

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 65 of 2022

STATE

V

IMAM ALI

Counsel : Ms. Shreta Prakash for the State
Mr. Ravneet Charan with Ms. Aashnal Goundar and Ms. Roberta Nair for the Accused

Dates of Trial : 28 & 29 May and 5-7 & 11 June 2024

Closing Submissions : 21 August 2024

Judgment : 28 November 2024

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

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

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

IMAM ALI, between the 1st of July 2017 and the 31st of July 2017, at Waiyavi, Lautoka, in the Western Division, inserted one of his fingers into the vulva of **SSK**, a child under the age of 13 years.

SECOND COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009.

Particulars of Offence

IMAM ALI, between the 1st of July 2017 and the 31st of July 2017, at Waiyavi, Lautoka, in the Western Division, inserted his tongue into the vulva of **SSK**, a child under the age of 13 years.

THIRD COUNT

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (c) and (3) of the Crimes Act 2009.

Particulars of Offence

IMAM ALI, between the 1st of July 2017 and the 31st of July 2017, at Waiyavi, Lautoka, in the Western Division, inserted his penis into the mouth of **SSK**, a child under the age of 13 years.

- [2] The accused pleaded not guilty to the charges and the ensuing trial was held over 6 days. Thereafter, the Learned Counsel for the Defence and the State 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) stipulates 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 two counts of Rape, contrary to Section 207 (1) and (2) (b) and (3) of the Crimes Act; and one count of Rape, contrary to Section 207 (1) and (2) (c) and (3) of the Crimes Act

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

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

[8] 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.

[9] 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 for penetrating the vulva of the complainant with one of his fingers, in respect of the first count; and for penetrating the vulva of the complainant with his tongue, in respect of the second count.

[10] Section 207 (2) (c) makes reference to a person penetrating the mouth of the other person to any extent with the person's penis without the other person's consent. In the instant case, the accused has been charged for inserting his penis into the mouth of the complainant, in respect of the third count.

[11] Section 207 (3) of the Crimes Act provides that a child under the age of 13 years is incapable of giving consent.

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

- (i) The accused;
- (ii) During the specified period (in this case between the 1 July 2017 and the 31 July 2017);
- (iii) At Waiyavi, Lautoka, in the Western Division;
- (iv) Penetrated the vulva of the complainant SSK, with one of his fingers;
- (v) At the time the complainant SSK was a child under the age of 13 years.

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

- (i) The accused;
- (ii) During the specified period (in this case between the 1 July 2017 and the 31 July 2017);
- (iii) At Waiyavi, Lautoka, in the Western Division;
- (iv) Penetrated the vulva of the complainant SSK, with his tongue;
- (v) At the time the complainant SSK was a child under the age of 13 years.

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

- (i) The accused;
- (ii) During the specified period (in this case between the 1 July 2017 and the 31 July 2017);

- (iii) At Waiyavi, Lautoka, in the Western Division;
- (iv) Penetrated the mouth of the complainant SSK, with his penis;
- (v) At the time the complainant SSK was a child under the age of 13 years.

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

[16] The second element relates to the specific time period during which the offences were committed. The third element relates to the place at which the offences was committed. The prosecution should prove these elements beyond reasonable doubt.

[17] In respect of Count 1, the fourth element involves the penetration of the complainant's vulva, with one of the accused's fingers; and in respect of Count 2, the fourth element involves the penetration of the complainant's vulva, with the accused's tongue. In respect of Count 3, the fourth element involves the penetration of the complainant's mouth, with the accused's penis.

[18] 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 vulva of the complainant with one of his fingers to any extent, in respect of Count 1; that the accused penetrated the vulva of the complainant with his tongue to any extent, in respect of Count 2; and that the accused penetrated the mouth of the complainant with his penis to any extent, in respect of Count 3.

[19] It may be important at this stage to distinguish between the vulva and the vagina of a female. It is well documented in medical literature that first, one will see the vulva i.e. all the external organs one can see outside a female's body. The vulva includes the mons pubis ('pubic mound' i.e. a rounded fleshy protuberance situated over the pubic bones that becomes covered with hair during puberty), labia majora (outer lips), labia minora (inner lips), clitoris, and the external openings of the urethra and vagina. People often confuse the vulva with the vagina. The vagina, also known as the birth canal, is inside

the body. Only the opening of the vagina (vaginal introitus *i.e.* the opening that leads to the vaginal canal) can be seen from outside. The hymen is a membrane that surrounds or partially covers the external vaginal opening. It forms part of the vulva, or external genitalia, and is similar in structure to the vagina. Therefore, it is clear one has to necessarily penetrate the vulva before penetrating the vagina. [Vide *Volau v. State* [2017] FJCA 51; AAU0011.2013 (26 May 2017); where the Fiji Court of Appeal commented upon this distinction].

[20] The final element is that at the time of the incident the complainant was a child under 13 years of age. The issue of consent will not arise in this case. Only a child of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. As would be seen later in this judgment, the complainant in this case was only 10 years and 8 months old at the time of the alleged incidents of Rape, and therefore, she had no mental capacity to give consent. [Her date of birth being 26 October 2006].

[21] It must also be noted that in terms of Section 129 of the 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 is obviously considered as an offence of a sexual nature. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.

The Agreed Facts

[22] 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.

[23] Accordingly, the prosecution and the defence have consented to treat the following facts as *“Admitted Facts”*:

1. Imam Ali is the accused person in this case.
2. The accused was 36 years old at the time of the alleged incident.
3. The complainant in this matter is SSK.
4. The complainant was 10 years old at the time of the alleged incident.
5. The date of birth of the complainant is 26 October 2006.
6. The accused, the complainant’s mother, the complainant’s brother and the complainant were staying together at the complainant’s grandmother’s house in Waiyavi.
7. The complainant’s mother is Nazmin Nisha.
8. The complainant’s brother is Azhar Ali and he is the older brother of the complainant.
9. The accused was in a de-facto relationship with the complainant’s mother.
10. The house where the accused, the complainant, Azhar Ali and Nazmin Nisha were staying has two bedrooms.
11. The complainant was a Class 5 student of Lautoka Muslim Primary School.
12. This matter was reported to Police on 10th August 2017 by the complainant’s mother.
13. The accused was then arrested by Police because of this report.
14. The complainant was medically examined at Lautoka Hospital on 25th August 2017.

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

Case for the Prosecution

[25] The prosecution, in support of their case, called the complainant (SSK) and her mother Nazmin Nisha.

[26] The prosecution also tendered to Court the Birth Certificate of the complainant as Prosecution Exhibit PE1.

[27] Evidence of the complainant SSK

- (i) *The complainant's evidence was recorded over a period of one day. Her evidence was recorded in a 'closed court' and a screen was placed so that the complainant could not see the accused.*
- (ii) *The complainant testified that she is residing at Waiyavi, Lautoka with her mother and her small baby. She has been residing there since birth. Her mother's name is Nazmin Nisha.*
- (iii) *The complainant confirmed that her date of birth is 26 October 2006. So she is currently 17 years of age. She is staying at home.*
- (iv) *The complainant testified that in the month of July 2017, she was schooling at Lautoka Muslim Primary and was in Class 5. At the time she was 10 years old. At the time she had been residing at Waiyavi, Lautoka, with her mother, her older brother, Mohammed Azhar Ali and her step dad, Imam Ali (the accused). The house they were staying in belongs to her maternal grandmother. [These matters are all part of the Admitted Facts as well (see paragraphs 4, 6, 8 and 11)].*
- (v) *When asked about her biological father, the complainant said that when her mum was 4 months pregnant with her, they had got separated. She has no contact with her biological father.*
- (vi) *It was revealed that her brother Azhar Ali had unfortunately passed away. He is said to have drowned. Azhar Ali was 6 years older than her.*
- (vii) *The complainant testified to the events which took place in the month of July 2017. She said that the house they were staying in was a two bedroom house. One room was her room, while the other room, her mum and her step dad used to share. Her brother Azhar Ali used to sleep in the sitting room.*
- (viii) *The witness said, one night she was sleeping in her room. Suddenly she felt somebody was touching her body – specifically her private part. When she woke up then she saw it was her step dad.*
- (ix) *The witness explained: "He put his hand inside my panty and he was standing and when I tried to yell, he then put his left hand on my mouth.... When he had put his hand inside my panty, he put his finger inside my private part. Then he took his finger out and pulled my panty with my pants down. Then he put my legs up and he came on the bed. Then with his tongue, he licked my private part. Then he put my legs down. He came up on me. Then he took out his private part and put it in my mouth. His hand was already on my mouth – he did 'this' and put his private part in my mouth (the witness demonstrated as to how the accused had put his penis into her mouth)".*
- (x) *When asked to explain what she meant by 'private part', she said the bottom private part. Then she said it is the part that is used to urinate. She said she did not know what other names that part was called (in English or in any other language).*
- (xi) *The complainant said that the accused had put one finger into her private part. He had done so for two minutes. She said she didn't like what he did. She*

- wanted to move him (away) from her body. However, since she was small and he was heavy, she couldn't do anything.
- (xii) The accused had been licking her private part with his tongue for about two minutes. She said she didn't like what he did. She said she couldn't do anything because the accused was on top of her – on the area of her leg. She couldn't scream because his hand was still on her mouth.
- (xiii) The witness explained further that at the time her legs were on top (her legs were up). In between her legs, the accused had put his head and from in between her legs he put his hands on her mouth. The witness demonstrated as to how the accused had been licking her private part.
- (xiv) When asked to explain further as to how the accused had put his private part into her mouth, the witness explained that the accused had put her legs down and he came up on her – his hips were on her chest area. Then he pressed her cheeks to open her mouth. Then he took out his private part and put it in her mouth.
- (xv) When asked what she meant by the accused's private part, she said it was the part with which he urinates with. She did not know any other name to describe this part.
- (xvi) The complainant said she did not like what the accused was doing to her. She had pushed him using her hands and her legs – because by then her hands and her legs were free. When she pushed the accused, he had hit a drawer which was in her room.
- (xvii) The accused had then left the room as he thought that her mum will wake up since the two rooms were side by side. The accused had not told anything to her when he left the room.
- (xviii) The witness said that after this incident, she was so frightened and scared. She just sat on the bed and did not know what to do. Since her mother was sleeping at the time, she could not tell her mother about the incident.
- (xix) The complainant testified that on the next morning, she went to the kitchen to tell her mother about the incident. At that time the accused had come and told her to go and get dressed for school as she was getting late. So she couldn't tell her mother at that time.
- (xx) Thereafter, she had gone again to the kitchen to tell her mother. The accused had come again and said, "aren't you getting late to school?" So she couldn't tell her mother even at that time.
- (xxi) Thereafter, she was sitting in the accused's van to go to school. Then the accused had come and sat on the driver's seat. He turned back and said: "Did you enjoy?" "Then he said, if you tell your mum, I will kill you and your mum". The complainant said that she felt frightened by what the accused said to her.
- (xxii) At the time her brother had been getting ready for school. The complainant said that she used to travel with the accused to school every day. She returns home

- by bus. Her brother sometimes travels by bus and sometimes travels with them. Her brother was attending Lautoka Muslim College (High School).
- (xxiii) When asked whether she informed her brother about what happened to her, the witness said: "No, because I was the sister, how can I tell him?"
- (xxiv) The complainant testified that on one Sunday (the following Sunday), the accused had gone to his aunt's place in Suva with his sisters. This was for a prayer function (Dua). That day she had told her mum that the accused had touched her. Then she had gone to her room and taken her books and started studying. [It is revealed later in evidence that the accused left for Suva on the following Saturday and returned on Sunday].
- (xxv) She had later got to know, that when the accused had returned from Suva later that day, her mum had asked the accused as to why he had touched her. The accused is said to have ignored the question and gone to sleep. The next morning (Monday morning), her mother is said to have asked the accused about this matter again. The accused had given her mother \$5.00 and told her to go and sort out all the papers for their legal marriage.
- (xxvi) Thereafter, the accused had got ready and left the house. The complainant said that the accused was supposed to drop her in school. However, he had quickly got ready and left the house. So she left to school on her own that day.
- (xxvii) The accused had never returned home thereafter. They had later got to know that he had gone to his sister's place in Sigatoka. She, her mother and her brother had then gone to Sigatoka (later the same day) to meet the accused (at his sister's house). Her mother had knocked the door but no one came out to meet them. They had waited for about an hour and returned home.
- (xxviii) That night, after returning home, the complainant had told her mother in detail as to what the accused had done to her – that he had put his finger into her private part, that he had licked her private part with his tongue and that he had put his private part into her mouth.
- (xxix) Her mum had been shocked on hearing this. Her mum had told her grandma and her brother about it. Her grandma had told to go and report the matter to the Police. Accordingly, the next morning, she and her mother had gone and reported the matter to the Police.
- (xxx) The complainant said that she knows the accused since she was very small – since she was 4 to 5 years old. So she knows the accused very well. She calls him Abbu (meaning father).
- (xxxi) The complainant identified the accused in the dock as Imam Ali.
- (xxxii) A copy of the Birth Certificate of the complainant was tendered to Court as Prosecution Exhibit PE1.
- (xxxiii) When Court inquired from the witness as to how long it was from the date of the alleged incident to the Sunday when the accused went to Suva, she said that it was 2 to 3 days later. Later she said it was about 1 week later.
- (xxxiv) The complainant was cross examined by the defence and the defence case theory was put to the witness.

- (xxxv) *The witness said that when she sleeps in her bedroom, the door to her bedroom is always left opened. She confirmed that even on the night of the incident the bedroom door was opened. She also said that the kitchen light is left on (in the night) when she goes to bed. There is light coming to her room when the kitchen light is on.*
- (xxxvi) *The witness said that after the incident, she was shocked and afraid. She just sat on the bed for quite a long time. Then she lied down, but she couldn't fall asleep.*
- (xxxvii) *It was suggested to the complainant that her brother used to sleep on the single bed and that she used to sleep on the single bunker bed which was in her room. The complainant denied the suggestion and said that she used to sleep on the single bed and that her brother used to sleep in the sitting room. No one slept in the single bunker bed.*
- (xxxviii) *The witness testified that she and her mother are now staying in a new house. This is at the same location as the old house. The old house was demolished. During her cross-examination the witness was asked to draw a sketch of the house (as it was in July 2019). The witness did so depicting the two bedrooms of the house, the living room/sitting room and the kitchen.*
- (xxxix) *It was suggested to the complainant that she used to go to school in the bus and not with the accused in his van. The witness denied the suggestion and said that she used to go to school with the accused in his van. He used to drop her in school and then go to Nadi where he used to work.*
- (xl) *The witness said that she, her mother and brother had gone to Sigatoka to meet the accused in the night (on Monday night). They had gone by Viti Mini. They had returned home at 1.00 in the morning. They had also returned by Viti Mini and got off at the Service Station in Lautoka. From there they had walked home.*
- (xli) *It was suggested to the complainant that she, her mother and brother had gone to Sigatoka and returned in their next door neighbour, Abdul Aziz's taxi. The witness denied this suggestion.*
- (xlii) *The complainant said that the accused's CRV van was parked in the compound in Sigatoka. It was suggested to the complainant that the van was open and that she, her mother and brother sat in the vehicle for a few hours. It was also suggested that her mother removed the key of the vehicle (and took it with her). The witness denied these suggestions.*
- (xliii) *The witness recalls that they went to Sigatoka on Monday night. She said the matter had been reported to the Police on a Tuesday (she doesn't recall the date).*
- (xliv) *The witness agreed that the name of the accused's sister, who resides at Sigatoka, is Sofia Shabnam Ali; and that her husband is Mohammed Hamid Iqbal. They were staying in Olosara, besides the Mosque. One of Sofia's daughters was studying with her until Form 5, at Lautoka Muslim College.*

- (xlv) *The complainant testified that she was in Form 5 last year. She stopped schooling at Form 5, because she was in a relationship and got pregnant. She now has a 2 months old baby daughter.*
- (xlvi) *The witness agreed that she has an aunt named Shabnam Sofia, who resides in New Zealand. The said Shabnam Sofia has a sister named Shabnam Firoza, who is a neighbour of theirs. She lives one house next to hers. Shabnam Sofia and Shabnam Firoza are her mother's cousin sisters.*
- (xlvii) *The complainant agreed that while the accused was in remand for this case, she had met Shabnam Sofia and Shabnam Firoza once at the latter's house. She denied that she had told them that her mother assaults her with spoons or with lead wire/extension cords. She testified that they had told her to say that her mother was assaulting her and that they were recording a video of the said conversation.*
- (xlviii) *It was suggested to the witness that she had told Shabnam Sofia and Shabnam Firoza voluntarily (she was not forced to say so) that her mother had told her to lodge a false report against the accused, because the relationship between her mother and step-father had ended. The witness denied this suggestion.*
- (xlix) *It was further suggested to the witness that her mother had forced her to make a false report against the accused, because the relationship between her mother and step-father had ended. The witness denied this suggestion and said: "No my Lord, it has happened with me (it happened to me). Then I told my mum and then the matter is reported. It's never told by mum to put it like this."*
- (I) *The Counsel for the defence highlighted the fact that the complainant's statement is recorded by the Police, on 10 August 2017, which is a Thursday (not a Tuesday).*
- (ii) *The complainant said that her brother had passed away on 13 September 2020.*
- (iii) *The witness said that she got married on 1 September 2023. It was the traditional marriage ceremony (The Nikah). She said an invitation was not given to her aunt Shabnam Firoza for the Nikah.*
- (liii) *It was suggested to the witness that after the accused had returned from Suva on that Sunday night, her mother and the accused had an argument, because the accused did not take her mother to Suva. The witness said she doesn't know since she was sleeping.*
- (liv) *The complainant said that on the night of the alleged incident she was wearing a green top, black pants and white pantie.*
- (lv) *During re-examination, the State Counsel clarified certain issues that arose during the cross-examination.*
- (lvi) *The complainant was asked to demonstrate how the accused was able to lick her private part after having lifted her legs up and pushing her legs with his knees. The witness was permitted to come out of the witness box and demonstrate how this happened. She sat on the floor of Court (close to the witness box) and demonstrated how the accused had been kneeling down, face to face, and had licked her private part, while she was lying on the bed.*

- (lvii) *The witness said that the relationship with Shabnam Firoza was not good. She explained that this was due to a family dispute- her mother, grandfather and grandmother had a fight (argument) with Shabnam Firoza. So they stopped going to Shabnam Firoza's place. Shabnam Firoza resides two doors next to their place.*
- (lviii) *She testified that Shabnam Sofia and Shabnam Firoza had forced her/threatened her to say that her mother was assaulting her and also to say that her mother had forced her to make false report against the accused.*
- (lix) *The complainant said that her husband is supporting her and her baby. They are currently not staying together because she is under 18. Once she turns 18 in October, they will be legally married and then she will be moving to her husband's place to stay.*

[28] Evidence of Nazmin Nisha

- (i) *The witness testified that she is 53 years of age. She is currently residing at Waiyavi Stage II, Yalandi Street, Lautoka. She works as a Cook at the Fiji Muslim League.*
- (ii) *The witness said that she is residing at Waiyavi with her daughter, the complainant, and her granddaughter (the complainant's daughter). She has been residing at Waiyavi since she was small. She was residing there with her parents who are now deceased. Her mum had passed away in 2018, while her father passed away over 21 years ago.*
- (iii) *When her mother was alive they were residing at the same location where she is staying now. It was two separate flats that were partitioned.*
- (iv) *The witness testified that she is currently unmarried. She is just staying alone with her daughter.*
- (v) *She was married previously. She got married first when she was 16 years old. Her first husband's name was Mohammed Hakeem. However, they are now legally separated. He is staying in Nausori. She has three children from this marriage – Mohammed Muaz (he is 35 years old), Mohammed Imraz (he is 34 years old) and Nafisha Nazmin Nisha (she is 29 years old).*
- (vi) *She got married a second time to one Mohammed Hazrath Ali. She had one son through this marriage – Mohammed Azhar Ali. However, her son has passed away (in the year 2020). She got legally separated from Hazrath Ali. She does not know his current whereabouts.*
- (vii) *The witness testified that the complainant's father is Mohammed Sharif Khan. She was not legally married to him. Now they are separated. She does not know his current whereabouts.*
- (viii) *The witness testified that in the year 2017 she was residing at her home in Waiyavi with Azhar, Imam Ali and the complainant. Imam Ali was her de facto husband. She was in a relationship with him for about 9 to 10 years.*
- (ix) *In 2017 Azhar was about 17 years and the complainant was 10 years. They were both going to school.*

- (x) *The witness testified to the events which took place in August 2017. She said she could recall that month. She was specifically referred to 5 August 2017, which was a Saturday. She said at the time she was staying at home and not working. Her son Azhar Ali used to work as a Packing Boy from Thursday to Sundays, if it was school holidays. Later the witness said, even on school days her son used to work.*
- (xi) *The witness testified that on 5 August 2017, the accused had left for Suva. He had gone to attend a milaad (a prayer function) following his father's sister's death. She had not joined the accused in going to Suva since there was no space in the van. The accused had told her that his sisters were joining him to go to Suva.*
- (xii) *After the accused left she had been doing the housework and thereafter she and her daughter were watching a movie. At that time, the complainant had mentioned to her that Abbu had touched her. The complainant refers to the accused as Abbu or father. The witness said that the complainant had told this to her during the day on Sunday (the next day). Thereafter, the complainant had left to study.*
- (xiii) *The witness said she did not inquire further from the complainant at the time, since something of this sort had never happened before. So she did not think much about it.*
- (xiv) *The accused had returned home around 11.30 to 12.00 midnight on Sunday. She had asked the accused about what the complainant had told her – that Abbu had touched her. The accused had replied that it's late in the night and tomorrow is work and aren't you feeling sleepy? Then they had gone to sleep.*
- (xv) *The next morning (Monday morning) she had asked him again prior to him leaving for work. However, the accused had left for work and never returned home after that day.*
- (xvi) *Thereafter, she had tried calling the accused but he never picked up the phone/calls. Then she had been informed by a neighbour that she had seen the accused's vehicle at the Sigatoka bridge.*
- (xvii) *She had then spoken to her son Azhar and they had decided to go to Sigatoka and check for the accused. Around 8.30 – 9.00 in the night, they had left for Sigatoka – the witness, Azhar and the complainant. They had gone in a Viti Mini van (15 seater). They had gone to the accused's sister's house in Sigatoka.*
- (xviii) *On reaching the house, she had knocked the door twice. However, no one had opened the door. Azhar had called out, Abbu, Abbu, however, there was no answer. The accused's van was parked in the compound of the house. They had been sitting outside the house close to where the van was parked for a while- they waited for about half an hour.*
- (xix) *The witness said that she knew people were inside the house since the lights were on (inside the house) and she could hear them talking.*
- (xx) *Since there was no response, they came to the road side and waited a while. They had boarded the Viti Mini and come to Lautoka. They got off at the Pacific*

Energy Service Station, after Red Cross Hall. Then they had walked home. The witness does not recall what time they had reached home.

- (xxi) After reaching home, the witness and her son Azhar had been chatting as to the reason why the accused didn't want to talk to them, in spite of them going all the way to Sigatoka to meet him. At this stage, the complainant had informed that the accused doesn't want to come home because of the things he did to her.*
- (xxii) The witness testified that the complainant had said: "I was sleeping in the night. Abbu was touching my private part. And he put his private part in my mouth. That's all what she told me". The complainant had looked frightened at that time. The witness said she felt really bad on hearing this. By Abbu the complainant had meant the accused.*
- (xxiii) The next morning (should be Tuesday morning). The witness had told everything the complainant told her to her mother. Her mother had told her to go and report the matter to the Police. Accordingly, they had reported the matter to the Police. The witness said it was a Tuesday.*
- (xxiv) The witness testified that the house they were staying in was a two bedroom house. There was a sitting room and a kitchen. Azhar used to sleep in the sitting room. One bedroom was hers (where she and the accused used to sleep). The complainant slept in the other bedroom, where there was one double bunker bed and a single bed.*
- (xxv) As to the CRV van the accused was driving, the witness said that the van was jointly owned by herself and the accused. They had bought the van when she was running the canteen at the Lautoka Muslim College. She was running the canteen for 7 years up until 2016. The payment for the van was paid from the monies received from the canteen.*
- (xxvi) As to the house expenses, she said that both she and the accused used to run the house. After she closed the canteen, she used to buy groceries and meet other expenses with the accused's and her son Azhar's income.*
- (xxvii) The witness testified that the accused never returned home after that day. She had been managing the house expenses with her son Azhar's income. Furthermore, before her mum passed away, her mum had transferred all properties under her name. So she also receives rental income from tenants with which she manages the expenses.*
- (xxviii) The witness was asked as to whether she had made any such reports to the Police against any of her previous three partners/husbands after they had left her. The witness said no.*
- (xxix) The witness identified the accused in the dock as Imam Ali.*
- (xxx) A question was put to the witness by Court to ascertain as to whether, during the time they were together, the accused used to always dress in the same costume/attire that he wears to Court. The witness said that during the time they were together, the accused used to wear t-shirt and pants. When he used to go to work, he used to wear uniform. If they were going somewhere, he used*

to wear t-shirt and pants. On Sundays – they usually have a prayer group meeting – if they are going for that prayer group meeting then the accused used to wear the costume/attire he comes to Court in.

(xxxi) The witness was cross-examined at length by the defence.

(xxxii) The witness said that when she and the accused started their relationship, the complainant was very small. She could not recall the year.

(xxxiii) The Defence highlighted the following inconsistencies in the evidence given by the witness vis a vis her statement made to the Police.

- i. In her testimony in Court she stated that she was in a relationship with the accused for 9 to 10 years.*

*However, in her statement made to the Police it is recorded as follows:
“We were in a relationship for the last 11 years”.*

- ii. In her testimony in Court she stated that in Sigatoka they had been sitting outside the house close to where the van was parked for a while.*

*However, in her statement made to the Police it is recorded as follows:
“So we were sitting in the van till 1.00 a.m.”.*

The Defence further highlighted the following omission in the evidence given by the witness vis a vis her statement made to the Police.

In her testimony in Court she stated that she went to the house where the accused’s sister was staying in Sigatoka.

However, in her statement made to the Police this is not recorded. What is only recorded is that they arrived at a house where the accused’s van was parked.

(xxxiv) It was suggested to the witness that her son Azhar used to always sleep in the bedroom (together with the complainant), because of the weak structure of the sitting room area. The witness denied the suggestion.

(xxxv) The witness admitted that the accused is paying her \$50.00 maintenance monthly. He pays the money directly into her bank account.

(xxxvi) The witness testified that the accused used to go to work in their van. It was a maroon color CRV. She doesn’t recall the registration number. The complainant used to go to school in the mornings with the accused in the van. The accused used to drop her at school and then go to work. Azhar Ali used to go to school sometimes with the accused. Sometimes he would walk or go by bus.

(xxxvii) The witness was asked whether she knows a work colleague of the accused named Siva Krishnan. She said she does not know such a person.

(xxxviii) It was suggested to the witness that she, Azhar Ali and the complainant went to Sigatoka on that Monday night, in one Abdul Aziz’s taxi. The witness

denied this suggestion and said she doesn't know who Abdul Aziz is and that they did not go to Sigatoka in a taxi.

- (xxxix) It was further suggested to the witness that when she went to Sigatoka (on that Monday night), she had taken the key of the van and brought it with her. It was further suggested that she had gone back to Sigatoka to return the key the next day. The witness denied this suggestion.*
- (xl) It was suggested to the witness that she was angry with the accused for not taking her to Suva and that she had an argument with him when he returned home. This argument had continued on the next morning (Monday morning). The witness denied this suggestion and said they never used to fight. She further said that on Monday morning, the accused took his parcel of food and went for work.*
- (xli) It was suggested to the witness that on Monday morning, the argument between her and the accused had continued and that the accused had ended their relationship, took his belongings and left home. The witness denied this suggestion.*
- (xlii) It was suggested to the witness that the mobile phone she was using at the time was +6799357074 and that she had sent text messages to the accused after the alleged incident and after he left home using the said phone. The witness denied the suggestion and said that she doesn't know how to write or how to send text messages. However, when they were together she used to take pictures and forward it to him. She doesn't recall whether the said mobile phone number was hers. She was asked whether she remembers the accused having a white Alcatel smart phone. She said she does not recall.*
- (xliii) The printouts of the messages said to be sent from mobile phone number +6799357074, during the period 3 August 2017 to 8 August 2017, were tendered to Court as Defence Exhibit DE1 (It was originally tendered subject to proof, as MFI 1). The witness totally denied having sent any of the messages.*
- (xliv) The witness agreed that Shabnam Firoza was her cousin (she said she was her step-father's sister's daughter) and that she stays one door next to her. Shabnam Firoza's sister is Shabnam Sofia, who resides in New Zealand. The witness said she did not invite Shabnam Firoza for her daughter's Nikah (on 1 September 2023), because they were not on talking terms for a very long time.*
- (xlv) She said she knew that Shabnam Firoza had come for her son Azhar's funeral, although she did not see her personally. Azhar had passed away on 13 September 2020.*
- (xlvi) It was suggested to the witness that the accused had ended the relationship with her and left home, that is the reason why she had fabricated this story against him. The witness denied the suggestion and said that when her daughter had told her, she had reported the matter.*
- (xlvii) It was suggested to the witness, that the day the accused went to Suva was not in August but was on 29 July 2017 (which was a Saturday). The accused had returned on 30 July 2017 (which was a Sunday). And that on 31 July 2017 (which*

was a Monday) the accused left home and never returned. The witness said she cannot recall the month or date. She only recalls that the accused went to Suva on Saturday and came back on a Sunday and left home for good the following Monday.

(xlvi) The witness agreed that after the accused left home, she attempted to call him but he did not answer her calls. Neither did he call her back thereafter. It was further suggested to the witness that since the accused had left home and did not return, that is why she is fabricating this case against him. The witness denied this suggestion.

[29] At the end of the prosecution case Court decided to call for the defence of the accused. 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.

[30] The accused decided to testify on his own behalf. He also called 6 other witnesses in support of his case – namely (1) Mohammed Hamid Iqbal (his brother-in-law); (2) Sofia Shabnam Ali (his sister); (3) Shiva Krishnan (a work colleague of his); (4) Shabnam Firoza (an aunt of the complainant); (5) Abdul Aziz (a Taxi Driver) and (6) Woman Corporal 5341 Barbara Salele (The Investigating Officer in this case).

[31] Evidence of Imam Ali

- (i) The witness testified that he is 43 years of age and currently living at Lot 170, Sukanaivalu Road, Lautoka. He is working as a Salesman at One Stop Paint Shop in Nadi. This was in Namaka, Waqadra New Sub-Division, Nadi.*
- (ii) The witness said that he is currently married to Gulnaaz Jasmin Saifi. They had got married in the year 2018.*
- (iii) In the year 2017, he was in a relationship with Nazmin Nisha. They had been in a relationship for 8 to 9 years (a de-facto relationship). He said that the relationship ended on 31 July 2017.*
- (iv) The witness said that the reason for the relationship to end was due to the fact that on the previous night (30 July 2017), when he had returned from Suva, Nazmin Nisha had asked him as to why he never takes her to Suva along with him and that he is having an affair with someone (else).*
- (v) The witness said that on that night he had returned home from Suva, around 10.00 to 10.30 p.m. Nazmin Nisha had fought (argued) with him and said that he is having an affair. She had checked his phone and checked his messages*

and told him that if you want to listen to your mother and sisters you can leave me and go home.

- (vi) Nazmin had also told him that the complainant's father Mohammed had offered her to come back/get back to him and that he will give her a house because the house she was staying was under her mother's name. She had continued saying: "You are with me since 8 – 9 years. What have you done for me? At least he is giving me a house."*
- (vii) The witness testified that Nazmin had further stated that he doesn't listen to her and that he messages other girls. I told her that she can check my phone. She had stated that I am listening to my mother and sister – that I never took her to Suva.*
- (viii) The witness had told Nazmin that he is tired and that he was going to have his shower. Then he had performed his night prayer. By the time he went to bed it was around 2.00 a.m. He had told Nazmin that it is late. Let's sleep and talk in the morning.*
- (ix) The witness said that in the morning he had performed his morning prayer, had a light breakfast and got dressed to go to work. At this stage Nazmin is said to have started again. She had repeated what she said earlier. This was on 31 July 2017, which was a Monday.*
- (x) The witness said that he had gone to Suva on 29 July 2017, which was a Saturday. He had gone in his CRV vehicle. He had left midday on Saturday – around 12 noon. From Lautoka he had gone to Olosara in Sigatoka. His sister (Sofia Shabnam Ali), brother-in-law (Mohammed Hamid Iqbal) and their two daughters and his mother had joined him when he went to Suva. They had gone to Vatuwaqa in Suva to attend his dad's sister's third day ritual after the funeral.*
- (xi) He had returned to Lautoka on Sunday, 30 July 2017. On the way he had dropped off his mother and sister's family in Olosara.*
- (xii) On 31 July 2017, he had left for work at 6.40 a.m. in his CRV vehicle. Before leaving home, he had told Nazmin that if she wants to accept a relationship from another man then he will finish his relationship with her. Since he already had some clothes with him in the van – in the suitcase which he took to Suva, he took the rest of his belongings and he left. He explained that these belongings included his daily clothes – the jeans, t-shirt, uniform and his safety.*
- (xiii) The witness said that the house he was staying in was Nazmin's mother's house. The house was built during Nazmin's father's time. The house had two bedrooms. Nazmin and he occupied one bedroom; while the complainant and Azhar occupied the other. In the bedroom occupied by the complainant and Azhar, there was one single bed, which was used by Azhar and one double bunker bed, which was used by the complainant. [The sketch drawn by the complainant at the time she testified in Court was shown to the witness during his testimony].*

- (xiv) *The witness testified that he and Nazmin had constructed a portion of that house. The kitchen and the sitting room was built by him – it was constructed using tin and timber – it was just done like that, not on a proper plan. It was not a strong construction. During cyclone Winston, the walls they fell on the side and the roof was blown away. They used the same material and put it up together.*
- (xv) *The witness said that on 30 July 2017, the argument with Nazmin had started as soon as he entered the gate to the house. He had opened the door – she came outside. Same time the argument started just near the van. The argument continued until they were inside the house.*
- (xvi) *After work on 31 July 2017, he had gone to his sister’s house in Olosara, Sigatoka. He said that during the day he had looked for a house to rent but couldn’t find one. Therefore, he had gone to his sister’s house. He had stayed there for 2 weeks. Thereafter, he had found a house in Nasoso in Nadi.*
- (xvii) *After going to his sister’s house, he had his shower, had his dinner, prayed and went off to sleep around 9.00 p.m. In the morning his sister had informed him that Nazmin had come in the night and was knocking at the door. They hadn’t opened the door. Then Nazmin had said: “I’ll accuse your brother that he was touching SSK”. Nazmin had also stated: “If your brother doesn’t return by Tuesday or if he doesn’t come to Lautoka – then I will accuse him of this allegation and report.”*
- (xviii) *His sister had told him that she had seen them sitting there. They had made a few rounds around the house then they had left. Nazmin had opened the van and started the van. Then she switched off the van and took the key with her.*
- (xix) *The witness said that when he had parked the van in the compound, he didn’t take out the key. It was still in the van. He said there was nothing to get frightened of because it was the quarters of the markaz (mosque). He realized the key was missing when he checked in the morning.*
- (xx) *The witness further testified that around 8.00 in the morning (on 1 August 2017), his sister had called Nazmin and asked her why she had taken the key and to give it back. Nazmin had told his sister that she is bringing the key back.*
- (xxi) *The witness said that he had gone to the Lautoka Police Station on 1 August 2017, to report that Nazmin had made a false allegation against him that he was touching the complainant. This was around 9.30 – 10.00 a.m. There was one lady officer with short hair and one tall male officer present– they were both Indo Fijians.*
- (xxii) *When asked to explain further as to whether he had made a formal statement about the allegation, the witness said, it was only noted on the complaint book – his name and Nazmin Nisha’s name. The witness said: “I asked them to give me a report number. I was told no. We can’t give you the report number. If they will lodge a complaint then action will be taken. I told them it is a serious offence – why don’t you call them because this could be sorted.*

Then I was told, no we can't call them. The Police said if they report, we will call you."

- (xxiii) From the Police Station, the witness said he had gone to the Lautoka Viti Mini bus stand to catch the bus from Lautoka to Olosara. At that time his sister had called him and said that Nazmin had come and returned the van keys. This was between 10.30 – 11.00 a.m. From Lautoka the witness had gone back to Olosara. Since he got late he did not go to work that day.*
- (xxiv) When asked as to why his sister had not opened the door to Nazmin and the children the previous night, the witness said that his sister had told Nazmin: "Why you taking offer from another man. What is wrong with my brother".*
- (xxv) The witness continued that in 2017, the complainant was schooling at Lautoka Muslim Primary School. Azhar was going to Lautoka Muslim College. The complainant used to go to school by bus. She used to catch the bus from Jinnu Road junction. The school students from the same area would accompany her. Azhar used to sometimes walk down, sometimes used to go to school by bus.*
- (xxvi) The witness testified that when he was staying at Waiyavi Stage II in Lautoka, his friend Shiva Krishnan used to pick and drop him from work. He used to pick him up since 2015. On the days Shiva Krishnan didn't go to work, he used to go to work by Viti Mini. The CRV vehicle used to consume a lot of fuel and fuel was expensive. So he didn't take his vehicle to work.*
- (xxvii) The witness said he used to take his own vehicle to work only when there used to be a mechanical problem with the CRV – because they used to also do mechanical work at his work place. On those days he used to leave home for work around 6.40 a.m.*
- (xxviii) The witness said that he has invited his work colleague Shiva Krishnan home to have tea. This was usually when Shiva Krishnan used to drop him back home after work. Nazmin used to make tea for them.*
- (xxix) The witness said that the full name of the company he was working was Nadi Plumbing Group of Companies. The sister Companies were One Stop Paint Shop, One Stop Snack Shop and Western Rentals.*
- (xxx) The witness testified that he and Nazmin had been running a canteen together at Lautoka Muslim College. This was for a period of about three years.*
- (xxxi) The Honda CRV vehicle had been purchased from his work place. The vehicle was under Western Rentals. The income derived from the canteen business was used to make the vehicle rental payments, to buy stuff, to pay the bills and to do the shopping.*
- (xxxii) The witness confirmed that he never returned home after leaving on the 31 July 2017.*
- (xxxiii) He said that on 3 August 2017, Nazmin, the complainant and Azhar had come to his work place. Then Nazmin had asked him when he was coming home. After the children had left, Nazmin had told him that if he is not coming*

home, then she will put the same allegation-that she will go and report that he was touching her daughter.

- (xxxiv) The witness said that thereafter, Nazmin kept messaging him on his phone. She had done so from 3 August 2017 to 8 August 2017. She had been using a phone with a number beginning with 935. He was not sure of the rest of the numbers. However, he had not responded. Nazmin had also kept calling him numerous times during this period. However, he had not answered the calls.
- (xxxv) The witness said that in 2017, he was using mobile phone number 9032355. He said he is still using the same number. In 2017, he was using a white Alcatel smart phone. He had been using that phone since 2015.
- (xxxvi) The witness said that he had taken pictures of these messages that were received on his phone. His phone was in his wife's hand, while he took the pictures. Later on he had obtained printouts. The printouts of the messages said to be sent from mobile phone number +6799357074, during the period 3 August 2017 to 8 August 2017, were tendered to Court as Defence Exhibit DE1 [It was originally tendered subject to proof, as MFI 1].
- (xxxvii) The witness further testified that Nazmin had been sending messages to him using a phone with a number beginning with 21. This was in 2018. The witness said that he had taken pictures of these messages that were received on his phone as well. Again his phone was in his wife's hand, while he took the pictures. Later on he had obtained printouts. The printouts of the messages said to be sent from mobile phone number +6792142835, commencing 8 May 2018 to 23 August 2018, were tendered to Court subject to proof, as MFI 2. [This document was not formally tendered in evidence].
- (xxxviii) All the above pictures/photos were said to have been taken by the witness about two weeks after the last message had been received by him on his phone in 2018. The last message is dated 23 August 2018.
- (xxxix) The white coloured Alcatel one touch phone was tendered to Court as Defence Exhibit DE2. The witness said that he had purchased a new battery for this phone on Saturday last week (on 1 June 2024). The battery had cost \$35.00. The receipt for the Alcatel battery purchased by him was tendered to Court as Defence Exhibit DE3.
- (xl) The witness said that he and Nazmin have a family case, in Lautoka Magistrate's Court. This case had been filed before he was charged for this case-around August 2017. After he came back from remand the order was given by the Court. As per the order, since 1 December 2017, he is paying \$50.00 per month as maintenance for Nazmin Nisha. He is still paying this amount to Nazmin. He deposits the sum directly into Nazmin's account at Westpac bank (the witness gave the account number as well to which the money is being deposited).
- (xli) The witness categorically denied all the charges against him in the Information.

- (xlii) *When asked by Court as to why would the complainant go and make such false allegations against him, the witness responded by saying: "SSK (the complainant) is out of the picture. It is Nazmin Nisha-because she thinks I am having affairs with other girls and by doing this I will come back home."*
- (xliii) *The witness was cross-examined at length by the Learned State Counsel and the prosecution version of the events were suggested to him. The Learned State Counsel also questioned the witness as to why certain important issues that he testified to in his evidence was not put to the complainant and to Nazmin Nisha during their cross-examination.*
- (xliv) *The witness was asked about the reasons for the argument which he said had occurred between himself and Nazmin on Sunday evening, upon his return from Suva (and even the following morning). The witness said the reasons stated by Nazmin were – that he had not taken her to Suva with him; that he was having an affair; that she checked his phone for messages he has sent to other girls and the offer made by the complainant's father Mohammed to Nazmin to come back to him and that he will give her a house. The witness agreed that when Nazmin was giving evidence, the only reason suggested to her was the fact that he had not taken her to Suva with him and that the other reasons were not put to her. The witness agreed that he had not told his counsel about the other reasons.*
- (xlv) *The witness was referred to the caution interview statement made by him on 28 September 2017, specifically to Question and Answer 60 – where he has stated the only reason for the argument was due to the fact that he had taken his other family members to Suva, but not taken Nazmin with him. The accused's caution interview statement had been recorded by WDC 5341 Barbara Salele (As she then was).*
- (xlvi) *It was suggested to the witness that after he left Nazmin, up to date Nazmin remains single and is living in the same house with the complainant. This proves that there was no offer made by the complainant's father Mohammed to Nazmin to come back to him and that he will give her a house. The witness said that he saw her talking to Mohammed.*
- (xlvii) *It was suggested to the witness that he was making up this whole story about an argument with Nazmin when in fact there was absolutely no argument between Nazmin and himself.*

[32] Evidence of Mohammed Hamid Iqbal

- (i) *The witness testified that he is 40 years of age and currently living at Velovelo, Lautoka. He is a Mowlavi at Asthana Alia Saifiya in Velovelo. He has been residing in Velovelo for the past 2 years – since 2022.*
- (ii) *Prior to coming to Velovelo, he was residing at Olosara, Sigatoka – from 2007 to 2022. He was residing in the Olosara Masjid quarters.*
- (iii) *The accused, Imam Ali, is his wife's biological brother. His wife's name is Sofia Shabnam Ali. He had got married to his wife in 2006.*

- (iv) *The witness testified that on 29 July 2017 he went to Suva to attend a Dawath (his father-in-law's sister's third day ritual after the funeral). He had gone in the accused's van, together with his wife, two children and his mother-in-law. They had returned to Olosara by afternoon on Sunday, 30 July 2017.*
- (v) *He testified that on 31 July 2017, he was at his residence. The accused had come to his place directly from work. When he had inquired from the accused as to what had happened, the accused had said that there are some issues at home – that they had an argument. So he didn't go home and came to his place.*
- (vi) *After they went to sleep in the night, the accused's wife, daughter and son had come to his place and wanted them to open the door. This was roughly between 9.00 and 10.00 p.m. However, since the accused was sleeping he and his wife had not opened the door. They had not opened the door to avoid Nazmin coming into the house and starting a fight. So they had just kept on talking from inside without opening the door.*
- (vii) *The witness said that the accused had come to their place in his van. The van was parked near the porch. He doesn't know exactly who, however, someone was going inside and opening and closing the doors of the van. He could see this from inside the house.*
- (viii) *The witness said that Nazmin and the children were outside the house for a long time. Then they had left. Whilst leaving she had said: "If Imam doesn't returned home then see what I do."*
- (ix) *The witness testified that the next morning (Tuesday morning) they had found the key of the van missing. He, his wife and the accused had all been searching for the key but couldn't find the key.*
- (x) *Later in the day, around 10.00 – 11.00 in the morning the accused's wife Nazmin had come to their place again. She had come alone. She said she wanted to talk to the accused. However, the accused had already left for work.*
- (xi) *Both the witness and his wife had been talking to Nazmin for a while. She had requested them to talk to the accused and send him home. After that she had left the van key on the porch railing and left their house. This was around 12 noon or 1.00 p.m.*
- (xii) *The accused had stayed at their house for about 2 weeks and was travelling to work from their place.*
- (xiii) *The witness said that after moving to Velovelo in mid-2022, his older daughter was studying at Lautoka Muslim College. The younger daughter was studying at Lautoka Muslim Primary School.*

[33] Evidence of Sofia Shabnam Ali

- (i) *The witness testified that she is 39 years of age and currently living at Velovelo, Lautoka. She is working as a Cashier at 78692 Halal Supermarket in Lautoka. She has been residing in Velovelo for the past 2 years – since 2022.*

- (ii) *Prior to coming to Velovelo, she was residing at Olosara, Sigatoka for 14 years – from 2007 to 2022. She was residing at the Sigatoka Islamic Centre quarters.*
- (iii) *The accused Imam Ali is her biological brother. Her husband's name is Mohammed Hamid Iqbal.*
- (iv) *The witness testified to going to Suva together with the accused and her other family members on Saturday 29 July 2017. The accused had picked them up from their house and taken them to Suva. They had returned from Suva the next afternoon – on Sunday 30 July 2017.*
- (v) *The witness too testified to what transpired on Monday 31 July 2017. She said her brother came to their place from Lautoka in his vehicle. He had parked the van just besides the porch. He had said that there was an argument between husband and wife and so the wife had chased him. The accused prayed, had his shower, ate and went to sleep.*
- (vi) *Even the witness had gone off to sleep. Around 10.00 p.m. Nazmin Nisha had come to their place with her kids. Nazmin and the kids had been calling out to the accused. The witness said she had woken up and then gone and woken up her husband. They had said that Imam was asleep.*
- (vii) *The witness said: "She (Nazmin) kept on insisting to wake Imam. So my husband tried to tell her, you came here after an argument and you have chased him and we are staying at a respected place working under the committee and if he wakes up and a fight starts or anything happens it doesn't look good." They had drawn the curtain open and had been speaking to Nazmin from inside the house.*
- (xiv) *The witness testified that her husband had then told her to deal with the matter and gone back to sleep. While going back to sleep, he had heard Nazmin saying: "If you don't open the door and Imam doesn't come home then you see what I do."*
- (viii) *The witness said that Nazmin had told her: "If Imam doesn't come I will frame Imam with an allegation that he was touching my daughter – as girls have lots of rights as what they say in Court."*
- (ix) *Thereafter, the witness said she heard the van engine being started. She had seen Azhar was doing something in the van. Then she had drawn the curtain closed. She said she doesn't know what happened thereafter. There was no noise or no sound. So they must have left. She doesn't know how Nazmin and the children came to their house or how they left.*
- (x) *The witness testified that the next morning (Tuesday morning) they had found the key of the van missing. They had all been searching for the key but couldn't find the key. The accused had gone to the van to check for himself. He had found the radio missing.*
- (xi) *Thereafter, the accused had his breakfast and left for work. When he was leaving she had warned/told the accused to go to the Lautoka Police Station and lodge a complaint or just to inform them that there was an argument in*

the night so as to avoid any problem or allegation. There should be a report made to the Police to save himself.

- (xii) The witness said that during the day, she and her husband were sitting down and talking. They were shocked to see Nazmin Nisha come to their place. She came by foot (not in a vehicle). She had first asked for Imam. They had informed that Imam had left for work. Nazmin had told them to talk to Imam and ask him to return home. She had promised that she will not argue with him anymore.*
- (xiii) Nazmin had been talking with them for sometime. Then she took out the van key from her purse and left it on the porch railing.*
- (xiv) The witness said that Nazmin had wanted to come to the house to use the washroom. The witness had told her there is one ladies washroom outside the house, you can use that one. Then Nazmin had left. She doesn't know whether Nazmin use the washroom or not.*
- (xv) The witness further testified that the accused had remained at their place for about 2 weeks. He had been travelling to work from their place.*
- (xvi) The witness said that after moving to Velovelo in mid-2022, her two daughters are studying at Lautoka Muslim College. In 2022, the older daughter was in Form 5. The second daughter was in primary school. She started college this year.*

[34] Evidence of Shiva Krishnan

- (i) The witness testified that he is 38 years of age and currently residing at Paipai Road, Vitogo, Lautoka. He does automotive painting as an occupation (painter of cars).*
- (ii) The witness said that he knows Imam Ali as he used to work with him. The witness started working in 2006, while the accused started in 2015. This was at One Stop Paint Shop – Nadi Plumbing at Namaka. The witness had been working there until December 2022.*
- (iii) Currently the witness is working at Shreddar Motors, Lautoka – since 28 December 2022.*
- (iv) The witness testified that in 2017 he had been staying at the same residence and working Nadi Plumbing. In 2017, he had a vehicle with registration number E7194. It is his own vehicle. He said that he used to pick up the accused from his house and then 2 – 3 other people who all work at Nadi Plumbing. He used to first pick up the accused.*
- (v) The witness said he used to leave home around 6.30 or 6.40 in the morning due to traffic. He used to pick up the accused around 6.50 or 7.00 a.m. They used to reach Nadi Plumbing in Namaka around 7.40 or 7.45 a.m. The accused had been travelling with him to work from 2015 until mid-2017.*
- (vi) After work he used to drop off the accused at home. When they reached Lautoka, it was around 6.30 p.m due to the traffic. The accused was staying with his wife and children. Whenever, he drops the accused at home, the*

accused used to invite him to come and have tea. The witness said he accepts the invitation. It was his wife who used to make the tea for them. He doesn't know her name.

- (vii) *The witness said after mid-2017, the accused had his own vehicle by then and used to bring it to work. When there is a fuel problem (since fuel is expensive) he used to call the witness to pick him up to work. Sometimes if there is a problem with the accused's vehicle and he brings the vehicle for repairs, then also he used to pick and drop the accused at home.*

[35] Evidence of Shabnam Firoza Atik

- (i) *The witness testified that she is 47 years of age and currently living at Yalandi Street, Waiyavi, Lautoka. She has been staying there since birth. She is doing domestic duties.*
- (ii) *The witness said that Nazmin Nisha is her first cousin and also her neighbour (they stay two doors next to each other). Her mother and Nazmin's father are brother and sister. She knows the accused Imam Ali. Nazmin has five children but one has passed away.*
- (iii) *Shabnam Sofia is her biological sister. She is staying in New Zealand. Her sister visits (Fiji) once a year. Whenever she comes (to Fiji) she stays at the witnesses house.*
- (iv) *The witness said that in 2017, she used to go to their place – when her aunt (Nazmin's mother) was alive. Her aunt was always sick so she used to go to see the aunt. As to her relationship with Nazmin, the witness said that they used to talk to each other but they were not very close.*
- (v) *The witness testified that Nazmin's children-Azhar and the complainant- used to always come to her place and eat. She said that Nazmin used to not cook in the house. So the children used to com and eat at her place.*
- (vi) *She said that although she was invited for the complainant's wedding (Nikah) she did not attend.*
- (vii) *When asked as to how the relationship was between Nazmin and the complainant, the witness said: "She always gets angry with the daughter. Always hits her with a cooking spoon and telephone /charging wire. She comes and tells...When the mother was not at home then she used to come."*
- (viii) *The witness was asked whether she recalls any incident, involving the complainant, which took place in the year 2017, when her sister Shabnam Sofia was staying at her place. The witness said she cannot recall.*

[36] Evidence of Abdul Aziz

- (i) *The witness testified that he is 46 years of age and currently living at Jinnu Road, Waiyavi Stage II, Lautoka. He has been residing there for over 30 years. He is a Taxi Driver by occupation. He has been a Taxi Driver for 12 years.*

- (ii) *The witness said that in the year 2017, he was driving his mother's taxi. She is a taxi proprietor.*
- (iii) *He said he knows the accused, Imam Ali. The accused used to give him jobs every morning, when he was staying at Yalandi Street, Waiyavi, Lautoka. The accused used to hire his taxi every morning from Waiyavi to town.*
- (iv) *The witness testified that he knows Nazmin. He used to work with Nazmin at Gimlie (which was a garment factory). She was working as a Machinist. This was nearly 30 years ago-when the witness was 17.*
- (v) *The witness said that in the year 2017, he took Nazmin, her daughter and son (who passed away) from Waiyavi to Sigatoka on one particular day. He does not recall the month or date. They left Lautoka around 7.30-8.00 p.m. and reached Sigatoka around 9.30-10.30 p.m.*
- (vi) *They had gone somewhere (to a house) in Olosora in Sigatoka. Nazmin and her son had guided him to the place. Nazmin had been saying it was the accused's sister's house. They had been there for about 45 minutes to one hour. He said: "But they were fighting with the house owner-punching the doors and pulling the gate."*
- (vii) *The witness said he was inside his vehicle (the steering position). He was right inside the compound of the house. He had slowly got off and told them to come inside. Otherwise that they will get charged for this.*
- (viii) *The witness continued that they had been fighting for 10-15 minutes. Then they came back.*
- (ix) *When asked whether he saw any other vehicle in the house, the witness said: "No. Nothing was there."*
- (x) *Thereafter, the witness testified that he had driven the three of them (Nazmin, her daughter and son) back home to Lautoka. They had reached Lautoka around 11.30 in the night. He had dropped them back home. He had charged them \$100.00 for the trip (up and down). The trip was actually more than \$120.00. However, Nazmin had requested him to take \$100.00. He had agreed.*
- (xi) *The witness was asked as to whether he heard the conversation that took place at Olosora. He said: "Something about Mr. Imam he ran away-for him to come back home-otherwise I will blame you with something." While returning to Lautoka Nazmin had said that she really wants the accused to come back home.*

[37] Evidence of Woman Corporal 5341 Barbara Salele

- (i) *The witness testified that she is 39 years of age and currently based at the Lautoka Prosecutions Office (since the end of 2020). She had joined the Fiji Police Force in 2007, as a Special Constable. This is her 17th year in the Police service. She has been attached to the Lautoka Police Station since 2011-upto date.*

- (ii) *The witness said that in the year 2017, she was based at the CID in Lautoka. She had joined this Unit in the year 2016. She was specializing in the Sexual Crimes Unit. Prior to 2016, she was based in the Uniform Branch.*
- (iii) *The witness explained the procedure adopted upon receipt of a report of a sexual offence relating to a minor. When such a report is received, they usually go and see the victims in their house or call them to the Lautoka Police Station. At Lautoka Police Station they have their own office (separate office) to attend to sexual crimes case. She said statements are recorded, if the need be, the victim is taken for medical examination and then further inquiries/investigations are carried out. These include visiting the scene of the alleged crime.*
- (iv) *The witness testified that she is familiar with this case since she was the original Investigating Officer in the matter. She confirmed that she had recorded the complainant's mother's statement on 10 August 2017. The complainant's statement had been recorded by Acting Corporal 3859 Sheetal.*
- (v) *The alleged crime scene had been visited along with the complainant, her mother, the crime scene personnel and Acting Corporal Sheetal.*
- (vi) *When asked as to when she had gone to the complainant's place first, the witness said it was 1 or 2 days before the statement was recorded.*
- (vii) *The witness testified that a subpoena had been issued by the defence ordering her presence to testify in this matter. She had also been directed to produce in Court the Lautoka Police Station Diary for the period 30 July 2017 to 11 August 2017.*
- (viii) *She submitted that she has not brought the Station Diary to Court and explained why she was unable to do so-since there are procedures to be followed with regard to taking out official documents from the Police Station.*
- (ix) *The witness testified that she had recorded the accused's caution interview statement, on 28 September 2017. She was asked prior to commencing the recording of the caution interview statement whether the accused had told her about any report he made of this incident at the Lautoka Police Station. The witness said NO.*
- (x) *The witness was further asked whether during the recording of the caution interview statement the accused had told her that he had made a report regarding this matter at the Lautoka Police Station. The witness again answered NO.*
- (xi) *In cross-examination the witness was asked before, during or after recording of the caution interview statement, whether the accused had at any time told her that he made a report against the complainant's mum Nazmin Nisha that she wanted to make a false complaint against him. The witness categorically answered: "No my Lord. Even if it was, as part of my investigation I would have checked with the Report Book because that is part of the investigation My Lord."*

(xii) The witness continued that she did not check since the accused did not tell her at any time during the caution interview.

Analysis

[38] As stated before, the prosecution, in support of their case, called the complainant (SSK) and her mother Nazmin Nisha. The accused testified on his own behalf and called 6 other witnesses in support of his case – namely (1) Mohammed Hamid Iqbal (his brother-in-law); (2) Sofia Shabnam Ali (his sister); (3) Shiva Krishnan (a work colleague of his); (4) Shabnam Firoza (an aunt of the complainant); (5) Abdul Aziz (a Taxi Driver) and (6) Woman Corporal 5341 Barbara Salele (The Investigating Officer in this case)

[39] The burden of proving each ingredient of the three 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 three charges beyond reasonable doubt. I have made reference to the elements that the prosecution has to prove at paragraphs 12, 13 and 14 of this judgment respectively.

[40] Accordingly, the prosecution has to establish beyond reasonable doubt that the accused, between the 1 July 2017 and the 31 July 2017, at Waiyavi, in Lautoka, penetrated the vulva of the complainant, with one of his fingers, and at the time the complainant was a child under the age of 13 years (in respect of Count 1).

[41] Similarly, the prosecution has to establish beyond reasonable doubt that the accused, between the 1 July 2017 and the 31 July 2017, at Waiyavi, in Lautoka, penetrated the vulva of the complainant, with his tongue, and at the time the complainant was a child under the age of 13 years (in respect of Count 2).

[42] Furthermore, the prosecution has to establish beyond reasonable doubt that the accused, between the 1 July 2017 and the 31 July 2017, at Waiyavi, in Lautoka, penetrated the mouth of the complainant, with his penis, and at the time the complainant was a child under the age of 13 years (in respect of Count 3).

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

[44] Based on the said admitted facts it is admitted that the accused was in a de-facto relationship with the complainant's mother, Nazmin Nisha, at the time of the alleged incidents. Therefore, the identity of the accused is not in dispute, as he was well known to the complainant and her mother. It is also admitted at the time of the alleged offending the accused, the complainant's mother, the complainant's older brother (Azhar Ali) and the complainant were staying together at the complainant's grandmother's house in Waiyavi, Lautoka. It is further admitted that the complainant was born on 26 October 2006, and at the time of the alleged offending she was 10 years of age. Therefore, it is proved beyond reasonable doubt that the complainant was a child under the age of 13 years.

[45] Therefore, the primary issue of dispute in this case is the physical act, namely whether the accused penetrated the vulva of the complainant, with one of his fingers; whether the accused penetrated the vulva of the complainant, with his tongue; and whether the accused penetrated the mouth of the complainant, with his penis, respectively, in relation to the three charges.

[46] I have summarized the evidence of all witnesses led during the trial.

[47] The complainant has clearly testified as to how on one night in July 2017, the accused had come into the room where she was sleeping and perpetrated the sexual acts on her. Suddenly she felt somebody was touching her body – specifically her private part. When she woke up then she saw it was the accused. I wish to reproduce that portion of her evidence below:

"He put his hand inside my panty and he was standing and when I tried to yell, he then put his left hand on my mouth.... When he had put his hand inside my panty, he put his finger inside my private part. Then he took his finger out and pulled my panty with my pants down. Then he put my legs up and he came on the bed. Then with his tongue, he licked my private part. Then he put my legs down. He came up on me. Then he took out his private part and put it in my mouth. His hand was already on my mouth – he did 'this' and put his private part in my mouth (the witness demonstrated as to how the accused had put his penis into her mouth)".

[48] When asked to explain what she meant by 'private part', she said the bottom private part. Then she said it is the part that is used to urinate. She said she did not know what other

names that part was called (in English or in any other language). It is clear from this evidence that the complainant is referring to the area of her vulva.

[49] At paragraph 19 of this judgment, I have distinguished between the vulva and the vagina of a female. The vulva denotes all the external organs one can see outside a female's body. This is the external genitalia of a female. The vulva includes the external openings of the urethra. The urethra is the tube that lets urine leave the bladder. Therefore, it is manifest that by 'private part' the complainant is making reference to her vulva.

[50] When asked what she meant by the accused's private part, the complainant said it was the part with which he urinates with. She did not know any other name to describe this part. It is clear from this evidence that the complainant is referring to the male sexual organ or the accused's penis.

[51] The complainant's mother, Nazmin Nisha, was the recent complaint witness. She testified that on 6 August 2017, which was a Sunday, the complainant had mentioned to her that Abbu had touched her. The complainant refers to the accused as Abbu (or father). The accused was not at home at the time as he had left for Suva the previous day. The witness said she did not inquire further from the complainant at the time, since something of this sort had never happened before. So she did not think much about it.

[52] On Monday night (7 August 2017), the day on which the accused left the house, and after they (the complainant, Azhar Ali and herself) had gone to Sigatoka to try and meet the accused and returned home, the complainant had informed her the reason why the accused does not want to return home was because of the things he did to her. The complainant had said: *"I was sleeping in the night. Abbu was touching my private part. And he put his private part in my mouth. That's all what she told me"*. The complainant had looked frightened at that time. The witness said she felt really bad on hearing this.

[53] The above clearly qualifies as a recent complaint. It is trite law with regard to recent complaint evidence that the complainant need not specifically disclose all of the ingredients of the offence and describe every detail of the incident, but the complaint should contain sufficient information with regard to the alleged conduct of the accused. I am satisfied that the complainant made a proper complaint in this case. Accordingly, I consider that her credibility is strengthened in view of that recent complaint.

- [54] I must emphasize that I have borne in mind that the recent complaint is not evidence of facts complained of, nor is it corroboration. It goes to the consistency of the conduct of the complainant with her evidence given at the trial. It goes to support and enhance the credibility of the complainant.
- [55] The Defence attempted to impeach the credibility of the complainant during their cross examination by stating that she did not inform her mother or report the matter to the Police immediately as it happened.
- [56] I agree that the complainant told her mother about the incident for the first time only on Sunday 6 August 2017. This was about a week after the alleged incidents had happened. The matter was formally reported to the Police only on 10 August 2017 and statements recorded.
- [57] However, this Court is conscious of the fact that children do not always react the same way to sexual acts as adults would. It would be a mistake to think that children behave in the same way as adults, because their reaction to events is conditioned by their personal experience and immaturity and not by any moral or behavioural standard taught or learned.
- [58] The complainant clearly testified as to why she did not inform about the incidents to her mother or anyone else soon after the incident happened, although she attempted to do so the morning after the incidents (but was prevented/interrupted by the accused). She said she had not informed her mother of what the accused did to her earlier as the accused had told her the morning after the incident (inside his van). *".....if you tell your mum, I will kill you and your mum"*. The complainant said that she felt frightened by what the accused said to her. She had finally told her mother about the incident when she realized that the accused was not coming back home.
- [59] In these circumstances, I am satisfied with the complainant's explanation for the delay (of about one week) in reporting the matter to her mother and subsequently to the Police.
- [60] The defence attempted to impeach the credibility of prosecution witness Nazmin Nisha by highlighting 2 inconsistencies and a single omission 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 inconsistencies and single omission when summarizing her evidence.

[61] 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 law 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."

[62] I have duly considered the explanation offered by the witness Nazmin Nisha in respect of the said inconsistencies and omission 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 these are only minor discrepancies which do not shake the basic version of the prosecution case. As such, I am of the opinion that the reliability and credibility of her evidence is unaffected.

[63] The accused totally denies the allegation made against him by the complainant. The defence position is that the complainant was forced by her mother, Nazmin Nisha, to make a false report or fabricate this story against the accused, because the relationship between her mother and the accused had ended. Both the complainant and Nazmin Nisha categorically deny that they fabricated this story against the accused. They submit that they reported the matter to the Police because the incident actually happened.

[64] The accused version is that he went to Suva on Saturday the 29 July 2017 and returned the following day (on Sunday 30 July 2017). He said as soon as he returned home Nazmin had started an argument with him on several issues. As per his testimony the reasons for

the argument were the following: because he had not taken her to Suva with him; that she alleged that he was having an affair with other girls; that she checked his phone for messages he has sent to other girls and that an offer had been made by the complainant's father Mohammed to Nazmin to come back to him and that he will give her a house.

[65] According to him, the argument had continued even the following morning (on Monday 31 July 2017), which had prompted him to leave his de-facto partner and leave home for good. Nazmin Nisha denied that there was any such argument on Sunday night or Monday morning. The prosecution version is that the accused left on being confronted about the incident.

[66] However, it was admitted by the accused that when the Nazmin Nisha was giving evidence the only reason suggested to her as the reason for the argument was that he had not taken her to Suva with him. The accused also admitted that he had not told about the other reasons for the argument to his Counsel so that the Counsel could have put it to the witness during her cross examination.

[67] It is also important to note that up until now (over 7 years after the alleged incident), Nazmin remains single and is living in the same house together with the complainant. She has not got back to the complainant's father Mohammed.

[68] Furthermore, the accused, his sister, Sofia Shabnam Ali, and his brother-in-law, Mohammed Hamid Iqbal, all testified to the fact that when the complainant, her brother and Nazmin Nisha, had come to Sigatoka that Monday night, that Nazmin had stated that if the accused does not come home she will frame the accused for touching the complainant. If this was true, this is an extremely important piece of evidence.

[69] However, when the complainant or Nazmin were testifying in Court this position was not put to them. This piece of evidence only came out during the defence case.

[70] The accused testified that on the morning of Tuesday 1 August 2017, he had gone to the Lautoka Police Station to report that Nazmin had made a false allegation against him that he was touching the complainant. This was around 9.30 – 10.00 a.m. He said there was one lady officer with short hair and one tall male officer present– they were both Indo Fijians. When asked to explain further as to whether he had made a formal statement about the allegation, the accused said, it was only noted on the complaint book – his name

and Nazmin Nisha's name. The accused said that although he asked them to give him a report number he was told that the Police can't give him the report number.

[71] Woman Corporal 5341 Barbara Salele, who was the Investigating Officer in this case, was called as a witness for the defence. She testified that she had recorded the accused's caution interview statement, on 28 September 2017. She was asked prior to commencing the recording of the caution interview statement whether the accused had told her about any report he made of this incident at the Lautoka Police Station. The witness said he did not. The witness was further asked whether during the recording of the caution interview statement the accused had told her that he had made a report regarding this matter at the Lautoka Police Station. The witness again said that he had not.

[72] In cross-examination the witness was asked before, during or after recording of the caution interview statement, whether the accused had at any time told her that he made a report against the complainant's mum Nazmin Nisha that she wanted to make a false complaint against him. The witness categorically answered: "No my Lord. Even if it was, as part of my investigation I would have checked with the Report Book because that is part of the investigation My Lord."

[73] Another witness the defence called was Shiva Krishnan, who was a work colleague of the accused. He testified that he used to pick up the accused from his home daily and take him to work. However, defence witness Abdul Aziz, who was a Taxi Driver contradicted this position by stating that the accused used to give him jobs every morning, when he was staying at Yalandi Street, Waiyavi, Lautoka. The accused used to hire his taxi every morning from Waiyavi to town.

[74] This evidence was brought by the defence to counter the complainant's evidence where she stated that it was the accused who used to take her to school every morning in his van. In fact, the morning following the alleged incident the complainant said that the accused had threatened her whilst she was sitting in the van "*.....if you tell your mum, I will kill you and your mum*".

[75] Abdul Aziz further contradicted the defence version by stating that he did not see the accused's vehicle at the time he had gone to the accused's sister's house in Sigatoka. The witness said that he had taken his taxi right up to the compound of the house.

Furthermore, witness Abdul Aziz stated that Nazmin Nisha and her family were fighting with the house owner-punching the doors and pulling the gate. However, this clearly contradicts the defence position. The accused's sister, Sofia Shabnam Ali, and his brother-in-law, Mohammed Hamid Iqbal, did not refer to any such punching on the doors and pulling of the gate by Nazmin Nisha or her family members.

[76] Considering the totality of the evidence in this case, it is my opinion, that the defence version cannot be accepted as truthful and reliable and I reject the defence version.

[77] In this case the defence is alleging that the complainant and her mother had fabricated and made up this whole story against the accused. However, it must be borne in mind that the complainant in this case is not merely complaining of an isolated incident or a single act. Here the complainant has testified to a sequence of events or a series of acts which the accused perpetrated on her during the course of the night. Therefore, it is the opinion of this Court that it is highly unlikely for the complainant, who was merely 10 years old at the time, to make up or manufacture such a sequence of events against the accused, unless it really took place.

[78] Having analysed all the evidence in its totality, it is my considered opinion that the evidence of the complainant and her mother, can be accepted as truthful, credible and reliable. In addition, 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.

[79] 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 three charges of Rape with which the accused has been charged.

[80] In the circumstances, I find the accused guilty of the three charges of Rape with which he is charged.

[81] Accordingly, I convict the accused of the three charges of Rape.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT LAUTOKA

Dated this 28th Day of November 2024

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

Solicitors for the Accused: Ravneet Charan Lawyers, Barristers & Solicitors, Lautoka.