"The Court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters, in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishment to their version perhaps for the fear of their testimony being rejected by the Court. The Courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy."

*In the case of **Arjun and Others v. State of Rajasthan**, (1994) AIR - SC-2507, it was held that; (A decision of the Indian Supreme Court).*

"A little bit of discrepancies or improvement do not necessarily demolish the testimony. Trivial discrepancies, as is well known, should be ignored. Under circumstantial variety, the usual character of human testimony is substantially true. Similarly, innocuous omissions are inconsequential."

[10] More often contradictions and omissions become the main tool used in courts to evaluate the testimonial trustworthiness of a witness's' evidence. As defined in the Oxford Dictionary "contradictions" means 'to offer the contrary'. On the other hand, if a witness has testified in the examination-in-chief on a certain thing which he has omitted to state in his statement to the police, it is called "omission". If the said omission is on minor points, it is not contradiction and court will not take cognizance of those omissions. Court will take cognizance of those omissions which are on material points and they are called "contradictions by way of omissions". In order to prove the omissions, it is necessary to find out as to what the witness has deposed before the court in the examination-in-chief.

[11] Any statement of a witness made to an investigating police officer does not form part of the evidence in trial. Court would not be looking into police statements of witnesses to find out the truth involved in a case. However, if any

party to a low suit is depending on 'contradictions' or 'omissions' to assail the trustworthiness of the evidence of any witness, it is necessary not only to highlight the 'contradictions' or 'omissions', but also to prove them at trial, so that the court could consider the effect of them according to the criterion laid down in the decided decisions referred above.

[12] Whenever it appears in the proceedings of a trial that the witness's evidence is tainted with certain contradictions and/or omissions, opportunity should be given to such witness to explain the basis for such infirmities. If the explanation is plausible that would have a direct impact on the credibility issue.

[13] In the case of Sri Cruz Pedro Pacheco v. State of Maharashtra, 1998 (5) Bom. L.R. 521-1998 Crim.L.J.4628, it was decided that; (an Indian Decision)

"Credibility of the witness can be impeached only after obtaining his explanation for the contradictory statement and by pointing out that the explanation given by him is not true or unsatisfactory. Then only the Court will be in a position to consider whether or how far the credibility of that witness is affected in that court. It is absolutely necessary to give the witness an opportunity of explaining the alleged contradiction. It must be borne in mind that the trial has to be fair not only to the accused but also to the witness who may be the aggrieved party himself."

[90] I have duly considered the explanation offered by the complainant in respect of the said inconsistency in her evidence as highlighted by the defence. It is my opinion that the said explanation is reasonable and acceptable. In any event, I am of the opinion that this is only a minor discrepancy which does not shake the basic version of the prosecution case. As such, I am of the opinion that the reliability and credibility of the complainant's evidence is unaffected.

[91] The defence attempted to discredit the complainant by highlighting her conduct consequent to the incident. The complainant agreed that she had written to the Office of the DPP requesting them to withdraw the charges against the accused. She also agreed that she had on one occasion verbally informed Court that she wanted to withdraw the charges against the accused. However, she categorically denied that she did so because the allegations were false.

[92] The complainant agreed that despite being aware of the accused's bail conditions, she had gone to the accused's mother's residence in Velevelo to celebrate his birthday (on 11 February 2023). It was suggested to the witness that she had visited the accused's work place several times, after he had obtained bail, so much so that the accused had to report it to the Lautoka Police Station against her. The complainant agreed visiting the accused at

his work place, but was unaware of any complaint made the Police by the accused. Furthermore, the complainant agreed that after the accused had obtained bail for this case, she had tried to contact him and also had sexual intercourse with him on multiple occasions.

[93] The above conduct of the complainant after the alleged incident took place seems highly unusual, especially her conduct after the accused was enlarged on bail on 5 January 2023 and up until his birthday in February 2023 (11 February 2023). However, the complainant provided an explanation as to the reasons for her aforesaid conduct.

[94] When asked to explain why she had written to the Office of the DPP requesting to withdraw the charges against the accused, the complainant said that after the accused was bailed out, he asked for forgiveness and wanted to get back to her. When asked whether she wanted to be with the accused again, the complainant said: *"I had no option. Because after he was remanded I became pregnant with my current partner. But after my current partner came to know why the accused was remanded, we got separated.... My current partner got into another relationship. I was pregnant. I informed the accused about the pregnancy. He was willing to accept me and my baby after the withdrawal. He wanted me to withdraw the case first.... I was homeless after my mum came to know I was pregnant."*

[95] The complainant agreed that after the accused was bailed out, she had visited the accused several times at his work place and had sexual intercourse with him multiple times. She said she did so because the accused promised her that he will not be repeating his actions again. So she was willing to get back to him. She further testified that she had no other source of support. She said: *"I was still on half salary. I was staying at the accused's house. Even while in remand, I was staying at his place with his mother, because my mother got to know I was pregnant and my current partner got to know about this case."*

[96] The complainant said that the last time she had met the accused was in February 2023, the day on which they celebrated the accused's birthday. When asked in re-examination as to why she was in Court to give evidence, the complainant said: *"In February 2023, we were celebrating his birthday. After all the celebrations he contacted my current partner Daniel Ram. Then accused wanted me to abort the baby and wanted me to tell my current partner that (that she is aborting the baby). I told my current partner. He (my current partner) heard me crying. So he called the Police to Velovelo. And the Police came. By the*

time the Police Officer came, the accused ran away from the house. From that night I realized that he would not be improving. He will continue to assault me, torture me. And that is the reason I am here today (to give evidence)."

[97] When questioned by Court as to why she wanted to get back to the accused after all what she alleged he did to her, the complainant said she was a divorcee, single mother, pregnant, no support from family and accused promised to reform. However, she realized that the accused only wanted her to withdraw the case or to give a letter of withdrawal. After the withdrawal letter was given, the accused had again treated her like before.

[98] I find that this explanation provided by the complainant for her conduct was reasonable in the circumstances she was placed at the time.

[99] Therefore, considering the totality of the evidence in this case, it is my opinion, that the accused's version cannot be accepted as truthful and reliable and I reject the defence version of events.

[100] The prosecution led in evidence Dr. Salome Daunivalu, the Medical Officer who had conducted the medical examination on the complainant. The doctor testified that there is evidence of injury on examination on the complainant's genitalia (her genital area) which was consistent with the history given by the complainant.

[101] Although, it must be mentioned once again that in terms of the provisions of Section 129 of the Criminal Procedure Act, where any person is tried for an offence of a sexual nature, no corroboration of the complainant's evidence shall be necessary for that person to be convicted.

[102] The State also called Woman Corporal 3961 Meredani Naba, the Investigating Officer in support of their case. The Officer testified to the Bail Undertaking made by the accused in Lautoka Magistrate's Court Case Number 566 of 2022 (the assault case). She read out the conditions under which the accused had been granted bail in the said case. One of the conditions was that he should not re-offend while on bail. The witness stated that the accused has not complied with his Bail Undertaking, specifically his undertaking not to re-offend.

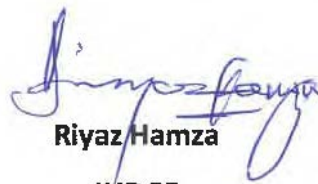
[103] The witness further testified that as per the Bail Undertaking, it is recorded therein that an Interim DVRO in terms of Section 27 of the Domestic Violence Act has been issued for the protection of the complainant.

[104] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the charges of Assault with Intent to Commit Rape (Count 1), Breach of Bail Condition, (Count 2), Breach of Domestic Violence Restraining Order (Count 3), and the three counts of Rape as found in Counts 4, 5 and 7.

[105] In the circumstances, I find the accused guilty of the charges of Assault with Intent to Commit Rape (Count 1), Breach of Bail Condition, (Count 2), Breach of Domestic Violence Restraining Order (Count 3), and the three counts of Rape as found in Counts 4, 5 and 7.

[106] Accordingly, I convict the accused of the aforesaid charges.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT LAUTOKA

Dated this 13th Day of November 2025

Solicitors for the State: Office of the Director of Public Prosecutions, Lautoka.

Solicitors for the Accused: Office of the Legal Aid Commission, Lautoka.