

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO: HAC 090 OF 2019**

**STATE**

**v**

**SHYMAL SINGH**

Counsel: Mr M. Rafiq for State  
Mr A. Reddy for Defence

Dates of Hearing: 04, 05, 06 & 14 March 2024

Date of Judgment: 04 April 2024

**JUDGMENT**

1. The accused is charged with three counts of Rape as per the following information filed by the Director of Public Prosecutions:

**FIRST COUNT**

Statement of Offence

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

Particulars of Offence

SHYMAL SINGH on the 13th day of April, 2019 at Nadi in the Western Division penetrated the vagina of MAMTA with his penis, without the consent of the said MAMTA.

SECOND COUNT  
Statement of Offence

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

Particulars of Offence

SHYMAL SINGH on the 13th day of April, 2019 at Nadi in the Western Division penetrated the vagina of MAMTA with a sex toy namely a dildo, without the consent of the said MAMTA.

THIRD COUNT  
Statement of Offence

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

Particulars of Offence

SHYMAL SINGH on the 13th day of April, 2019, at Nadi in the Western Division penetrated the vagina of MAMTA with his penis, without the consent of the said MAMTA.

2. The Accused pleaded not guilty to the above charges. At the ensuing trial, the Prosecution presented the evidence of the Complainant and two other witnesses. At the close of the Prosecution case, the Accused was put to his defence. The Accused and two other witnesses presented evidence for the Defence. At the end of the trial, the counsel from both sides tendered written submissions.
3. Having carefully considered the evidence presented at the trial and the submissions of the counsel, I now proceed to pronounce my judgment as follows.
4. The Prosecution bears the burden to prove all the elements of each offence. That burden must be discharged beyond a reasonable doubt. The burden never shifts to the Accused at any stage of the trial. The presumption of innocence in favour of the Accused will prevail until the charge is proved beyond reasonable doubt.

5. According to Section 206 of the Crimes Act, the term consent means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent. Consent obtained by force, threat or intimidation etc. will not be considered as consent freely and voluntarily given.
6. To establish the fourth element of Rape, the Prosecution must prove that the Accused knew or believed that the complainant was not consenting or that he was reckless as to whether the complainant was consenting or not.
7. I shall now summarise the salient parts of the evidence led in this trial.

#### Case for Prosecution

PW1: Mamta (The Complainant)

8. Mamta is a beautician by profession. She used to work for Island Resorts until she shifted to Nadi with her *ex-de-facto* partner Shymal Singh (Shymal), the Accused in this case.
9. Mamta and Shymal first met in 2017 at Kokomo Island Resort. Shymal was the Chief Engineer at the resort when they got into a relationship. In 2017, they were renting a flat in Navo, Nadi. They raised two Rottweiler dogs. The relationship lasted till April 2019 when they got separated.
10. Mamta described the events that took place on 12 April 2019 that led to the dispute on 13 April 2019. 12 April is her birthday. Since Shymal was not able to come home from the island to celebrate her birthday, one of her friends planned a day out for her. When Shymal heard this he got angry. He was disagreeing on that plan because he didn't like her friend Deslyn. But in the afternoon at around 6 p.m., he agreed for her to go out on the condition that she come back on time and that she be under his surveillances. When she went out,

Shymal was constantly calling her to monitor her and started accusing her. He threatened to come home the following day to deal with her in Nadi. She came home at around midnight and slept.

11. On 13 April 2019, she was home alone with her two dogs. Shymal came home from Kokomo Island at around 10.30 a.m. He started yelling and accusing her. He threatened her to shut her mouth and reminded her that the food she was eating was the food he bought for her. He told her to pack up her clothes and go. He rang up her mother. After talking to each other, her mother agreed to take her away since their relationship was not good. After that he did not talk to her. She went to her room and closed the door to take a nap because she was really dehydrated, tired and had a headache.
12. When she woke up in the afternoon, they still did not talk to each other. Later in the evening, he told her to cook food and started to please her. He requested her not to go back to her parents because she had already made up her mind to leave home. Then he started drinking beer and went somewhere and came back. He wanted to talk to her, but she just ignored him. Later in the evening at around 9 p.m. he went out again. After he left, she went to her room in the two bedroom flat, put her dogs in the room, locked the room and fell off to sleep as she wasn't feeling well.
13. At night, she felt somebody standing beside her. She opened her eyes and started yelling. This person covered her mouth and pushed her back to lay her down. Upon being asked by the Court how this person entered the room when the door was locked, Manta said the door had been opened with a knife. He covered her mouth and said, '*it's me, it's me*'. Her bedroom light was off at that time, but from the kitchen light, she could recognize this person. It was Shymal Singh, her ex-partner. She tried to remove his hands and started calling her dogs. Then she realised that the dogs were locked outside. Shymal said '*see I have locked them outside.*' She removed his hand and asked him; '*why did you lock them outside?*' She got up from the bed and sat on it. He held her two legs and pulled her when her head got hit on the head board of the bed. While she was holding her head, he spread her legs. When she was trying to close her legs, he pushed her back by holding her neck. When he was too close to

her, she realised that he was without clothes. Then she asked him why he is without clothes. He said he wants to have sex with her. Her response was 'no'. He then forced her and started to have intercourse with her forcefully for five minutes. She was hurt. She pushed him away, as her body was weak. Before putting his penis into her vagina, he tore her undies (panty) up and threw it away.

14. She did not want him to have sexual intercourse with her. She kept repeating so many times that she didn't want to have sexual intercourse with him. After that, he took both her arms on upward position so that she cannot stop him. In that process, she got bruises. She pushed him away with both legs, then he stood up and went to his room.
15. She thought it was over. When she was still lying on the bed for a while, she saw Shymal coming again to the room with a sex toy, a dildo, which was gifted to her as a teaser gift on her birthday. He spread her both legs and inserted the dildo inside her vagina. She could feel the pain when he inserted the dildo inside her vagina for 3-5 minutes on high speed. She was yelling out saying; '*don't do it, leave me.*' He was really angry and said; '*now I'm really fucking you.*' He inserted it inside and held it tightly so that she couldn't come out. It was painful. When she pushed his hands, the dildo fell on the bed. Then at the same time, he penetrated her vagina with his penis. She did not want him to do this. She told him, '*don't do this*'. When he pushed her away, he fell from the bed. He stood away from the bed and started swearing at her. Then she stood up from the bed because she thought he will come again on top of her.
16. When she said that she didn't want to have sex with him, he started accusing her of having an affair outside. He told her not to lock the door anymore and call anybody or else he will break her phone. At that time she saw behind him a knife which he had used to open the door. The knife was as big as her palm. She saw that knife when it was stuck in the door. She realized that he was so angry that she shouldn't be fighting with him or else he would throw that knife and hit her. He then went away. She went to see how many bruises she had sustained. She was having pain over her body and her vagina was paining. She saw a little bit of blood at vagina when she tried to wipe it. It was done forcefully. Her legs were shaking.

17. She reported this matter to Nadi Police Station on 19 April 2019. Explaining the delay of 6 days in reporting, she said that she was really frightened; she had no support at all. She told her father that Shymal had assaulted her and she was not safe, so come and pick her up. Her father said he is coming on 19<sup>th</sup> to pick her up. Shymal returned to the island on the 15 April 2019. Before going, he threatened her that he will kill her and bury her inside the house so that her parents will not be able to locate her body. She was really frightened. She was not able to say anything to anybody because she could not trust anybody when the partner whom she trusted the most had done this to her.
18. When she spoke to her father, father told her to go and report. But her parents only knew that Shymal had assaulted her. She did not inform them about being raped because they were physically and health wise were not fit to take it. When they came from Nausori to Nadi on Friday, she informed them what Shymal actually did to her.
19. After the report was lodged, she was sent home because the police did not have a medical kit with them. On Sunday, the police took her to the hospital for examination. Upon being asked, she told what happened. She informed the doctor that, after that incident, she started to have smelling discharge from her vagina. The injuries she sustained were fade and turned purple but the muscles of the inner thighs were painful. When the doctor spread her legs to examine her vagina, she felt the pain. Upon being asked by Court, she said that Shymal had finished nine stubbies of beer.
20. Under cross examination, Mamta said that she left beauty therapist job because she was not physically fit to work for she had a wrist problem. She agreed that Shymal had many arguments with her on many occasions and used to complain to her mother. She denied receiving \$1,000.00 per month from Shymal. She agreed that while he was away, she carried his bank card and withdrew money.
21. She agreed that she kept asking Shymal to come from Kokomo for her birthday. Deslyn took her to an evening coffee and then for diner at Hotel Ramada. Only she and Deslyn were in

the hotel room. She agreed that Deslyn had two friends in the hotel but she didn't know them. She agreed that he wanted her home by midnight because of the two dogs. At midnight she didn't pick up his calls because they had a lot of arguments and disagreements. He started swearing at her and accusing her. She agreed that Shymal insisted before midnight that she walk through the hotel room while video call was on and that she showed him everything.

22. She agreed that there were cameras in the house to monitor the house. She agreed that he got angry after seeing the two boys at the hotel and that he asked her to go home. She agreed that she was picked up at 2 a.m. by a taxi driver. She agreed that Shymal called her mother and her mother gave her time to think about her life. She agreed that Shymal apologized and said he was convinced that he was mistaken about the previous night. She denied hugging Shymal. She agreed that they were having problems before. She did cook dinner because she had no option when he ordered her to cook saying her being unemployed and he was paying her to cook. Everything was not normal between them although she cooked. She did not eat.
23. She was surprised when Shymal turned up at home on 13<sup>th</sup>. She thought he was just threatening her that he will come. She saw Shymal drinking in the sitting room. As the person who cleared all bottles, she knew he had finished nine bottles that were in the fridge. After he went out for the 2<sup>nd</sup> time, she went to sleep after 9 p.m. because she wasn't feeling well. She was weak because she had not eaten anything from morning. She was in deep sleep. She did not hear dogs barking or the door being opened. At the end of the incident, she figured out, how he really opened the door with the knife. She just felt somebody standing in the room when he was too close to her. She could feel someone standing beside her and had goosebumps.
24. She admitted that she did not tell the police that the door of the room was locked and that it was opened by Shymal using a knife and that she had seen a knife. When the Counsel asked: *He never threatened you with a knife? She said he did threaten me.* She said that when she opened her eyes, she saw him standing. She told the police, *I opened my eyes I saw my de-facto partner on my bed trying to take off my clothes, then I started looking for my dogs ...* She agreed that she had not told the police that her panties were torn, she just said; *He tried*

*to pull my panty off and forced me to lie down on the bed.* She threw the panty away, there was no use of it. She did not think of its evidential importance.

25. Her room's light was off, but the light in the kitchen which was bright enough for her to see what was going there. She told the police that she was trying to get him off. By that, she meant she was trying to push him away, but he has left his whole body weight on top of her. She yelled out.
26. On that weekend, the landlord was not home, there were no neighbours around. She did try to defend herself, tried to pull the panty up but he just took it off and torn it apart. When she was half seated, he was trying to pull her panty using his full body weight. He pulled her back and she fell backwards when her head got hit the headboard of the bed. After the argument she and Shymal were sleeping in different rooms.
27. She told the police and the medical examiner that he punched her on her left cheek. By the time of the medical examination, it wasn't swollen. The doctor checked inside her mouth and said that everything was fine. She needed a lot of strength in her as a masseur. So she had to give up her job because of the problem she had in her wrist. She was not able to push him back. He did not ejaculate.
28. Dildo is a battery operated sex toy made up of rubber. It was a teaser gift received on her birthday. She only used the dildo on herself once when Shymal was in the island and he knew about this. It's a dildo is a new version of dildo. She could not move her body upwards when he was inserting the dildo because she was already in pain and tired after the intercourse he had just run. She was trying to think what just happened to her. She could not leave the room because he was already on top of her holding one leg and bracing himself on the other leg. She had no strength on her legs and on her hips to go away from there but she pushed him. In her EIC, she was not able to say that she was punched because she was not asked about the details by the State Counsel.



29. She was asked to leave the house with her parents by the 20<sup>th</sup> when they come for Easter. After Shymal left, she wanted to leave the house, but she had no other option but to wait for her parents. She had no money to hire a taxi. She had his bank card but she could not use it without his permission. He used to monitor from the outside camera. After the incident she didn't have that courage to even argue with him.
30. She agreed the text messages that were shown to her in Court were the ones exchanged between them. She agreed from 15 to 20 April, when she was in telephone conversations, not on What's App, with Shymal, she told him that she was angry, sad and scared about the fact that he raped her. She conveyed the message that it was hard to accept his apology for the incident happened on 13 April. He declined his offer for a massage in a Spa in Denarau. On the 20<sup>th</sup> she had mistakenly dialed him. After lodging the complaint she didn't contact him.
31. When her parents came on 19 Friday, she showed them the bruises and told them everything happened to her. She had the vehicle but she could not go to the police station. On the 18 April, she received a call from Mahesh to check on her. Upon being asked about the telephone conversation, she said this:

*"When Shymal returned back to the island, he has asked one Mahesh to convince (mama) that's me for me not to go back home that I should focus a lot on my education and I have to work under Mahesh. When myself and Mahesh we talked with each other, then I have told Mahesh when both of us talked with each other and I have told him everything what has happened to me and I also informed Mahesh that on the 20<sup>th</sup> my parents will come, I will go back home. Then Mahesh told me that on Thursday, he will call me that is on the 18<sup>th</sup> that what I have decided for my future. That he wants to stay behind and you have to still be in a painful situation or you want to go home and have a bright future and he said, I have a daughter myself. I don't want anything, this kind of situation happening to a daughter.*

*Then Shymal came to know that I am talking to someone who's advising, totally opposite. Not from his side and that's the time he called me and started accusing that I'm having an affair with Mahesh and that's the time I said 'no', I am not having an affair. And he said, I am gonna tell your parents now to come and pick you right away. It's like, you know what, now we are actually done. I don't want to live here, I am going and if you call my parents, go ahead. That's the time he called my parents. My Dad called me and then I told him, I've been tolerating all this from the incident and now he is accusing me to having an affair because I am not listening or agreeing to his situation, to stay back and suffer".*

32. From the day Mahesh came to know about this incident, from 15<sup>th</sup> till 18<sup>th</sup>, Mahesh was in contact with her to change her mind. She admitted that she did not tell in examination in chief or to the police that she had told one Mahesh about an alleged rape incident. Her explanation was that police wanted to know about the incident, and not about the people she had contacted. On 19<sup>th</sup> Shymal wanted to kick her out of the house on the premise that Mahesh was in contact with her. She denied that she lodged a report because Shymal told her *'I do not want you in my house and that's the end of your relationship'*.
33. She admitted that on the 14<sup>th</sup>, Shymal allowed her to meet Dipika and Dipika picked her. She didn't inform Dipika about the incident on 14<sup>th</sup> because she was very frightened. She broke down to Dipika on Sunday. In that conversation, Dipika said to her... *this is the kind of world we live in, if a woman stands for her right, she will be defamed, she will be accused that I am lying. So do I have any prove, I myself is the proof. I am having the discharge, my body is bruised and she said, you have to mentally prepare, if you stay with him, it might happen to you again and if you are willing to go, just go home and have a safe life.* Then she spoke to her friend Deslyn.
34. On the 15<sup>th</sup>, she was having body pains with fever. She asked Shymal if he could take her to hospital. He touched her and said, *you really having fever.* Then he said, *let's go, I am going to take you to the doctor.* They quickly had a bath and got ready. But he didn't take her to the doctor, he took her to Bohai Restaurant to have food because she did not have any food. Then he said, *you eat* and after that he will take her to the doctor. After that he took her to Tappoo City to buy her some stuff which she didn't need. He said, *I am going to buy this, whatever I have done to you, I am gonna repay you'*.
35. At Tappoo, he bought shoes for her. She had to cooperate with him in buying, so she tried the shoes, otherwise he would have just left her with no money. She was scared of him. So she took it and put it in the van. She did not tell anybody at Tappoo or at the restaurant; her explanation was that: *I do not understand that if there is salesperson and I go and tell him or her the whole story what has happened to me and I need protection.* When she was taken to Tappoo and the restaurant on the 15<sup>th</sup> Shymal did not leave her alone at any point in time.

After that horrific night and assaults, she was scared of him that again he would start yelling at her and harm her because he did that in public. She denied she was happily shopping with Shymal. She was cooperating because he promised that he is going to take her to a doctor. But he did not take her to the doctor, he took her home.

36. She agreed that Shymal called multiple times on 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> and that some of the calls were lengthy ones. She admitted that she withdrew money even after the alleged incident on Shymal's permission to do the payments for the things and take dogs for treatment when he only put money in that card.
37. The telephone conversation allegedly took place between Mahesh and the Complainant on 18 April 2019 was then played in open Court.

*Man: Are you asleep?*

*Lady: Which phone contact you are using to call me?*

*Were you missing me a lot?*

*Man: See how I make you wake up.*

*Whole night you were awake, that is the reason you are not able to wake up early in the morning.*

*Lady: I slept in the morning, I was not able to sleep. I don't know why I'm not able to sleep.*

*Man: I have send messages and you did not reply and something has happened in the night, maybe a thief came.*

*Lady: No, no, I was not able to sleep, I'm still lying on the bed.*

*Yes.*

*Man: It's still sunny outside.*

*Lady: No, it's not.*

*Man: No, it's not sunny?*

*Lady: Yes, in the morning, it was raining. There is no hot water coming.*

*Man: Oh! That's solar? That's why.*

*Lady: Then I have to bath with cold water.*

*Man: Why don't you heat the water in the kettle?*

*Lady: Aww I have to wash my hair and I don't know how much water I would need to wash my hair. I need to use warm water.*

*Man: Then you bath with cold water.*

*Bath with cold water first.*

*Lady: Okay, I have to get up and take them outside. Oh I thought it was 7 to 8 in the morning.*

*Now I realize it's 11.30 in the morning, fuck man.*

*Man: Okay, you wake up.*

*Bye.*

38. She confirmed that it was a telephone conversation she had with Mahesh but could not confirm the exact date because they had been talking from Monday 15<sup>th</sup>.
39. A video CCTV footage recorded on 15 April 2019 obtained from Tappoo City Nadi was then screened in Court.
40. She admitted that after ending the conversation on 18<sup>th</sup> she switched off the cameras on the property and the hidden cameras as well because she didn't want him to monitor her. She said that the hidden cameras inside the house had been set up without her knowledge to monitor her like a person under house arrest and he used to monitor everything and he used to ask and growl at her.
41. On 19<sup>th</sup>, Shymal asked her parents to take her home. She denied that she came to the Magistrates Court on 1<sup>st</sup> May 2019 to monitor whether Shymal will be granted bail or not. She said she went to the Magistrate Court to lodge a breach of DVRO complaint to get protection. She admitted going to Family Court registry to lodge an application seeking the custody of a dog because Shymal had agreed to give one dog to her in the event of them being separated. She denied that she had made a complaint after the alleged rape to Kokomo Island Resort through somebody that Shymal was stealing from his company. She denied lodging a report against Shymal for breaching a DVRO.
42. Under re-examination, Mamta said that she declined the offer to get a massage at Denarau after the incident of rape, because he was trying to butter her up which he always used to be manipulative. In the text when she said *it is hard to accept*, she referred to the apology she received after the rape incident because it broke her mentally, physically, down and it's very hard to forgive someone for that.

43. She behaved as if she was not raped because she had no choice since she was staying in his house. She had to listen to whatever he said till she went back to her parents' home. She complained to Dipika about being raped in a text message on 14<sup>th</sup>. She asked ask Dipika to take her to the Police Station but Dipika explained what would happen if she went to the Police Station.

PW 2 Dr. Courtney Pene

44. Dr Pene is a Medical Officer at CWM hospital. In the year 2019, she was based in Nadi hospital with 2 years of experience. She examined the complainant on 20 April 2019 at their Nadi Hospital. She tendered her report in evidence marked as PE 1. In D12, she noted the Specific Medical Findings. The patient had a *bruise on left posterior aspect of thigh, nil vagina laceration seen, and nil signs of inflammation, nil bleeding and per vaginal discharge noted*. The patient was complaining of muscle tenderness at inner upper thigh.
45. Bruises are typically caused by blunt force traumas. It's possible that the bruises on the left posterior aspect of the thigh having been caused by an assault. How long a bruise would last depends on the force used? They usually last at least 4 to 5 days and it can be longer if it's a bigger force.
46. Per Vaginal discharge coming from the vaginal canal can be absolutely normal. Throughout the menstrual cycle, some discharge is normal but also is a signs of infection like yeast infection, vaginosis discharge. If she were having the menstruation, she would have seen blood within the vaginal canal. There was none so she could assume that she was not having her menses.
47. Under cross-examination she agreed that PV discharge could also be a sign of sexual transmitted diseases (STD). If a person says that she feels pain, she would palpate that area to check if it's painful in that area. That's what they call it tenderness. Upon palpation, the patient was in pain. It is possible that muscle tenderness having been caused if a 40kg dog jumping on her lap but she wouldn't have expected to see a bruise in one spot on posterior.

If the big dog with a paw is jumping up on top, one could get the bruise. History is based on what the patient had told her. She could not rule in or out because of what she had told her.

PW3 DC Fabiano Koiroko

48. In 2019 Fabiano was based at the Nadi Police Station. He was the Investigating Officer for this case. When he was doing his night shift on 18 April 2019 he received a report from the complainant and that's when he prepared the Police Medical Report for her to be medically examined. She came back on 19 April 2019 for her statement to be recorded. He tasked a team to conduct the scene visit at Navo, Nadi to gather information and recording of witnesses' statements. An orange small vibrator was uplifted from the scene. Under cross-examination Fabiano said that there were stand-alone houses beside the house where the alleged incident happened.

Defence Case

DW 1 Shymal Singh

49. Shymal testified that he is the Chief Engineer and the Director of Fiji Operations for Kokomo Island Resort Fiji. His role is to look after and oversee all the operations of his company in Fiji. He first met Mamta in 2017 in Kokomo Island where he was the Chief Engineer. She joined his team as a spa therapist. The friendship with her started at a function on her birthday 12 April 2017 and it gradually developed into a serious relationship in June 2017 with the blessings of her parents.
50. In 2018, he resigned and joined Jack's manufacturing and she also resigned and joined Jacks Oasis Spa and moved to Navo, Nadi and started living together. He was blamed for her resignation and had small arguments. After that she had gone through three jobs and the arguments were becoming very intense. Mamta was staying home looking after the dogs while in December of 2018, he again joined Kokomo where both of them were given accommodation.

51. Her best friend was Deslyn. He had a different opinion about her. Deslyn used to sleep with rich men for money and he did not like her influence on Mamta. That was one of the reasons why he didn't like Deslyn. Mamta's relationship with Deslyn affected his relationship with Mamta when she started to hang around with Deslyn and her other friends.
52. On 12 April 2019, it was Mamta's birthday and that's the day they had an argument in the evening when she kept on asking over the phone whether he was coming or not for her birthday. April is a busy month for hospitality industry and it was not possible to take leave at short notice. The argument started because of the dogs whom he raised as his kids and slept with him in his bed. She informed that Deslyn had booked a hotel room and asked whether she could join her. He said 'no' and said it's too late of a notice, he won't get leave in peak season and his dogs are not staying outside.
53. A couple of attempts by her annoyed him and he decided not to allow her to go to the hotel. He finally allowed her to go to the nightclubs on the condition that she will be back home by midnight. Because she was out on this particular day, he had to monitor the dogs via cameras and keep an eye on the dogs because the dogs had to stay outside. The dogs started crying because they were kept outside without air-condition. He was getting a little bit impatient and waiting till midnight when he made a video call to Mamta on WhatsApp which she did not answer.
54. She then made a voice call and it sounded she was in the bathroom so he asked her to hang up and answer his video call. When she answered the video call, she looked distress and he asked her to walk through the room. He could see a lot of glasses more than enough for two people. He questioned, who are there? She said it was just she and Deslyn. He was suspicious and he wanted her to walk him through the whole hotel. There was a little bit of hesitation and delay in doing that. When she opened the entry door he saw two boys standing at the corridor at a distance of approximately 10 metres. He got angry and asked her to leave that place immediately.

55. He trusted her and even left his bank card, the vehicle and the dogs with her. She refused to go home. He got angry when he saw those two boys and started swearing at her. She started swearing back at him. The arguments escalated to the point where she was not answering his phone. He had to call her mother and sister. Her sister messaged him to inform that Mamta was going home. From the camera he could see Mamta was dropped by Dipika at around 2.00 a.m. He was monitoring the dogs in anger. He deleted the call history and did not keep any screen shots to show in the call history that she missed his calls.
56. On the 12<sup>th</sup>, he organized a helicopter with the General Manager, for an emergency lift to go home and relocate his dogs. On the following day (13<sup>th</sup>), he got his leave approved from the General Manager and left the island at 9.30 a.m. to come to Nadi. He was granted leave because he was to return two days after. He did not get his leave approved for Mamta's birthday because they had plans and agreement to do something for the dog's birthday on 19<sup>th</sup> April.
57. He had asked Mamta to leave the house after a heated argument and asked Mamta to call and inform her mother. He took a taxi and arrived home at around 11.30 a.m. and walked through the door past her. Mamta was emotional, tears on her eyes as if she was crying. At that time, he was angry of what had happened the previous night. He asked where her mother was. She replied '*she is coming*' in a tough angry voice. He took a call to Mamta's mother on loudspeaker, and then the mother asked Mamta *what do you want?* He told the mother that it's really frustrating having arguments all the time and he relayed what had happened the previous night. The mother said she'll be coming over to Nadi on 19<sup>th</sup> or 20<sup>th</sup>.
59. Once the call was hung up, Mamta was still crying. He started talking to her and apologized to her and said *sorry*. He changed his emotions all of a sudden because she was crying; she's the person she loved and trusted. He did not have enough evidence to confirm that there were boys in the hotel room. It was her birthday, so he felt bad and sympathized with her. Then she was hitting on his chest, blaming him for spoiling her night and always shouting and fighting with her. After that, they made up, it was slowly on the process of being normal again. That's when he asked her to cook for him.



60. After lunch he was at the TV watching a movie, drinking beer left in the fridge, not the nine bottles brought by her uncle. He drank one and a half bottles for 2-3 hours until he went out to Namaka. He came back and continued to watch the movie. It was getting dark and he invited her for dinner but she was not in a mood to eat. He drank another two beers over 2-2 ½ hrs. They talked to each other very little. Mamta, having finished cooking, was in the smaller bedroom on the phone. He then went out for a drive to Namaka and came back and sitting there with the dogs, watching the movie and having 1-1/2 bottles in that spell. Altogether he had finished approximately six beers till around 9-10 p.m. but he did not get drunk because he wanted to drive.
61. At around 10.30 p.m., he walked into the room where Mamta was sleeping, not sleeping, lying down on the bed, on her phone facing the opposite door. The door was open, light was off. He went to her, lied down and kissed her and whispered "*Karat manta*" .....meaning '*I want to do it*'. He meant '*I want to have sex*'. She said, '*if you want to do it, do it slowly*'. He continued kissing, his hands were on her breast. He removed her underwear and was engaging in kissing. He removed his shorts and his underwear and they were having sexual intercourse for one to one and half minutes. After that he pulled out and went down and had oral sex licking for about 30 seconds. They had done it many times. She was normal. After 30 seconds of oral sex, he came up and they had intercourse again for 1-3 minutes. He ejaculated onto her stomach because they were not prepared to have a baby. He got the toilet paper, wiped her stomach, wiped himself, wore his clothes and went to the sitting room. He went to the other (master) bed room and slept with the dogs. Mamta came into the room to check on them and left to the other room.
62. On the next morning, (14<sup>th</sup>), he went to the shower. Mamta joined him in the shower and said that Dipika was having issues with her partner so she wanted to see her. After the shower Dipika came to pick her up at around 9-10 a.m. When Mamta went with Dipika, he checked her drawers to discover a lot of party clothes, new shoes and cash over \$300. She had spent a lot of his money.

63. When he returned with the dogs in the afternoon, a neighbour cautioned him about theft happening around that area because the neighbour had seen his car coming during early hours. It made him curious and he installed another audio visual dummy camera behind the TV without informing Mamta. At around 7 p.m., Mamta was dropped off by Dipika. After having a shower they went to bed early because he had to attend a meeting next morning.
64. On 15<sup>th</sup> while Mamta was still asleep, he went to Nadi and came back at around 11 a.m. Upon his return, they went out to Bohai to have lunch. She was back to normal and had lunch with him. After lunch, they went to Tappoo to pick lay-buy shoes she had ordered. He paid the balance and bought the shoes for her. She behaved like a normal person, trying perfumes. After that they went back home. She dropped him to the flight to fly back to the island.
65. On 16<sup>th</sup>, he had a few conversations with her over the phone. He explained the screen shots on WhatsApp chat messages between him and Mamta to show that they had normal conversations after the alleged rape. Because he could not buy anything for her birthday, he offered her a massage and apologized for being harsh on her birthday. The apology from his side was for the mean things she had said in the arguments on her birthday. In the afternoon, there was again arguments popped up between them giving him stress.
67. On the 17<sup>th</sup>, there was nothing unusual. Apart from WhatsApp messages, they had normal conversations using his mobile phone. There were a lot of missed calls from the Complainant perhaps because he was busy.
68. On 18 April 2019, when he was listening to the dummy camera device set up inside the house, he heard a conversation between Mahesh, the Financial Controller and Mamta. Mahesh was known to Mamta because she used to drop some dog stuff at his house. By listening to that conversation, he realised that they were in a boyfriend-girlfriend conversation. He got angry. He called Mamta and inquired who the person that was calling her. When she denied calling any men. Then he revealed that there is a dummy camera behind the TV and that he heard her conversation with a man.

69. When she repeatedly denied he said, *I'm done with you. You pack your things.* To prove that she was lying he inspected Mahesh's call logs on their Private Address Branch Exchange (PABX) system for recorded calls and he managed to find the recording. PABX system was set up to prevent call abuses of the staff. Before giving the recording to his lawyer he took permission of the Management.
70. The audio recording, that contained the conversation between Mahesh and Mamta, allegedly took place on 18 April 2019, was played in Court. After hearing this recording, he was sad and in anger and he called Mamta's mother first and then the father and explained to him what had happened. He told her dad that he could not be with her anymore and asked if they could come and pick her up. He agreed to take their daughter.
71. On the same day, he received a call from Mahesh in the evening to be informed that Mamta called him and said that he (Mahesh) and Mamta were having an affair. He said to Mahesh that he never said that to Mamta. Later on, Mamta's mother rang up and complained that he had assaulted Mamta which he denied and challenged her to complain to Police. Mahesh called him again and apologized to him saying, he was sorry if their relationship coming to an end because of him and offered him financial help to find a lawyer.
72. On the 19<sup>th</sup>, he messaged Mamta and thanked her for everything wishing her all the best for her future and also asked her to turn on the camera. He became emotional for she stayed with her for long and he had plans to marry her. The marriage was delayed because there was disagreement over the wedding. He was Hindu and she was Christian. The camera was turned on and he could see the father's van parked outside and things were being loaded into the van. After they left, his mother came home from Labasa.
73. On 20<sup>th</sup>, he got a missed call from Mamta in the morning which he did not answer. Later in the day, his mother called him and said that the police officers were coming into the house with Mamta. His mother had been informed by the officers that Mamta had lodged a complaint against him for raping her.

74. He didn't get a call until later in the week. Vunisea Police wanted to take him to Vunisea Police Station. General Manager intervened and promised to send him to the police station. Because there was no clear direction which police station he had to go, he went to the Namaka Station. No one was there to take his case. He contacted his lawyer and went to the Nadi Police Station the next day. His interview was recorded on 29 April 2019.
75. During his interview, he sought police assistance in obtaining the CCTV footages from Bohai and Tappoo. When he was produced in the Magistrate's Court, he was remanded in Lautoka. He was in a state of shock after coming out on bail. He wasn't fired from his job. The owner supported him to resume work. He did not contact Mamta again, however, she tried to do things to tarnish his reputation, take his job away by making false complaints. He was called by police to inquire her complaint in which she had claimed a dog. An allegation had been made through Mahesh Mistry to her Financial Controller, that he was taking money from the suppliers. There was an alleged complaint to Vunisea Police Station that he breached the DVRO which he denied. There was no formal complaint but Sgt. Maharaj had received information to that effect. On 22 November 2019, he got a letter from Mamta's lawyer demanding \$12,000.00.
76. Under cross-examination, Shymal disagreed that no thief would come to steal the dogs that are aggressive in nature and therefore there was no reason for him to blame the complainant for going out.
77. He admitted that he had heard all Digicel calls on PABX between Mamta and Mahesh. He disagreed that he hand-picked one particular conversation. He disagreed that the nature of that conversation could establish that there was any form of relationship between Mamta and Mahesh. He said that the reason for coming back from Kokomo Island was his dogs. He agreed that he went out driving after having beers but he was within the limit. He admitted that he immediately changed his evidence that Mamta was 'sleeping' to 'lying down on her phone'. He agreed that in his EIC he had agreed penetrating the vagina of Mamta twice on that night of the 13 April, 2019 but disagreed that he did so without her consent.

78. He agreed that the word ‘Yes’ didn’t come out of her mouth when he approached her and she only said “*Kare manta*”.....meaning *I want to do it*. She only said, *if you want to do it, do it slowly*.

DW2 Mohammed Shaiyum Harun

79. Harun is the Manager-Operations at Tappoo Group of Companies. In April 2019, he was based at Nadi Branch. He remembers a police officer asking for a CCTV footage in relation to Shymal’s shopping in the shop on 15 April 2019. He remembers Shymal and his partner on the shoe section looking at the shoes. From there they went to perfume floor. He recalls that the girl whispering something into Shymal when they were looking at Nova shoes. They behaved just like a normal couple.
80. Under cross-examination, he denied that he did’t have any special reason to remember their exact demeanour of a person on that particular date after a lapse of five years.

DW3: Nileshna Maharaj

81. Maharaj said that he came to know Shymal when he was a Crime Officer in Kadavu in 2019, when he went to Kokomo to attend a report regarding one theft case. Two days before leaving for Kokomo, he received one phone call at Vunisea Police Station by an unnamed Indian female and told him that one Shymal had breached the DVRO in Nadi. He advised her to report the matter to the nearest police station, so the officers will inform them. He went to see Shymal personally at his office and informed him about the report against him for breaching a DVRO and warned him.

Analysis / Evaluation

82. There is no dispute as to the identity of the Accused. It is agreed that the Accused and the Complainant were in a *de-facto* relationship and were residing at their home at Navo, Nadi at the material time on 13 April 2019. It is also not in dispute that the Accused had sexual

intercourse with the complainant on that day. The Defence Counsel at the outset clarified that the Defence is completely disputing the allegations and all elements of Rape as charged in the 2<sup>nd</sup> and the 3<sup>rd</sup> counts.

83. The complainant said that the Accused forcefully penetrated her vagina twice with his penis and once with a sex toy or vibrator called dildo, without her consent. The Accused denies having engaged in the said alleged sexual conducts without her consent. The outcome of the case mostly depends on who told the truth in Court. However, the Prosecution bears the overall legal burden to prove each charge beyond a reasonable doubt. That burden never shifts to the Defence. Therefore, even if the Court finds the version of the Accused to be not credible, still the burden is on the Prosecution to prove the charges beyond reasonable doubt.
84. As the rape allegations arise out of incidents that happen in utter secrecy, in the absence of eye witnesses, the court is presented with a difficult task in getting to the truth by analysing the evidence of the Complainant and the Accused. This task becomes extremely difficult when the alleged rape victim is none other than the partner or the wife of the Accused. Whether the Complainant is telling the truth in Court has to be decided mostly on the basis of how she had conducted herself before and after the alleged incident. The tests generally used by the Courts to determine the conduct are often based on common myths and stereotypes about rape and rape victims. However, the Court must be careful not to be swayed by those myths but must find facts strictly based on the evidence led in the trial.
85. As it happens in many rape trials, main arguments of the Defence are based on those stereotypes. Therefore, it is for the Court to decide whether those stereotypes are relevant to the Complainant and the alleged incident in the present case. I start off with the tests generally used by the courts to test the credibility of a witness.
86. The main contention of the Defence is that the complaint the Complainant belatedly made to police on 19 April 2019 was not genuine. The Defence submits that the Complainant made up the rape allegations only when she was told to leave the Accused's house after her being

caught talking to one Mahesh Mistry. Bearing that contention in mind, I shall proceed to analyse her evidence to test her honesty and credibility.

Contradictions/ Omissions.

87. The Defence says that the Complainant contradicted her own version as regards the presence of two boys in the hotel room. She said only she and Deslyn were in the hotel room and then she agreed that two friends of Deslyn also joined them. She did not deny that two male friends of Deslyn were also there in the hotel room and they were not known to her. She had not denied this fact even to the Accused and that was why he got angry and told her to leave the hotel immediately. There is no contradiction there.
88. The Complainant said she locked the door of the room and that a knife had been used by the Accused to open the door. In her statement to police she had not talked about a knife. She had told the police that she locked up the house and went off to sleep. I accept that there is an omission so far as the knife is concerned. However, the Complainant told about the knife only when the Court sought a clarification as to how the Accused entered the room if it was locked.
89. While recording a statement, the police officers are not generally expected to cross-examine a complainant the way the lawyers would do in the Courts. The Complainant never said that a knife was used to threaten her although the Defence Counsel cross-examined her on that premise. Therefore, the Complainant may have missed it and not have realised the importance of the knife for her complaint. Had she said that the knife was used to threaten her to get her consent for sexual intercourse, then of course the knife would have been material to her complaint. Her evidence in examination-in-chief (EIC) was that she was in deep sleep and she opened her eyes only when she felt somebody present in her room. She never said she saw the door being opened by the Accused. What she said was that she saw behind him a knife which he had used to open the door when it was stuck in the door. She did not say it was in his hand. In her re-examination, she clarified that, after the incident, she figured out how he really opened the door with the knife.

90. What she was actually telling the Court was that she realized that he was so angry that she shouldn't be fighting with him or else he would throw that knife and hit her. That cannot be interpreted to mean that the Accused had used a knife to threaten her. If she said that the Accused had used a knife to threaten her to get her consent for sexual intercourse, then of course, the omission on the part of the Complainant would have been an omission tantamount to a material contradiction. Therefore, I would not regard her failure to mention the knife to police is a material contradiction to discredit her evidence.
91. The Defence Counsel further argued that the Complainant had told the police that she closed the door of the house and not the door of the room. He contended that the Complainant changed her evidence in Court to dramatize the saga. I agree there is a slight inconsistency there. What she told the police goes like this: *At about 9 p.m., he went out again in his vehicle not informing me where he was going. I then locked up the house and went off to sleep with the dogs.* I would not agree that this inconsistency is suggestive of a deliberate attempt by the Complainant to dramatize the saga. Being a young woman alone it was natural for her to go to bed at night after locking the door of the room with her dogs because the Accused had gone out without informing her where he was going. There was no dispute that he went out for a night ride. He did not say he took the key of the house when he went out. Therefore, the door of the house should have been kept unlocked for him to come in, while locking only the door of her room. I accept her evidence that she locked the door of the room and went off to sleep with the dogs.
92. The Learned Defence Counsel alleges that the Complainant refused to answer simple questions put to her like whether cooking or not cooking is a choice. I am unable to subscribe to the view of the Counsel. Her answers were straightforward and not evasive. She clearly said she had no choice but to cook when he ordered her saying; *I pay for you to cook.* She was financially dependent on the Accused and therefore she could in no way refuse to cook whilst being under his roof. She emphasized that she did not eat with him what she cooked.



93. It was also contended that the Complainant lied to police about being surprised that the Accused came home on the 13<sup>th</sup>. She explained what prompted her to tell that to police. She said that even on previous occasions he had indicated that he would come but he did not come. She had all the reasons to be surprised because the Accused himself had told her that, during the peak time in the hospitality industry, it was difficult for him to get leave so that he could not come for her birthday. I am not convinced that she had lied to police.
94. The Defence argues that the Complainant lied on the number of bottles of beer he had drunk that night. She said that nine bottles brought by her uncle were left in the fridge and that she saw the empty bottles when she cleared them up after the Accused had left the house. If she had energy to cook for him, I do not believe she did not have energy to clear up the bottles even though she was weak and tired. The counting of the empty bottles would have been important for her to know the level of intoxication of her partner in a context where they were in heated arguments since his arrival at home and also when he had taken the wheel of his car after consuming alcohol.
95. In cross-examination, the complainant accepted that the dogs would bark or scratch at the door if someone was outside the door. The Defence argues that if the door was forced opened using a knife she and the dogs would have heard and been alerted. She said she was in deep sleep at that time and she only saw him when he felt his presence in close proximity. The dogs, especially Rottweilers, known for their loyalty to the master, would have realised that it was his master and not a stranger that was opening the door and therefore no reason for them to bark or scratch the door. It is not in dispute that the complainant came home after 2 a.m. and that she had not eaten anything. That is why, he took her to the Bohai Restaurant for lunch as he said. Therefore, I accept that she did not hear the opening of the door, because she was in deep sleep.
96. The Defence submits that none of the assertions she made in Court about how the incident started and what happened were relayed to the police. I do not see any requirement for her to tell every detail of what she had gone through before the incident. She had told everything that is material to her complaint.

97. The Complainant said she had goosebumps when asked what sense she used to feel that there was someone standing there. It is understandable when she felt something and had goosebumps she had absorbed his presence from her nerves system.
98. The Defence submits that the Complainant was not consistent in her description of her posture during the incident and where the Accused placed himself and his posture. Having faced such a horrific experience, I do not think, after a lapse of approximately five years, she will be able to tell in every detail exactly in what posture she and the Accused were in during the incident. I agree that she had not told the police about her panty and it being torn by the Accused. I do not believe a woman of her caliber would have understood the evidential importance of the panty.
99. I am not convinced that the so called contradictions and omissions highlighted by the Defence are material enough to discredit the version of the Complainant.
100. Having dealt with the alleged inconsistencies, I shall now turn to the common stereotypes associated with rape and rape victims that the Defence argues are relevant to this case.

#### Lack of recent Complaint

101. Defence argues that if the Complainant were a genuine complainant she could have complained to somebody and that the complaint she eventually made on 19 April 2019 was a fabrication. Let me examine the tenability of this argument.
102. The Complainant said that she got permission to go out with her friend Dipika on 14 April, the day after the alleged incident. She had the opportunity to contact her parents and Mahesh over the phone. The Defence argues that she had an opportunity to complain to any of them without waiting till the 19 April and that she did not complain because she was never raped.

103. This argument is based on the myth that a rape victim will always complain to somebody at the first available opportunity. The tenability of this argument should be addressed in the context of the evidence led in this trial. The Complainant and the Accused were living together in a domestic relationship at the material time. It is not disputed that she was under constant surveillance through CCTV cameras and, even when she went out, through video calls. She said that she was virtually under house arrest. Although she had access to his bank account, all the expenses had been monitored and subject to his permission. The bank statements tendered in evidence by the Defence confirms her evidence. Even on her birthday, the day the disputes started, the account had only \$ 250. Her admitted withdrawal of \$ 200 had brought the account to a nil balance. After the alleged incident, he had transferred almost all the monies to another account bringing the account balance to zero. She had withdrawn \$500 on 17 April and \$ 180 on 18 April for permitted use bringing down the balance to zero. It is in that context that the Court should see whether reasonable explanations are available on evidence that prevented her from making a prompt complaint.

104. The Defence submitted that the Prosecution lacked witnesses to testify to recent complaints. I accept that. The Complainant said she relayed the incident to Deslyn. At the outset, the State Counsel informed that he was unable to get down the recent complaint witness Deslyn as she had migrated to Canada. The objection taken by the Defence Counsel on Deslyn's non availability as a witness prompted me to examine the disclosures to see if any prejudice would be caused to the Defence by Prosecution not calling or making Deslyn available as a witness. That examination convinced me that Deslyn had in fact recorded a statement and, had she been called, she would have been a recent complaint witness. However, in a context where Deslyn being not available as a witness, the Court is prohibited from using the so called recent complaint as evidence to test the complainant's credibility. But, the fact that she had made a complaint to Deslyn (not the contents of the complaint) is relevant and admissible as long as the Prosecution does not intend the contents of the complaint to be proved, even without calling Deslyn, the recipient of the complaint.

105. The Complainant had not told the police about the other people whom she said she made complaints to, namely her parents, Mahesh and Dipika. The Complainant's explanation was

that police wanted to know about the incident, and not about the people she had contacted. It would have been natural for her not to tell about them if the police did not question her about them. It is also possible that the police may not have recorded other witness statements because of Deslyn's statement on recent complaint.

106. The Complainant said that she informed Dipika about the rape. But the police had not recorded any statement from Dipika and therefore nobody knows if Dipika received a complaint at all. However, what the Complainant said about what she heard from Dipika has some weight in deciding her justification for the delayed complaint. The Complainant said when she told Dipika about her being raped, she received a discouraging response. After the discussion these were the questions the Complainant was asking herself: *Will she ever be able to prove the rape charge against her partner? Would she be believed? if she stood for her rights, will she be defamed? will she be accused of lying? Is she mentally prepared to complain if she were to stay with him? might it happen to her again?*

107. I agree that if she had bruises and a discharge, they could have supported her case. However, being a layman as she was, she had all the reasons not to rush to the police station without the support of somebody. She further said she was not able to say anything to anybody because she could not trust anyone when the partner whom she trusted the most had done this to her.

108. Mahesh Mistry was the other person she said she complained to. No statement had been recorded from Mahesh either. According to Shymal, Mahesh was in a superior position at his workplace. Not only that, Mahesh was accused by the Accused of having an affair with the Complainant. In that context, I have serious doubts that the Complainant had the courage to tell the police about the conversation she had had with Mahesh. All in all, the Prosecution lacked any recent complaint evidence in this case. However, lack of recent complaint evidence does not mean that the Complainant was never raped.

109. Now I turn to the complaint she eventually made to police on 19 April 2019, six days after the alleged incident. Although her complaint had been recorded on 19<sup>th</sup>, Sgt. Fabiano

confirmed that the matter was reported to police on 18 April 2019. The notes on page 01 of the Medical Form confirms this. The Complainant was giving evidence after five years from her memory. The Court can safely assume that the Complainant had vacated the Accused's house on 18 April and reported the matter to police the same day, although she said it happened on 19<sup>th</sup> April or else was she just referring to the date she had recorded the statement? I am not convinced that she deliberately changed the date to 19<sup>th</sup> to bolster up her case. I accept that she lodged the complaint with police on 18 April 2019.

110. Explaining the delay of complaint, the Complainant said she was frightened and that she had no money and no support at all until her parents arrived from Nausori. The Defence argues that she had nothing to fear when the Accused left home on 15<sup>th</sup> for island; and that she had money as she had access to his bank account. Her evidence was that she was frightened of him; before he left on 15<sup>th</sup>, he threatened her that he will kill her and bury her inside the house so that her parents will not be able to locate her body. Although he left home on the 15<sup>th</sup>, he was able to constantly monitor her via CCTV cameras. She had to get permission for her expenses and her withdrawals were being monitored.
111. She also said that she had no support at all during that period. Although she did not tell her parents over the telephone of the rape for the reason she described, she had complained to them of the assault. Her father promised to come and pick her up on the 19<sup>th</sup>. She knew that the parents are coming soon so she waited for them to come. By then she had made up her mind to leave the Accused and was only buying time for her parents to arrive. She made the complaint at the very first moment when she felt safe in the hands of her parents. I accept there was a reasonable basis for her to be scared of him from 15<sup>th</sup> -18<sup>th</sup> and that she needed some time and support to reassure her confidence to complain. The reason for the delay is satisfactorily explained.
112. The next myth about rape victims relevant to this case is that if the complainant was raped, she must have evidence to the effect that she offered some physical resistance and in that process received some injuries. This mythical thinking is contrary to Section 206 of the

Crimes Act which I alluded to above which states that the submission without physical resistance by a person to an act of another person shall not alone constitute consent.

113. The evidence of the complainant is that during the first rape, she pushed him away but her body was weak so he could overpower her. He took both her arms on upward position so that she could not stop him. In that process, she got bruises. She pushed him away with both legs. During the second rape, as he inserted the dildo inside her vagina, she started yelling when she felt the pain. He held the dildo tightly, so she couldn't come out. When she pushed his hands, the dildo fell on the bed. During the third rape, she pushed him away, and he fell from the bed. After the whole incident, she was having pain over her body and her vagina. She saw a little bit of blood at vagina and she started to have smelling discharge from her vagina. Her legs were shaking. She said she told the doctor about the incident and the injuries she had sustained. But by that time, the swelling and the injuries were fade and turned purple but the muscles of the inner thighs were still painful. When the doctor spread her legs to examine her vagina, she felt the pain.
  
114. Dr Pene, the medical officer who examined the Complainant on 19 April 2019 observed a bruise on Complainant's left posterior aspect of the thigh, PV vaginal discharge. According to the doctor, bruises are typically caused by blunt force traumas and could usually last at least 4 to 5 days and it could be longer if it's a bigger force. The examination had been done 6 days after the alleged incident. Therefore, it can be assumed that a considerable force had been used to cause the bruise to last that long. The doctor almost ruled out this bruise having been caused by a dog as suggested by the Defence Counsel. There was not even a suggestion put to the Complainant that the dogs were ever jumping on her lap. She confirmed that the patient had complained of muscle tenderness at inner upper thigh and confirmed that the patient felt pain in that area upon palpation. The Complainant's evidence that the Accused held her two legs and pulled; he spread her legs forcefully when she was trying to close her legs is consistent with medical evidence.
  
115. The doctor said that a PV vaginal discharge can be absolutely normal during menstrual cycle. However, since there was no blood to be seen, she assumed that the patient was not having

her menses. She did not rule out the discharge was due to an infection. Since there is no evidence that the Complainant was suffering from a STD, it is possible that she had an infection as a result of forceful penetration. The doctor noted that the history is consistent with a sexual assault although under cross-examination, she admitted that she could not rule it in or out. I find the medical evidence to be consistent with the Complainant's evidence that she was raped.

116. The Complainant did not deny that she was taken by the Accused for lunch at Bohai Restaurant and then to Tappoo City to buy her shoes on 15 April 2019. The Defence argued that a rape victim would never behave like that and would not accompany the rapist for lunch and shopping. I must appreciate that the alleged rapist in this case was not a stranger but the partner of the victim.
117. The Complainant explained the circumstances under which she had to go out with the Accused. She said she was having body pains with fever and asked the Accused if he could take her to hospital. He pretended that he was going to take her to the Doctor. But he didn't take her to the doctor. He took her to Bohai restaurant and asked her to eat because she did not have any food and then they could go to the doctor. Instead of taking her to the doctor, he took her to Tappoo and asked her to buy some stuffs and said, *I am gonna repay you for whatever I have done to you*. She said she had no option but to go with the Accused.
118. She *said* when she was taken to Tappoo and to the Bohai Restaurant the Shymal did not leave her alone at any point in time; She was scared of him that again he would start yelling at her and harm her because she did that in public. She denied she was happily shopping with the Accused. She was cooperating because he promised that he is going to take her to a doctor. She behaved as if she was not raped because she had no choice since she was staying in his house. She had to listen to whatever he said till she went back to her parents' home.
119. I watched the video carefully but did not see the Complainant smiling and happily shopping with the Accused. Mohammed Harun (DW 2), the manager at Tappoo Group said he saw the girl whispering something into the Accused when they were looking at shoes and that

they behaved just like a normal couple. He said the Accused was not known to him. If that is the case, it is hard to believe that he could recall a customer whispering to a girl and their demeanour after a lapse of five years. I accept the evidence of the Complainant that like the offer for a massage in a spa in Denarau, this shopping tour is a subtle attempt of the Accused to calm her down (butter her up) and prevent her from going to a doctor and authorities.

120. The Defence argues that if the Complainant raised alarm somebody from the neighbourhood would have come for her help. This argument is also based on a common myth that a rape victim will always raise alarm, scream and seek help. The Complainant said that she yelled and raised alarm but her landlord was not home. Sgt. Fabiano said there were stand-alone houses in the neighbourhood. However, he did not use any note or sketch to refresh his memory. He had never checked or recorded any statement from any of those neighbours. She had seen a knife in the room and was frightened. Therefore even if she did not raise alarm, I am not inclined to believe that she did not raise alarm because she was never raped.
121. The Complainant was straightforward and not evasive. I agree that an ideal normal rape victim may not have behaved like her. However, given the circumstances of this case, the Complainant's conduct is consistent with that of a genuine rape victim. I have no reason to reject her evidence.
122. Let me now analyse the evidence of the Accused. The position of the Defence is that the alleged rapes never happened, and that the Complainant fabricated the allegation and lodged the report with the police in frustration at being asked to leave the house upon the love affair she had been having with Mahesh Mistry being caught.
123. He said he was really concerned about the wellbeing of the dogs and he tried to portray that the heated arguments and his sudden home visit on 13 April 2019 were triggered by his concern for the dogs. I am unable to accept that assertion. He was always monitoring the dogs via the CCTV cameras and knew the dogs were safe, even though they were crying, when the Complainant was not home. The dogs were grown up (40 kg) Rottweilers and no sensible thief will ever think of stealing them. Having watched the cameras, he knew that



the Complainant returned home at 2 a.m. I am unable to accept that his concern for dogs prompted him to apply for special leave to rush home. The stated purpose of his sudden visit home is not justified on evidence.

124. I am convinced that the Accused arranged a sudden visit home to teach a lesson to the Complainant who defied his orders that she shall not go to a hotel with Deslyn, for breaching the midnight deadline and partying with two boys. He admitted that he was in a heated argument with the Complainant from 12<sup>th</sup> midnight and upon realising that two boys had joined the party, he got angry. He had ordered her to go home immediately which she refused with counter arguments. He was swearing at her, and the arguments escalated to the point where she was not answering his calls. He then called her mother and sister and even asked the Complainant to leave the house. He also threatened to come home to deal with her.
125. These arguments continued once he got back home on 13<sup>th</sup> morning. He knew that her mother is coming on 19<sup>th</sup> or 20<sup>th</sup> to pick her up. According to him, after those arguments, they ironed out their differences and the normalcy was slowly returning. The Complainant maintained that she ignored the Accused and did not talk with him although she cooked. I am unable to accept that the Complainant after being subjected to so much trouble, degradation and humiliation in the morning, would ever give consent to a sexual intercourse in the evening. I am sure the sudden change of his evidence towards reconciliation was to convince the Court that the first sexual intercourse which he admitted was consensual.
126. The Defence argues that the only reason why she lodged the report with the police was to take revenge on the Accused who had asked her to leave his house on the premise that she was in a relationship with Mahesh. The Complainant having denied that she was in a relationship with Mahesh, admitted that she had had several conversation over the phone with Mahesh from 15-18 April 2019 when Mahesh was trying to change her mind to go back to her parents. To show that she was in a relationship with Mahesh, a recorded telephone conversation is alleged to have taken place on 18 April 2019 was played in Court. That conversation does not impress me that it has anything to do with an intimate relationship between two lovers. According to the Accused, he himself had denied having alleged the

Complainant of having an affair with Mahesh when he was confronted by Mahesh in the same evening. The Accused said that the Complainant knew Mahesh as a friend. Therefore, it is not unusual for them to have a conversation like that.

127. The Accused admitted that he had access to the Mahesh's call logs on their Private Address Branch Exchange (PABX) and that he listened to all Digicel calls on PABX between the Complainant and Mahesh. Then why did he hand-pick only one conversation and give it to his Counsel? I am convinced that the audio recording is part of the conspiracy of the Accused to bolster up his Defence. Accessing private conversations is illegal and I do not believe such a system was in operation in a multi-billion Australian hotel project in violation of right to privacy guaranteed under Section 24 of the Constitution.
128. During his interview, the Accused had sought police assistance to obtain the CCTV footages from Bohai and Tappoo. Then why didn't he give this piece of evidence which he thought was important for his defence to the police investigators so that they could legally access the PABX system and check its authenticity. The Defence ambushed the Court with this audio recording without giving the Prosecution an opportunity to access the source of its recording.
129. The Accused had declined to come home for the Complainant's birthday and postponed his home visit till 19<sup>th</sup> April which was the birthday of the dogs. It is hard to believe that if the Accused had really loved and cared for his partner, he would ever give priority to the dog's birthday.
130. The Defence tendered call history logs to show that the Complainant and the Accused were having normal conversations even after the alleged rape incident. She agreed that they were texting and talking to each other regarding the dog and other household affairs and added that the WhatsApp messages that were produced in Court did not contain all the conversations they have had during that period. It is clear that the Accused has selected only some parts of their conversations to support his assertion. Although the Defence attempted to show that they were normal conversations, I am not convinced that they were mere normal conversations. In one of them, the Accused had apologized to the Complainant which she

had refused to accept. He tried to show that the apology was in respect of the harsh words he had used and spoiling her birthday and that it had nothing to do with the rape allegations. According to Accused's own evidence, he had already apologized for those words and reconciled when he arrived home on 13<sup>th</sup> morning and even had had consensual sex in the afternoon. Then why would he want to apologize her again over the telephone? I am convinced that the Complainant refused to accept his apology and his offer for a massage at a Spa in Denarau because she was raped.

131. The Accused had not presented himself at the Vunisea Police Station and dodged the investigations. His evidence that he was not directed to the correct police station at which he should report is unbelievable. After buying time, he had finally appeared at the Nadi Police Station with his Counsel on 29 April 2019. If he is clean, he should have had the courage to face the investigation without any hesitation.

132. The Defence case theory is not consistent with the evidence of the Accused. It started off informing the Court that the Accused admits sexual conduct only of the first count. However, the Accused in his evidence admitted that he penetrated the Complainant's vagina twice. When the Accused was totally denying penetration with a sex toy, his Counsel was putting questions to the Complainant on the basis that the sex toy used was of a different kind.

*Q: I'm also going to put to you, what was used between you two in that intimate moment was a dildo which was different from what you had kept in your house?*

*Q: What was used on you was a dildo and not a vibrator, which the vibrator was kept in your house?*

133. The nature of the object used to penetrate does not matter as long as it had penetrated the vagina of the Complainant, at least slightly.

134. The Accused failed to give a plausible explanation as to why he had slept in a different room after the sexual intercourse which he said was consensual. It is hard to believe that he slept with the dogs in the master bedroom when the Complainant slept in the small room.

135. I observed the demeanour of the Accused. It appeared that as if he were reading a prepared script, coming up with information that were not relevant to the questions that were posed by his Counsel. He was not straightforward. He quickly changed his evidence when he realized that the answer he had already given was not favourable to him. This was evident when he quickly changed his evidence from him having seen the Complainant sleeping to lying on the bed on her phone.
136. The evidence of the Accused is not appealing to me. It failed to create any doubt in the version of event of the Prosecution case. Even if I were to accept the evidence of the Accused, I am not satisfied that the risk he took in proceeding to the first sexual intercourse was justified in the circumstances known to him. Ahead of the first sexual intercourse, the Accused said he approached the complainant and kissed her and whispered "*Kare manta*".....meaning '*I want to do it*'. What it meant to him was '*I want to have sex*'. She, in reply said, '*if you want to do it, do it slowly*'. Then he continued kissing. Given the circumstances known to him from the morning, I am not satisfied that the Accused had reason to believe from the reply he got that the Complainant had expressed unqualified consent for a sexual intercourse.
137. I am not convinced that the allegations are fabricated. I do not believe that the complainant was capable to fabricate not only one but three allegations within such a short period. I reject the evidence of the Defence. I know that the mere rejection of Defence evidence does not mean that the Prosecution has proved its case. Upon overall assessment of evidence led in trial, I am satisfied that the Prosecution proved beyond reasonable doubt that the Accused penetrated the Complainant's vagina twice with his penis and once with a sex toy without her consent.
138. The evidence is overwhelming to find that the Accused knew that the Complainant was not consenting to have sex with him. She indicated by her conduct and the words that he was not prepared to have sex with him. The Accused was aware that the complainant was not consenting and yet he continued to force her.

139. The Prosecution satisfied all the elements of Rape on each count as charged beyond reasonable doubt.

140. I find the accused guilty of Rape as charged and convict him accordingly.



Aruna Aluthge

Judge

4 April 2024

At Lautoka

Solicitors:

Office of the Director of Public Prosecutions for State  
Reddy & Nandan Lawyers for Defence