

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

**Crim. Case No: HAC 217 of 2023**

**STATE**

**v**

**WAISAKE TULAILAI**

**Counsel:** Mr. Z. Zunaid for the State  
Ms. A. Dean for the Accused

**Date of Judgment:** 19 March 2025

---

**JUDGMENT**

---

**Caveat** - The victim shall herein be referred as '**ZIR**' pursuant to the name suppression Order.

1. **Waisake Tulailai**, the accused, is indicted with two counts of ***Rape***, laid out as follows in the Information by the Acting Director of Public Prosecutions dated 18 July 2023 and filed on 19 July 2023:

## **COUNT ONE**

### *Statement of Offence*

**RAPE:** Contrary to section 207(1) and (2)(a) and (3) of the Crimes Act 2009.

### *Particulars of Offence*

**WAISAKE TULAILAI**, on an unknown date between the 11<sup>th</sup> day of April 2022 and the 16<sup>th</sup> day of December 2022 at Kuku Village, Tailevu, in the Central Division, had carnal knowledge of **ZIR** a child under the age of 13 years, by inserting his penis into her vagina.

## **COUNT TWO**

### *Statement of Offence*

**RAPE:** Contrary to section 207(1) and (2)(a) and (3) of the Crimes Act 2009.

### *Particulars of Offence*

**WAISAKE TULAILAI**, on the 29<sup>th</sup> of May 2023 at Kuku Village, Tailevu, in the Central Division, had carnal knowledge of **ZIR** a child under the age of 13 years, by inserting his penis into her vagina.

2. Waisake Tulailai pleaded *not guilty* and tried for the aforesaid two counts of *Rape* (18 March 2024 – 26 March 2024; Closing submission – 4 April 2024), and this is the Court’s judgment.
3. Pursuant to sections 57 and 58 of the Crimes Act 2009 including Woolmington v DPP [1935] AC 462 at 481 (HL), the prosecution bears the burden to prove *beyond reasonable doubt* all elements of the offence of *Rape* in Counts 1 and 2 in the indictment.

### **Physical and fault elements of Rape**

4. In this instant, as per the two counts in the indictment, *Rape* is contrary to section 207(1) - (2)(a) & (3) of the Crimes Act 2009 which state:

#### ***Rape***

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

(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; ...*

(3) *For this section, a child under the age of 13 years is incapable of giving consent.*

206.- *In this Part –*

(3) *The term “penetrate” does not include penetrate for a medical, hygienic or law enforcement purpose only.*

(4) *If “carnal knowledge” is used in defining an offence, the offence, so far as regard that element of it, is complete on penetration to any extent.*

5. The physical and fault elements for the offence of *Rape* in this instant are:

- i) A person i.e. the accused
- ii) Penetrated the complainant's vagina with his penis
- iii) Intentionally

### **Admitted facts between prosecution and defence**

6. The ***Amended Admitted facts*** between the prosecution and defence filed on 7 September 2023 pursuant to section 135 of the Criminal Procedure Act 2009 are:

- 1) Waisake Tulailai (hereinafter referred to as the Accused) was born on the 26<sup>th</sup> of October 1987.
- 2) ZIR, (hereinafter referred to as the complainant) was born on the 10<sup>th</sup> of January 2012, and a copy of her Birth Certificate is tendered by consent as a Prosecution Exhibit – [ **PE1** ].

- 3) The Accused is the complainant's brother-in-law as he is married to her older sister namely Tulia Lewatu.
  - 4) The Accused and his wife have been married for 13 years, and together they have four children.
  - 5) Whilst living with the Accused and his family, the complainant attended Krishna Vedic School.
  - 6) In 2022, the complainant was in class 5 and in 2023, she was in class 6.
  - 7) On one occasion, Tulia Lewatu left for the Western Division on a Friday and returned on a Sunday.
  - 8) In their home at Kuku village, they have one room designated as the prayer room.
  - 9) That the 29<sup>th</sup> day of May 2023 was a Monday and was a public holiday in honor of Ratu Sir Lala Sukuna.
  - 10) The complainant was medically examined on the 14<sup>th</sup> of June 2023 by Dr. Kesaia Tuidravu, and a medical report was subsequently prepared by her.
  - 11) The Accused was arrested and taken to the Nausori police Station on the 27<sup>th</sup> of June 2023, and was interviewed under caution which was video recorded.
7. At trial, prosecution called 4 witnesses: PW1: ZIR (complainant); PW2: Miriama Moceiwai; PW3: Dr. Kesaia Tuidravu; and PW4: Kinisimere Rawaqa, and tendered the following prosecution exhibits:

**PE1** - copy of complainant ZIR's Birth certificate registration no. 1564865;

**PE2** – PW1's (i.e. complainant ZIR) drawing of what she meant of the I-Taukei term '*polo*', and what according to her a '*polo*' looks like; and

**PE3** – PW1's (i.e. complainant ZIR) drawing on a blank white paper sheet of what she understands to be a '*pussy*'.

Defence, on the other hand, called 1 witness, that is, the accused DW1: Waisake Tulailai who gave sworn testimony.

#### **Prosecution case via PW1, PW2, PW3 and PW4**

**PW1: ZIR (complainant)**

8. **PW1 ZIR** the complainant testified in **examination-in-chief** that she is 12 years old and stays at the Dilkusha Home, and attends Dilkusha Girls School, and her favourite subject in school is Basic. PW1 stated that she knows the difference between a truth and a lie. PW1 stated that it was a lie when the prosecutor showed her a jacket saying that it was red in colour, when in fact it wasn't red in colour. PW1 stated that it was true when the male prosecutor told her that he was a boy. PW1 stated that the jacket shown to her earlier by the prosecutor was black in colour. At this particular juncture, the Court then acknowledged and ruled that PW1 was capable of telling the difference between a lie and truth. PW1 stated that she has 3 older brothers namely, Filimoni Bogileka, Akariva Tuidrola and Keasi Nataraku. PW1 stated that she does not know the ages of her 3 brothers. PW1 stated that she has 2 sisters namely, Tulia Latu and Miriama Moceiwai (12 years). PW1 stated that her sister Tulia Latu is older than her, and she is married to Waisake Tulailai. PW1 stated that she recalls the period **between 11 April 2022 and 16 December 2022** when she was in class 5. PW1 stated that during that period, she was in class 5 at Krishna Vedic School located at Naduru in Nausori, and stayed at Kuku village with her sister Miriama Moceiwai and 4 other siblings, brother-in-law Waisake Tulailai and elder sister Tulia Latu. PW1 stated that the 4 siblings she mentioned are her brother-in-law Waisake Tulailai's children namely, Ropate (12 years), Mereoni, Ana and Male, and Ropate is the eldest and same age as her. PW1 stated that during that period when she was in class 5, her parents were in Lautoka. PW1 stated that the house that she stayed in Kuku village belongs to her brother-in-law Waisake Tulailai, which house has 3 bedrooms, and one of the rooms is used for prayer purpose. PW1 stated that one bedroom is where they only put the clothes, and the other one used for sleeping. PW1 stated that she use to sleep with the 4 siblings and her sister Miriama Moceiwai. PW1 stated that the rooms had locks on it. PW1 stated that her brother-in-law Waisake Tulailai slept in the prayer room, and she has been inside that prayer room before, which also has windows. PW1 stated that the home has a sitting room which is 3 meters away from the prayer room, and about 5 to 6 meters from the room she sleeps in, and 2 meters away from the room where they put the clothes. PW1 stated that a television is kept in the sitting room. PW1 stated that during the period 11 April 2022 and 16 December 2022 when she was in

class 5, she use to return home from school, put on a skirt and t-shirt, and sat in the sitting room, and then Waisake called her to go to the room, and at that time her sister Tulia had gone to Lautoka. PW1 stated that at that time she watched movies together with her siblings Ropate, Mereoni, Ana and Male including her sister Miriama Moceiwai. PW1 stated that Waisake's 4 children and her sister Miriama were watching television in the sitting room. PW1 stated that they were watching cartoon that usually comes on week days at daytime. PW1 stated that she returned from school and were watching cartoon with the others at 4 o'clock. PW1 stated that Tulia had gone to Lautoka to attend her brother's thanksgiving feast. PW1 stated that while watching TV she looked back and saw Waisake Tulailai calling her to go to the room, and told her to go to the room in the I-Taukei language. PW1 stated that when Waisake told her to go to the room, she stood up and then went to the prayer room, and the door of that prayer room was ajar. PW1 stated that she was inside the prayer room with her brother-in-law Waisake Tulailai. PW1 stated that she was able to see Waisake Tulailai's face while inside the prayer room, and light was coming through the window. PW1 stated that she wore a skirt and t-shirt including a panty and bra when inside the prayer room, while her brother-in-law Waisake Tulailai wore a long trousers and t-shirt. PW1 stated that in that prayer room Waisake Tulailai removed her skirt, bra, t-shirt and panty and lay her down on the *davodavo* or bed. PW1 stated that Waisake Tulailai then removed his trousers by unbuckling and unzipping it, and then put out his *polo* or balls. PW1 stated that Waisake Tulailai did not take off his t-shirt. PW1 stated that after Waisake Tulailai had put out his *polo*, he then lifted PW1's legs and put his *polo* in and out of her *pussy*. PW1 stated that boys have *polo* and they use it to pee or urinate from. Leave was then granted by the Court for the prosecution to demonstrate via a doll. PW1 pointed to the genitalia area of the doll to indicate where the *polo* is located on the doll pretending it is a boy. PW1 stated that she can draw on a paper of what a *polo* looks like. Leave was then granted by the Court to allow PW1 to draw on a blank paper what she means by the term *polo*. PW1 then drew on a blank white paper of what she meant by the term *polo*, and how a *polo* looks like to her understanding, which particular drawing was then tendered by the prosecution and marked as prosecution exhibit 2 [ **PE2** ]. PW1 stated that Waisake Tulailai had put his *polo* in and out of her *pussy*, and that girls have *pussy* to pee or urinate from. Leave was then granted by the Court for PW1 to use the doll to demonstrate where the *pussy* is located. PW1 then pointed to the genitalia area of the doll to indicate where the *pussy* is located. PW1 stated that she is able to

draw to the Court of what a *pussy* looks like. Leave was then granted by the Court for PW1 to draw on a blank white paper sheet of what she understands of a *pussy*. PW1 then drew on a blank white paper sheet of what she understood to be a *pussy*, and tendered by prosecution as prosecution exhibit 3 [ **PE3** ]. PW1 stated that Waisake Tulailai laid her on the bed, and she indicated that she lied down facing up and both of her legs lifted up. PW1 then demonstrated using the doll as to how Waisake Tulailai lifted up both her legs apart. PW1 then showed the Court by using her right second finger or pointer finger as to how Waisake Tulailai's *polo* was going in and out of her *pussy*. PW1 stated that she felt bad and pain in her abdomen area when Waisake put his *polo* in and out of her *pussy*. PW1 stated that after Waisake Tulailai had put his *polo* in and out of her *pussy*, he also sucked her breast, and put his *polo* inside her mouth, and told her to 'keep this as our promise'. PW1 stated that she did not tell Tulia of what Waisake did to her because they always fight. PW1 stated that Waisake had put his *polo* in and out of her *pussy* for just a short time, and that she does not know how to tell the time but knows how to count. PW1 stated that she felt bad and pain when Waisake had put his *polo* in and out of her *pussy*, but did not shout because he told her to bite his clothes and for her not to shout. PW1 stated that she bit a piece of cloth given to her by Waisake.

PW1 stated that she remembers Ratu Sukuna Day on **29 May 2023** when she was in class 6. PW1 stated that on Ratu Sukuna Day in 2023, her sister Tulia had gone for a feast preparation to where the soldiers were, and she was at home. PW1 stated that on Ratu Sukuna Day, she wore a skirt, t-shirt, panty and a bra, and they were watching movie in the sitting room in the evening, then Waisake Tulailai kicked her leg indicating to her to go to the room. PW1 stated that she was watching movie in the sitting room with her sister Miriama Moceiwai and the 4 siblings. PW1 stated that when Waisake Tulailai kicked her leg for her to go to the room, she then stood up and went to the prayer room. PW1 stated that Waisake Tulailai then closed her inside that room, took off her clothes including her bra and panty, lay her down on the bed, he then took out his *polo* and put it inside her *pussy* and pulled it out again. PW1 stated that before Waisake put his *polo* inside her *pussy*, he brought the coconut oil from the prayer room. PW1 stated that on that day Waisake wore a wrap-around sulu and a t-shirt. PW1 stated that when Waisake brought the coconut oil, he then oiled her *pussy*. PW1 then demonstrated via the doll of her position when Waisake oiled her *pussy* with coconut oil by positioning the doll facing upward

and both legs raised. PW1 stated that after oiling her *pussy*, Waisake then sucked her breast and put his *polo* inside her mouth. PW1 stated that Waisake had put his *polo* inside her *pussy* for a minute and she felt pain in her abdomen area. PW1 stated that Waisake had opened his wrap-around sulu and put out his *polo*, and then put his *polo* into her *pussy*. PW1 stated that when Waisake was putting his *polo* into her *pussy*, the 4 children and her sister Miriama were watching movie in the sitting room. PW1 stated that she did not scream when she felt pain when Waisake was putting his *polo* into her *pussy* because he told her to bite a piece of cloth. PW1 stated that she did not tell her sister Tulia of this second incident on Ratu Sukuna Day because they always fight.

PW1 stated that after Ratu Sukuna Day, she cried and told her friends at Krishna Vedic School of what had happened to her. PW1 stated that she told her friend in school that she was raped by someone named Waisake Tulailai. PW1 stated that her friends then informed Madam Kinisimere Rawaqa who then told the Head Teacher. PW1 stated that she told Madam Kinisimere Rawaqa that Waisake had raped her. PW1 stated that the only thing she knows is that Waisake Tulailai raped her. PW1 stated that if she sees Waisake Tulailai again, she is able to recognize him since she lived with him when she was in class 5 and 6. Leave was then granted by the Court for Dock ID. PW1 then engaged in Dock ID and positively identified Waisake Tulailai in Court sitting in the accused box.

9. In **cross-examination** by Ms. Dean, PW1 testified that in the period between 11 April 2022 to 16 December 2022 she was in class 5 at Krishna Vedic School and staying in Kuku village with her sister Miriama, 4 siblings and sister Tulia. PW1 stated that the house she stayed in is a 3 bedroom house. PW1 stated that out of the 3 bedrooms, one of the rooms is a prayer room situated next to the living room and 3 meters apart. PW1 stated that Waisake had indicated to her to go to the prayer room while she was watching cartoon on TV with her sister Miriama and 4 siblings. PW1 agreed that anyone entering the prayer room can be seen by anyone sitting in the living or sitting room. PW1 stated that before she entered the prayer room, she told Miriama Moceiwai that she was going into the prayer room, but did not tell her why she was going into the prayer room. PW1 stated that there is a bed in the prayer room which Waisake had lay her on, and there is also a table in that prayer room. PW1 stated that there is a mat spread on the



floor inside the prayer room. PW1 agreed that the only time anyone is allowed into the prayer room is during devotion time. PW1 stated that when she entered the prayer room, it was not devotion time, and no one asked her why she had entered the prayer room when it was not devotion time. PW1 did not agree with defence counsel's suggestion that no one asked her because she did not enter the prayer room. PW1 stated that she washes her uniform when she reaches home after school including dish washing, while her sister Miriama cleans the house and the 4 siblings pick up rubbish outside. PW1 stated that she does not know where Waisake works, and while she stayed with Tulia at that time, Waisake was working then. PW1 stated that when she reaches home after school every day, Tulia is at home but not Waisake who would come home around 5. PW1 stated that she likes cleaning the house and washing her uniform only a bit. PW1 stated that she gets scolded if she does not clean the house and wash her uniform. PW1 agreed that Tulia and Waisake are strict with her. PW1 stated that she gets scared when scolded. PW1 stated that she did not like staying with Tulia and Waisake. Defence counsel put to PW1 that she only said that Waisake had put his *polo* into her *pussy* because she did not like staying with them, to which PW1 stated that they also use to hit her. PW1 stated that she stayed with Tulia and Waisake because her mum put her there. PW1 stated that her mum lives in Lautoka and separated from her father. PW1 stated that prior to living with Tulia and Waisake, she stayed with her mum and not other relatives. PW1 said no when defence counsel suggested to her that she use to stay with her uncle and had run away from her uncle's house causing her mother to place her with Tulia and Waisake to be disciplined. PW1 stated that Waisake had removed her clothes when defence counsel suggested to her that she had lied to the Court that Waisake had taken off her clothes. PW1 stated that Waisake had put his *polo* inside her *pussy* in response to defence counsel's suggestion that Waisake did not do so. When defence counsel suggested that PW1 had said about all these against Waisake because she did not want to stay with them, to which PW1 stated that they including Waisake also use to beat her up. PW1 stated that she did not like Waisake Tulailai, and that is why she told the teacher that he had removed her clothes and inserted his *polo* into her *pussy*. PW1 stated that she did not lie to her teacher about Waisake. PW1 stated that she told her teacher that Waisake had raped her. PW1 confirmed that she drew a diagram of the *polo*, and she knew that what she drew is the *polo* because only a male or boy has it. PW1 stated that her favourite subject in school is Basic Science, and she learned about the male and female body parts from Basic Science. PW1 stated

that her Basic Science textbook have diagrams of the male and female body parts, and she has seen it. PW1 stated that she could still be able to draw the male and female body parts even if she hadn't seen the diagrams of the male and female body parts in her Basic Science textbook. PW1 stated that Waisake worked while she stayed in the house. PW1 said no when defence counsel suggested to her that Waisake use to return home after work at 8pm every day. PW1 said no when defence counsel suggested that she has been lying to the Court. PW1 stated that Ratu Sukuna Day was on 29 May 2023, and her sister Tulia had gone to Lautoka to prepare a feast at the soldiers place. PW1 stated that on that Ratu Sukuna Day, Waisake had poured coconut oil on her *pussy* which happened in the prayer room. PW1 stated no when defence counsel suggested to her that her sister Tulia was at home on that Ratu Sukuna Day, and spent that day with Tulia, Waisake, the 4 siblings and Miriama at their home. PW1 stated that Waisake took her inside the prayer room on that Ratu Sukuna Day, and he put coconut oil on her *pussy*. PW1 stated that they also use to beat her up, in response to defence counsel's suggestion that she had lied about Waisake removing her clothes and putting his *polo* into her *pussy* because she did not like Waisake and did not like staying with them. PW1 stated that she did not get along with Waisake when staying there.

10. In **re-examination** by the prosecutor, PW1 stated that she went into the prayer room because Waisake called her. PW1 stated that Tulia was not at home when Waisake put his *polo* into her *pussy*. PW1 stated that Waisake was at home when he put his *polo* into her *pussy*. PW1 stated that Waisake put his *polo* in her *pussy*. PW1 stated that her teacher asked her more questions after she told the teacher that Waisake had raped her. PW1 stated that Waisake took off her clothes and put his *polo* in her *pussy*.

**PW2: Miriama Moceiwai**

11. **PW2 Miriama Moceiwai** testified in **examination-in-chief** that she is 12 years old, lives at the Dilkusha home, and in class 7X at Dilkusha Girls School. PW2 wants to be a soldier when she grows up. PW2 stated that the prosecutor lied when telling her that the doll is white, when instead the colour of the doll is black. PW2 stated that the prosecutor also lied when telling her that the jacket that he currently wore is red, when it is of a different colour. PW2 stated that she

is in Court to tell the truth. The Court then found that PW2, as a child, is competent to comprehend what constitutes a truth vis-à-vis a lie. PW2 stated that she has older brothers namely, Vilimoni, Tuidrola and Keasi. PW2 stated that she has 2 sisters namely, Tulia and ZIR who is 12 years old and her twin sister. PW2 stated that Tulia is older than her and married to Waisake with 4 children namely, Ropate, Mereoni, Ana and Male, and Ropate is the eldest and turning 12 this year. PW2 stated that when she was in class 5 and 6, she stayed in Kuku at the brother-in-law Waisake's house with Tulia, ZIR, Ropate, Ana, Male and Waisake her brother-in-law. PW2 stated that her mum and dad were in Lautoka. PW2 stated that Tulia had gone to Lautoka, and those who remained at their home in Kuku were Waisake, ZIR, Mereoni, Ropate, Ana, Male and herself. PW2 stated that between the months of April and November 2022 when Tulia went to Lautoka, her brother-in-law Waisake use to call ZIR to massage his legs in the prayer room, and ZIR would go to the prayer room, and only Waisake and ZIR would be inside the prayer room. PW2 said that she could not see what was happening in the prayer room from where she was in the sitting room. PW2 stated that ZIR did not tell her anything. Leave was then granted for PW2 to engage in Dock ID, upon which PW2 positively identified her brother-in-law Waisake in Court sitting in the accused box.

12. When **cross-examined** by Ms. Dean, PW2 confirmed that she is 12 years old and has a sister by the name of ZIR. PW2 confirmed that in 2022 and 2023, she stayed in Kuku village with her sister and brother-in-law. PW2 stated that her sister Tulia was in Lautoka when her sister ZIR went to massage Waisake's legs in the prayer room. PW2 stated that she has never been inside the prayer room. PW2 stated that the prayer room is used for prayer, and only Waisake and her sister Tulia or Lewatu are allowed to go inside the prayer room. PW2 stated that she has seen the inside of the prayer room, and inside that prayer room are bible verses, but no furniture and no bed. PW2 stated that her relationship with Waisake was good when she stayed with them. PW2 stated that Waisake sometimes use to scold her and ZIR. PW2 stated that she does not share things with her sister ZIR, but if something happens to her, she would go and tell ZIR.
13. In **re-examination** by the prosecutor, PW2 stated that sometimes she goes into the prayer room, and see everything inside the prayer room. PW2 stated that apart from the bible verses, there is the blanket and pillow on the side.

**PW3: Dr. Kesaia Tuidravu**

14. **PW3 Dr. Kesaia Tuidravu** in **examination-in-chief** testified that she works at the Medical Services Pacific, a NGO based at 355 Waimanu road, Suva. PW3 stated that she is a medical officer, a clinician at Medical Services Pacific, and they provide sexual and reproductive health issues. PW3 stated that they have a medical officer that looks after the post-rape cases ensuring that they provide holistic service to client survivors, they also have legal services where they can link the clients should they need such service, they also have counsellors that cover psychological and emotional support that clients need. PW3 stated that she respectively attained her medical degree i.e. MBBS from Fiji National University, and Postgraduate Diploma in Sexual and Reproductive Health in 2017 and 2022. PW3 stated that she has worked for Medical Services Pacific for 10 months, and prior to that she was employed by the Ministry of Health for about 4 to 5 years. PW3 stated that she specializes in sexual and reproductive health. PW3 stated that on 14 June 2023, she was based at Medical Services Pacific at 355 Waimanu road, Suva, and prepared a medical report for the police. PW3 stated that on 14 June 2023, she medically examined a child namely ZIR, and signed on the medical report. Leave was then granted by the Court for PW3 to be shown the medical report. Once the medical report was shown to PW3, she then confirmed that it is the same medical report that she prepared for ZIR. PW3 stated that she honestly forgot to write her initials on the first page of the medical report. PW3 confirmed her initials on pages 2 and 3 of the medical report. PW3 stated that her signatures are on page 4 in sections D(16) and E(19). PW3 stated that she forgot to write her initials on page 5 of the medical report. PW3 stated that the handwriting on the medical report is hers. PW3 stated that she medically examined the patient from 2.10pm to 3.15pm as reflected in D(16) for about an hour and 5 minutes. PW3 stated that ZIR was brought in by a social welfare officer and a sexual offence unit officer from the Nausori Police Station. PW3 stated that in section D(11), she vividly remember that ZIR walked in very jovial and had a smile on her face, a slim built I-Taukei female with a mini-cut black hair. PW3 stated that she ensured that she was able to establish a rapport with her client, and upon securing her consent, they then started talking about the events surrounding the client's complaint. PW3 stated that as she explored further, the client got really emotional about the events and began to shed a few tears. PW3

stated that in section D(12), she found that the client's hymen was not intact, no signs of recent injury were noted, however suggest that vaginal penetration had taken place. PW3 stated that she may have forgotten to add on her findings in D(12) that there were multiple tears around the vaginal opening with hymenal remanence or residue. PW3 stated that the hymen is a thin mucosal membrane or tissue that partially covers the opening of the vagina, and is usually perforated at its center. PW3 stated that usually after child birth, the hymenal tissues only consists of tags which are essentially the remanence or residue. PW3 stated that there are several types of hymen, and the most common type is the crescentic or annular hymen, the other types are the septate hymen, cribriform hymen, and perforated hymen. PW3 stated that while it is rare, there are also females who are born without a hymen, a condition called congenital absence of the hymen. PW3 found that the hymen was not intact with multiple tears around the vaginal opening. PW3 opined that most likely there was vaginal penetration so the physical findings were consistent with the victim's account of the rape that she experienced. PW3 stated that in D(12) the term 'recent injury' mean that for clinicians, ideally, they would like that clients come in within a certain period of time and there are reasons to this. First of all, in terms of medical management, they need to provide clients certain medications such as HIV prophylaxis, which is only effective within 72 hours of time of exposure to the assault. Another example is the emergency contraceptive pills or ECP, which is most effective within 72 hours and can go as far as 5 days, but anything beyond 5 days period becomes ineffective and there is no justification to issue the ECP to the client. Similarly for HIV, anything beyond 72 hours is rendered ineffective. PW3 stated that within 72 hours they can ascertain whether there is any injury. PW3 stated that 'blunt force trauma' is essentially an injury to the body that is caused by a forceful impact or a fall or physical attack with a dull object. PW3 stated that in light of the findings, she found the hymen not intact with multiple tears indicating that most likely there was vaginal penetration, and so the physical findings were consistent with the victim's account that this was the rape that she had explained happening on 3 different occasions. PW3 stated that in D(13) she noted 'extensive multiple ringworm lesions from the below umbilicus extending to the buttock area, *mons pubis* and medial thighs'. PW3 stated in D(14) her professional opinion is that the physical findings that is non-intact hymen with the multiple tears seen were consistent with the victim's account of events. PW3 stated that in D(15), ZIR did not require hospitalization, and she prescribed medications from the clinic for sexually transmitted infection prophylaxis. PW3

stated that there was no need to give HIV prophylaxis because it was well over 72 hours since the assault. PW3 stated that she also prescribed Griseofulvin and miconazole ointment for the fungal infection. PW3 stated that she also collected the client's blood for STI testing. PW3 stated that in D(16) she concluded that ZIR had a non-intact hymen with multiple tears seen around the vaginal opening, which were consistent with the victim's account of events. PW3 stated that it did not occur to her to draw on the diagram on page 5 of the medical report. PW3 opined that a penis can cause those findings in the medical report. The prosecution then tendered via PW3 the medical report prepared by PW3 dated 14/06/23 and marked as prosecution exhibit 4 [ **PE4** ].

15. When **cross-examined** by Ms. Dean, PW3 confirmed that she has been a medical officer for 6 years, and has conducted multiple police medical form examinations for victims. PW3 stated that the medical report does not contain all the findings that she had seen on the victim, given that she had observed multiple tears on the vaginal opening, which she did not state in the medical report. PW3 stated that her medical report is a true reflection of her medical findings, but did not state a particular finding of hers. PW3 stated that in D(13) there were extensive ringworm lesions on the victim which extended all the way to the buttock area, *mons pubis* and medial thighs. PW3 stated that she noticed 'multiple tears on the opening of the vagina', and it is unlikely that it could be caused by scratching the ringworm infection. PW3 stated that the anatomy of where the vagina lies compared to where the ringworm lesions are, although in close proximity, however the fungal issue remain on the surface of the skin and not within the vaginal walls or the vulva. PW3 stated that the injuries on the victim could have been caused by a penis, and there could be other causes as to why the hymen was not intact.

16. PW3 was not **re-examined** by the prosecutor.

**PW4: Kinisimere Rawaga**

17. **PW4 Kinisimere Rawaga** in **examination-in-chief** testified that she is a teacher at Krishna Vedic Primary School in Kuku, and has been teaching there for the past 3 years going to her 4<sup>th</sup> year. PW4 stated that on 13 June 2023 at around 10am, she was inside her classroom taking a

lesson and a Ms. Kumar came to see her and asked her if she can go and talk to ZIR of year 6. PW4 stated that ZIR is one of their student who lives in Kuku, and under their care. PW4 stated that she does not know ZIR's full name. PW4 stated that Ms. Kumar had told her to talk to ZIR because ZIR had told Ms. Kumar that morning that the brother-in-law was doing bad touches on her. PW4 stated that she then went to ZIR's classroom and asked her teacher if she can talk to ZIR. PW4 stated that ZIR was then sent outside, and she then asked ZIR to follow her to the sports room. PW4 stated that ZIR was sad and wiping her tears, and made her sit down next to her and informed her of what Ms. Kumar told her in the morning. PW4 stated that she spoke to ZIR in the I-Taukei language in the sports room so that she is comfortable sharing her story. PW4 stated that in the sports room she asked ZIR about the incident that she told Ms. Kumar. PW4 stated that her first question to ZIR in I-Taukei was '*ZIR sa bau dua na gauna drau veiyacovi kei iko o Tamai Ropate*' [ English translation – 'ZIR have you at any time have had sexual intercourse with Ropate's father' ]. PW4 stated that ZIR had informed Ms. Kumar that her brother-in-law was doing bad touches on her, and the brother-in-law's first born is Ropate who is in the same class as ZIR and Miriama who is ZIR's twin sister. PW4 stated that when she asked ZIR as to whether she had had sexual intercourse with Ropate's father, ZIR replied and said 'Yes'; PW4 then informed her, '*ZIR iko kila na ka iko tukuna tiko?*' [ English translation – 'ZIR do you know what you are saying?' ], and she said 'Yes'. PW4 then asked ZIR, '*Iko kila nai balebale ni veiyacovi?*' [ English translation – 'ZIR do you know the meaning of sexual intercourse?' ], and she replied 'Yes'. PW4 then asked ZIR 'What is sex?', and she replied in I-Taukei, '*Saka, ya na boci me curu kina noqu pi yaya vakayalewa*' [ English translation – 'Madam, that is the male genital entering my pi female genital' ] and then pointed towards the front of her genital area because she was sitting down. PW4 stated that as a teacher they study their children's background, and so for ZIR's case, she knew that ZIR was staying with the elder sister and her husband i.e. Tamai Ropate, Ropate's siblings, Ropate and the 2 twin sisters. PW4 stated that she then asked ZIR, '*ZIR iko na gone lailai. Kevaka e dua na veiyacovi kei iko ena dodonu vei iko mo na kaila se iko na vakila na mosi. Segi ni dua e vale e rogoca ni ko kaila se iko tagi na gauna e veiyacovi kina kei iko o Tamai Ropate?*' [ English translation – 'ZIR you are a small child. If someone has sexual intercourse with you, you should have shouted or you would have felt pain. There was no one at home who heard you screaming or you crying at the time of the sexual intercourse with Ropate's father?' ], to which her reply

was ‘Whenever this happens, the sister is not at home’. PW4 stated that she then asked ZIR in I-Taukei, ‘*ZIR iko sega ni bau vakila na mosi? Cava o iko sega ni kaila mada ga*’ [ English translation – ZIR did you feel any pain? Why didn’t you at least shout’ ], and her reply was in I-Taukei, ‘*Saka e dau vakayagataka o Tamai Ropate nai lumu me lumu kina nona i yaya vakatagane kei na yaya vakayalewa o ZIR*’ [ English translation – Madam, Ropate’s father uses oil to oil his male genitalia and my female genitalia’ ]. PW4 stated that she then said ‘*You should have at least shouted*’, to which ZIR replied saying ‘*Saka, e tukuni vei au meú katia nai sulu.*’ [ English translation – Madam, I was told to bite a sulu or cloth. ] PW4 stated that she then asked ZIR, ‘*ZIR sa dede na kena yaco tiko mai qo?*’ [ English translation – ‘ZIR has this been happening for a while?’ ], to which she replied saying ‘*The recent incident happened during the Ratu Sukuna holiday last year*’. PW4 then asked her, ‘*E tekivu mai na gauna cava sa dau vakayacora tiko mai qo o Tamai Ropate?*’ [ English translation – ‘When was the beginning of what was done to you by Ropate’s father?’ ], and her reply was ‘*Saka, na gauna keirau sa qai vuli kina ena Krishna Vedic Primary School ya ena 2021. 2021 keirau mai Christmas holiday kina e Kuku*’ [ English translation – ‘Madam, it started when we started schooling at Krishan Vedic Primary School in 2021. In 2021 we came to Kuku for Christmas holiday.’ ] PW4 then asked ZIR, ‘*Na recent incident qo na Ratu Sukuna holiday, a tu evei nomu sister?*’ [ English translation – ‘This recent incident on the Ratu Sukuna holiday, where was your sister?’ ], and her reply was ‘*Saka, o koya e sega ni tiko e vale*’ [ English translation – ‘Madam, she was not at home’. PW4 stated that she gave a police statement in relation to this matter and signed it as well. PW4 stated that ZIR told her that the recent incident happened during the Ratu Sukuna holiday in 2023. PW4 stated that ZIR told her that her brother-in-law asked her to give him a massage in the room, and the brother-in-law locked the door from inside the room during the massage, and started to do bad touches on ZIR. PW4 stated that she asked ZIR, ‘What part of the body did he touch?’, and she said, ‘He touched her breast and her pee female private part’. PW4 stated that ZIR told her and said, ‘*Tamai Ropate e veiyacovi kei au*’ [ English translation – ‘Ropate’s father had sexual intercourse with me.’ ]. PW4 then asked ZIR, ‘*Sa vakavica beka na gauna?*’ [ English translation – ‘How many times?’ ], and she replied, ‘3 times’. PW4 stated that to her and all teachers in the school, this was a serious matter that needed to be looked at, and so she took the matter up to the Head of School. PW4 stated that the Head of school then called ZIR to the computer room, and in PW4’s presence questioned ZIR, and ZIR told the Head



Teacher whatever she had told PW4 earlier, and did not change her statement. PW4 stated that after that, the Head Teacher took further steps. PW4 stated that Ropate's younger sibling Mereoni was her student when she was in year 1, and due to COVID they were not allowed to interact with parents and so in 2023 she got to meet Ropate's dad after the Saraswati pooja that was held in school. PW4 stated that parents were informed to come and pick their children due to the rainy weather, and that is the time she met Ropate's father. Leave was then granted by the Court for PW4 to engage in Dock ID, and in doing so PW4 positively identified the accused whom she referred to as *Tamai Ropate* of Ropate's father sitting in the accused box.

18. In **cross-examination** by Ms. Dean, PW4 confirmed that ZIR had told her of what Ropate's father had done to her. PW4 stated that when she conversed with ZIR, ZIR did not specifically mention the word 'rape'. PW4 stated that she did not mention the exact word 'rape' to ZIR when they conversed.

19. PW4 was not re-examined by the prosecutor.

20. Soon after PW4's testimony, the prosecution then closed its case, and Ms. Dean informed the Court that her client is willing to take the stand the testify.

### **Defence case via DW1: Waisake Tulailai**

21. **DW1 Waisake Tulailai** in **examination-in-chief** testified that he currently stays at Nadali settlement with his cousin-brother and his wife including their senior pastor and a lady who is looking after the senior pastor's family. DW1 stated that he is married and his wife's name is Tulia Lewatu. DW1 stated that he can recall his whereabouts during the period 11 April 2022 to 16 December 2022. DW1 stated that during that period he stayed in his house located in his village called Kuku village in the province of Tailevu with his wife Tulia Lewatu and their 4 children Ropate Toravakadrau, Mereoni Tabuaroqoti, Ana Vautoa and Maleli Rauga including the 2 sisters who are his sisters-in-law namely, ZIR and Miriama Moceiwai. DW1 stated that ZIR and Miriama Moceiwai stayed with him for just one and a half year, and they are the same age as his eldest son who is 12 years old. DW1 stated that ZIR and Miriama came to stay with

them when his mother-in-law and father-in-law began separating. DW1 stated that before they came to stay with them, ZIR and Miriama stayed with a couple of families and they were the last family to accept them. DW1 stated that during that period, ZIR and Miriama attended school with his 3 children, and his youngest child stayed home with his wife while he was at work. DW1 stated that ZIR and Miriama attended Krishna Vedic School which is about 5 minutes walk away from his house. DW1 stated that during the period 11 April 2022 to 16 December 2022, his house is a concrete house with 3 bedrooms. DW1 stated that inside his house there is the sitting room, 3 bedrooms, a kitchen, bathroom, toilet and a porch outside. DW1 stated that at that time, of the 3 bedrooms, one is usually dedicated for a prayer room, one is their changing room, and the last room is for him and his wife Tulia Lewatu. DW1 stated that they kept all their clothes inside the changing room, and no one sleeps in that changing room. DW1 stated that all their children sleep in the sitting room. DW1 stated that in the sitting room there is a sideboard with a TV on top of it, a rug and mat. DW1 stated that inside the prayer room is just a small coffee table which they keep their bible on top, a rug and mat on the floor including bible verses all around the wall of the prayer room. DW1 stated that there is no furniture inside the prayer room. DW1 stated that during that period he was working looking after 2 old Indian couple whom he drove around, and the old man suffers from Parkinsons disease. DW1 stated that he use to live for work during the day before their children went to school and returns home at night between 8 to 9 o'clock. DW1 stated that he worked everyday. DW1 stated that his wife Tulia stayed home doing domestic duties with their youngest child. DW1 stated that whenever the children return home from school everyday, their mum is always at home waiting for them. DW1 stated that when their children return home from school, they know what to do according to the timetable they provide for them within a day. DW1 stated that ZIR and Miriama were also included in the daily timetable for chores after school. DW1 stated that ZIR and Miriama stayed with him for one and half years during that period. DW1 stated that his relationship with ZIR was good. DW1 stated that ZIR sometimes did not like being corrected when he corrects her and his children when they misbehave. DW1 stated that when ZIR and Miriama came to stay with his family, they came in with new habits and attitude with new way of speaking and uttering languages which were not suitable in his family. DW1 stated that there is a prayer room in his house located one and half meters away from their bedroom, 3 meters away from the sitting room, and 1 meter away from the last bedroom. DW1 stated that

no one is allowed inside the prayer room, until they allow them inside the prayer room to clean it. DW1 stated that the prayer room has a door. DW1 stated that he did not call ZIR inside the prayer room, nor took off her clothes. DW1 stated that during that period, whenever they came back from school, he was not at home as he is still at work. DW1 stated that did not lay ZIR down on the bed inside the prayer room, and there is no bed or furniture inside the prayer room apart from the small coffee table which their bible is kept on. DW1 stated that he did not pull out his penis and inserted it into ZIR's vagina. DW1 stated that during that period which ZIR talked about, his wife and youngest child Maleli Rauga went to Lautoka. DW1 stated that they left home together that same morning when the children went to school. DW1 stated that they went to Lautoka, while he went to the 2 old couples whom he looks after. DW1 stated that he recalls 29 May 2023, which was Ratu Sukuna Day holiday and he was at home with his wife and their 4 children including his 2 sisters-in-law. DW1 stated that on that day they were celebrating the holiday at home, made *lovo* (i.e. cooking food in an earth oven), and enjoying themselves at home as a family. DW1 stated that in the evening of that day, they were all in the sitting room right after devotion having tea and enjoying watching comedies. DW1 stated that he did not indicate to ZIR to go inside the prayer room, as he cannot do such a thing and then saying in I-Taukei, '*Ai tovo e torosobu, lolovira vaka oya*' [ English translation – 'It is an indecent and unbecoming conduct' ] DW1 stated that he did not go into the prayer room, nor took off ZIR's clothes inside the prayer room. DW1 stated that the prayer room is only dedicated for prayer and building up relationship, that is, spiritual relationship for their Lord and Saviour alone and nothing else. DW1 stated he did not put coconut oil on ZIR's vagina, nor inserted his penis into ZIR's vagina. DW1 stated that as he had said before that he cannot do such behaviour, and then said in I-Taukei, '*Ena rawa ni vakawai kina vakalevu sara na noqu bula ena loma ni noqu matavuvale ena dela no noqu i tutu vaka Tama, dau ni veisusu ena loma ni matavuvale e kacivi au kina na Kalou*' [ English translation – 'My position as a father, care giver in my family can be put into question by the members of my family given that my role as father and care giver is one ordained by God.' ]

22. In **cross-examination** by the prosecutor, DW1 stated that in 2022 and 2023 he resided in Kuku village with his wife Tulia, Tulia's younger sisters namely ZIR and Miriama, and their 4 children. DW1 stated that his eldest child Ropate was in the same class as ZIR at Krishna Vedic

School. DW1 stated that his job during that period was looking after 2 old Indian couples. DW1 stated that it would take about 40 minutes to walk from his home to that of the 2 Indian couples home. DW1 stated that it was not a formal job in the sense that he did not have to apply for leave for a day off work, and in I-Taukei said *‘E dau vakatau saka veirau na veiwatini na gauna rau via solia vei au meú vakacagicagi kina se meú vakayagatka kei iratou noqu matavuvale me vaka ni rau sa malumalumu sara’* [ English translation – ‘It depends on the couple on the day or time they allow me to take my leave, also to spend time with my family given that they are an elderly couple.’ ] DW1 stated that he does not have to fill any form when seeking a day off or time off from work. DW1 stated that he only takes leave or time off work if the Indian couple allow him to do so. DW1 stated that he starts work at the Indian couple’s home at 8.30am in the morning just after the children left home for school, then he gets everything ready for his wife and younger son and then go to work. DW1 then confirmed that he leaves for work after the children go to school, and the prosecutor put to DW1 that in his examination-in-chief, he told the Court that he use to leave early in the morning before the children go to school, to which DW1 replied ‘Yes. It depends whenever they want me early morning or later. If they want me earlier, I will leave the house earlier as soon as possible.’ DW1 stated that he does not have a fixed schedule of his starting time at work, and it depends on the 2 old couple whether they really need him if there is any serious situation, or they are not, and so if they need him as soon as possible then he will leave the house earlier before the children left for school. DW1 also stated that if they don’t have any serious matter then he will leave the house after the children have left for school, and he gets everything ready such as food, root crop and water given that there is low water pressure in their area and sometimes there is no water at all. DW1 stated that he gets everything prepared for them then he leaves the house. DW1 stated that when the Indian couple do not have any serious issues, they then allow him to go home, and he will only leave them whenever he gets everything ready and prepared according to their needs such as anything they need from the shop or in town, so that they don’t call when he is home. DW1 stated that his work concluded each day at different times depending on the old Indian couple’s needs. DW1 stated that in the period 2022 and 2023, he was the only adult male figure in his house. DW1 stated that being the only adult male figure in the house, all the children including ZIR and Miriama would listen to him. DW1 stated that he is the only person earning in his house, and his wife Tulia is completely dependent on him. DW1 stated that during that period in 2022 and

2023, ZIR and Miriam were not completely dependent on him because his mother-in-law also supported them at all times when they need anything. DW1 stated that when ZIR and Miriama stayed at his house, he did not have certain degree of control over them, and said that his control over them is limited and the rest he lives it to his wife who is their elder sister to control them. DW1 stated that in terms of control, ZIR would listen to him. DW1 stated sometimes he sleeps in the prayer room with his second youngest child when his wife Tulia is not at home. DW1 did not agree with the prosecutor's suggestion that sometime the prayer room is also used as a place to sleep, and stated instead that all the time he enters the prayer room, even of his wife is with them at home or otherwise, his second youngest child Ana Vautua always accompanies him inside the prayer to pray, and will remain with him inside the prayer room until she sleeps, and the amount of time he spends praying in the prayer room is also the amount to time his daughter is there in the room with him sleeping. DW1 stated that the prayer room is only for praying and it is forbidden to sleep in there. DW1 stated that he can recall when he was interviewed by the police. DW1 stated that he told the police that when his wife is not at home, he sleeps in the prayer room with his sickly child whom he is very close to, and the amount of time his daughter sleeps in the prayer room that is also the amount of time he prays in the prayer room. DW1 stated that he does not sleep in the prayer room, and only his daughter sleeps there. DW1 stated that they stay together in the prayer room, and the longer he stays in the prayer room, the longer too she stays in the prayer room with him sleeping. DW1 maintained that he does not sleep in the prayer room, but only his daughter slept there whenever he is there with her while he prays. DW1 stated that there is no bed in the prayer room. DW1 stated that the prayer room door is always open and it is not closed, and if anyone goes inside the prayer room, people in the sitting room could easily see persons going inside the prayer room. DW1 stated that if the prayer room door is completely closed then they cannot see what is happening inside the prayer room. DW1 stated that in that prayer room, they don't allow anyone to close the door because if any of them is inside praying and if any of their children look for them, there is no need for the children to knock on the door and not distract them praying, as they would just peep inside and if they see any of them praying, they would just turn back. DW1 then confirmed that if the door to the prayer room is closed then no one can see what is happening inside. DW1 recalled that between 11 April 2022 and 16 December 2022, his wife Tulia had gone to Lautoka for 2 days with their youngest son, while he remained home with their 3 children including ZIR and Miriama. DW1

stated that he was the only adult at home at that point in time, and was in charge of his 3 children and sisters-in-law ZIR and Miriama. DW1 stated that he has never asked ZIR to give him a massage, however, only when his wife is at home and she needs a massage then he asks all the children as to whoever is willing to massage them. DW1 stated that ZIR has never given him a massage before. DW1 stated that ZIR has never massaged him, but only massaged his wife. DW1 stated that only Miriama massages him using her feet. DW1 stated that he told the police that his children including ZIR gave him massage, only when they are willing to massage them in the sitting room, because whenever the ZIR, Miriama and Ropate massage them, the younger ones too always want to massage them too. DW1 stated that ZIR massages his wife when she wants a massage, and at the same moment whenever he asks Miriama for a massage, she always have a good heart to come and massage him with her feet until the rest of them join in to massage him as well. DW1 stated that he told the police that his children and ZIR massage him. DW1 stated that during the period 11 April 2022 and 16 December 2022, he did not call ZIR into the prayer room. DW1 stated that he did not undress ZIR, nor did he lay ZIR on the bed in the prayer room. DW1 stated that he did not unzip his pants, nor insert his penis inside ZIR's vagina. DW1 stated he did not do this sexual act that caused ZIR to feel pain in her abdomen area. DW1 stated that he did not ask ZIR to bite on a piece of cloth so that she does not scream, nor did she tell ZIR 'to keep this as a genuine promise between them'. DW1 confirmed stating in cross-examination that on Ratu Sukuna Day on 29 May 2023, they were celebrating at home, making *lovo* and enjoying as a family, and in the evening had a devotion and watched comedies, and maintained this to be the truth. DW1 stated that on the morning of the Ratu Sukuna Day holiday just after they had buried and covered the *lovo*, he then went to the 2 Indian couple's home to finish painting the frontage of the house. DW1 stated that on Ratu Sukuna Day his wife had not gone to prepare a feast, nor did he tell ZIR to go inside the prayer room. DW1 stated that he did not close the prayer room door, nor take off ZIR's clothes and lay her down. DW1 stated that he neither applied coconut oil on ZIR's vagina, nor insert his penis in ZIR's vagina for about 1 minute. DW1 agreed that Mrs. Rawaqa had identified him as '*Tamai Ropate*' or Ropate's father. DW1 stated that between 11 April 2022 and 16 December 2022, he did not rape ZIR because he knew that his wife was away in Lautoka, nor because it was an opportunity for him to rape ZIR being the only adult in the house. DW1 stated that he did not rape ZIR when his wife Tulia had gone to prepare a feast on Ratu Sukuna Day 2023, nor

took that opportunity to rape ZIR being the only adult in the house at that moment in time.

23. DW1 was not re-examined by Ms. Dean.

24. Soon after DW1's testimony, the defence then closed its case.

25. Both counsels then submitted their closing submissions, and this the Court's judgment on the two counts of *Rape* in the indictment.

### **Analysis of the prosecution vis-à-vis defence evidence**

26. Having carefully considered the entire prosecution and defence evidence including the *Amended Admitted Facts*, I have found that:

- a) Pursuant to section 207(3) of the Crimes Act 2009, consent is not an issue in this instant since the complainant ZIR was below the age of 13 years during the rape.
- b) The identification of the accused Waisake Tulailai is well substantiated and established.
- c) The accused Waisake Tulailai was present at his house in Kuku village, Tailevu, during the periods i) between 11 April 2022 and 16 December 2022; and ii) 29 May 2023, and I reject any evidence that suggest otherwise.
- d) **PW1: ZIR** the complainant is a credible and reliable witness, and her drawings exhibited as **PE2** & **PE3** are also consistent and reliable. PW1's testimony remained consistent and was not heavily discredited or unsettled via cross-examination. PW1 could tell the difference between a truth vis-à-vis a lie, and remained calm and composed while testifying, and her demeanour is consistent with the finding of enhancing her credibility and reliability as a witness, and I therefore attach immense weight to her testimony.
- e) PW1's testimony and that of PW2, PW3, and PW4 are consistent, credible and reliable, and any discrepancy does not, in my view, render the prosecution evidence incredible and

unreliable. In Nadim v State [2015] FJCA 130; AAU0080.2011 (2 October 2015) at paragraph 15, Prematilaka, J. stated:

*[15] It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of incidents, minor discrepancies are bound to occur in the statements of witnesses.*

- f) Based on the particular findings in a) – e) above, I therefore attach substantial weight to PW1's, PW2's, PW3's and PW4's testimonies including the corresponding prosecution exhibits **PE1**, **PE2** and **PE3**, which respective testimonies were not heavily discredited nor unsettled via cross-examination.
- g) I reject DW1: Waisake Tulailai's testimony on the basis that he is not a credible and reliable witness, and therefore attach less weight to his testimony, which in terms of probative value is, in my view, heavily outweighed by the testimonies of PW1, PW2, PW3 and PW4 and related prosecution exhibits **PE1**, **PE2** and **PE3**.
- h) For the above rationale, I therefore find that the prosecution has proved *beyond reasonable doubt* all elements of the offence of *Rape* in Counts 1 & 2 of the indictment, in that:

Count 1 – Waisake Tulailai, in the period between 11 April 2022 and 16 December 2022, intentionally inserted his penis into ZIR's vagina inside the prayer room at his house situated in Kuku village, Tailevu; and

Count 2 – Waisake Tulailai on 29 May 2023 intentionally inserted his penis into ZIR's vagina inside the prayer room at his house situated in Kuku village, Tailevu.

27. I therefore find Waisake Tulailai **guilty** of the two counts of *Rape* in the Information by the



Acting Director of Public Prosecutions dated 18 July 2023 and filed on 19 July 2023, and **convict** him accordingly.

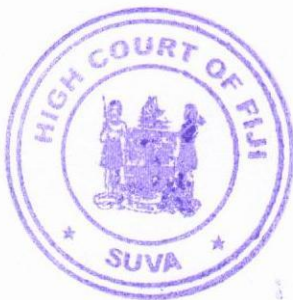
28. Thirty (30) days to appeal to the Fiji Court of Appeal.

**Order(s) of the Court**

1) Waisake Tulailai is hereby found guilty and convicted of:

- Count 1: Rape contrary to section 207(1), (2)(a) & (3) of the Crimes Act 2009; and
- Count 2: Rape contrary to section 207(1), (2)(a) & (3) of the Crimes Act 2009 in the indictment.

2) Waisake Tulailai is to be remanded in custody to await sentencing.



Hon. Mr. Justice Pita Bulamainavalu  
**PUISNE JUDGE**

**At Suva**

19 March 2025

**Solicitors**

Office of the Director of Public Prosecutions for the State.

Legal Aid Commission for the Accused