

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 184 OF 2019

BETWEEN : STATE

AND : VISHESH RAJ

Counsel : Ms U Tamanikaiyaroi with Ms P Kumar for the State
Mr J Reddy and Ms S Begum for the Accused

Date of Hearing : 19 – 21 April 2022

Date of Judgment : 3 June 2022

JUDGMENT

Charges

[1] The charges against the accused are as follows:

Counts 1, 3, 5, 7

Abduction of a person under 18 years of age with intent to have carnal knowledge contrary to section 211 (1) of the Crimes Act.

Count 2

Rape of a child under the age of 13 years contrary to section 207(1) and (2) (a) and (3) of the Crimes Act.

Counts 4, 6, 8

Defilement of a young person between 13 and 16 years of age contrary to section 215 (1) of the Crimes Act.

Burden and standard of proof

- [2] The accused has pleaded not guilty to the charges. The burden is on the prosecution to prove each charge beyond reasonable doubt. This burden never changes, never shifts to the accused.

Abduction

- [3] Section 211 (1) of the Crimes Act defines abduction as:

A person commits a summary offence if he or she, with intent that any unmarried person under the age of 18 years shall be unlawfully and carnally known by any person (whether such carnal knowledge is intended to be with any particular person or generally), takes or causes to be taken the person out of the possession and against the will of his or her father or mother, guardian or any other person having the lawful care or charge of the person under 18 years.

- [4] To prove abduction the prosecution must prove that the complainant was under the age of 18 years and unmarried when she was taken out of the possession of her parents against their will for the purpose of sexual intercourse. It is not necessary to prove that the complainant was taken by force, either actual or constructive and it is immaterial whether the complainant consents or not. What is required is proof that there was a "substantial interference with the possessory relationship of parent and child". The question of whether the complainant was in the possession of her parents is a question of fact. Reasonable belief that the complainant was over the age of 18 years is a defence to abduction.

Rape

- [5] Section 207 (2) (a) of the Crimes Act defines rape as:

A person rapes another person if —

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

- [6] To prove rape, the prosecution must prove that the accused had sexual intercourse with the complainant by penetrating her vagina with his penis and that at the time of the sexual intercourse the complainant was under 13 years old. Slight penetration is sufficient. Ejaculation is not necessary. It is not necessary to prove lack of consent when the complainant is under the age of 13 years because a child under the age of 13 years is incapable of giving consent to sexual intercourse.

Defilement

- [7] Section 215 (1) of the Crimes Act defines the offence of defilement as follows:

A person commits a summary offence if he or she unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any person being of or above the age of 13 years and under the age of 16 years.

- [8] To prove defilement, the prosecution must prove that the accused had unlawful sexual intercourse with the complainant when she was above the age of 13 years and under the age of 16 years. Unlawful means without lawful justification or excuse. Consent is not a defence to defilement but reasonable belief that the complainant was over the age of 16 years is a defence.

Admitted facts

- [9] Both parties have agreed to certain facts, which are taken as true.
- [10] The identity of the accused is not in dispute. His date of birth is 14 May 1990. In 2019 he was 28 years old and married. Between 1 January 2019 and 31 May 2019 the accused taught at Arya Samaj Primary School in Samabula. In 2019 he was Year 3 class teacher and owned a motor vehicle with registration number JO 361.
- [11] The complainant's identity is not an issue. She was born on 6 March 2006 and her biological parents are AL and AD (Birth Certificate of the complainant PE1).

Prosecution case

- [12] The prosecution led evidence from four witnesses.
- [13] The complainant's evidence is that she attended Arya Samaj Primary School from Year 3 to Year 6. She lived with her parents off Mead Road in Namadi Heights. In 2019 she was in Year 6. Her class teacher was Ms Fong. She knew the accused from the school. He was her class teacher in Year 3. When she was in Year 6 she spoke to the accused on a number of occasions in school.

Counts 1-2

- [14] In relating to the allegations set out in counts one and two, the complainant said that during a conversation with the accused in school he suggested to her that they go out and visit some place together. She said that she had this conversation in February 2019. She didn't say anything to the suggestion but she met the accused at the Shop & Save Supermarket, Nabua car park on a school day before her 13th birthday. She left her home in school uniform, but instead of going to her school, she got off the bus at Nabua and boarded the vehicle of the accused. They went to Pacific Harbour and got off at a beach. At some stage she changed into civilian clothes which she had brought either in her school bag or wore underneath her uniform.
- [15] The complainant said that she accompanied the accused to a hotel in Pacific Harbour. After they entered the hotel room he closed the door and put the curtains down. He told her to undress but when she didn't he undressed her and told her to lie on the bed. She complied. He went on top of her and spread her legs apart. He put his mouth in her vagina and told her to come on top of him. She came on top of him and he then inserted his penis into her vagina. She felt pain in her vagina. He penetrated her for a short time and ejaculated outside on her stomach. She described the ejaculation as some kind of liquid came out of his penis. She said that he wiped the white liquid from her stomach with toilet paper.
- [16] Before returning home she changed back into her school uniform. The accused dropped her off at around 3.45 pm at a bus stand near her home. Her evidence is

that when they were travelling from Pacific Harbour to her home, he told her not to tell anyone that he took her somewhere. He told her that if she revealed to anyone that she went out, her parents will beat her up.

Counts 3-4

[17] In relating to the allegations set out in counts three and four, the complainant said that the second time she accompanied the accused to a hotel was in the month of March after her birthday. She cannot recall the date but it was a school day. She left home in the morning in her school uniform and met the accused at the Shop & Save Supermarket, Nabua car park. She accepted that she suggested to meet the accused at the Shop & Save Supermarket when he asked her about a place to meet where her parents won't be able to see them.

[18] From the car park, she boarded his vehicle and they drove to Saweni. They went to a motel and the accused got off the vehicle and went to the reception while she remained in the vehicle. He came back and then told her to sneak into the room quickly as people were looking. When she went in the room, he closed the door and put the curtains down. He told her to undress and lie on the bed. She complied. He undressed himself. He spread her legs and put his mouth in her vagina. He then inserted his penis into her vagina. She cannot recall the time span of the penetration but she said that it was for a short time.

[19] Her evidence is that the accused dropped her off at a bus stand near her home at around 3.45 pm. She said that the reason she got dropped off at the bus stand was to avoid her family seeing her with the accused. When she reached home her mum was at home but she did not inform her about her whereabouts of that day. She said that the accused told her that if she kept quiet he'll take her out again in future.

Counts 5-6

[20] In relating to the allegations set out in counts five and six, the complainant said that the third time she went out with the accused was on a school day in April. She

left her home in the morning in her school uniform and got off at the Shop & Save Supermarket, Nabua car park.

- [21] From there she accompanied the accused to a motel in Colo-i-Suva in his vehicle. Before reaching the motel she changed into civilian clothes. She remained in the vehicle while he got off and went to the reception to pay for the room. From the reception he came back to the vehicle and took the complainant to a room. He closed the room door and put the curtains down. He told her to undress and lie on the bed. She complied. He spread her legs and told her to come on top of him. He pulled her hands to come on top of him. He penetrated her vagina with his penis.
- [22] Before returning home she changed back into her school uniform. The accused dropped her off at the bus stop near her home at around 3.45 pm. Her mum was at home but she did not tell her anything because he told her not to tell.

Counts 7-8

- [23] In relating to the allegations set out in counts seven and eight, the complainant said that the last time she went out with the accused was on a weekend in May during the school holidays. She said that she had a conversation with the accused during the school term in which he told her to give him a call during the holidays. She said that she used her mum's phone and called him on his mobile. She said that the accused gave his mobile number to her which she was able to recall in court. She said that she went to her aunt's place close to her home. Before 12 noon she met the accused at the roundabout near her home and boarded his vehicle.
- [24] She said that she accompanied the accused to a hotel in Valelevu. She remained in the vehicle while he went to the reception to pay for the room. He came back to the vehicle and took her into a room. He closed the door and put the curtains down. He told her to undress. She complied. He spread her legs and told her to come on top of him. She complied. He inserted his penis inside her vagina. Later he dropped her off near her home and drove away.

- [25] The complainant's evidence is that when she was getting off the vehicle her brother noticed and questioned her about her whereabouts. She lied to her brother that she was at a friend's place. She said that her brother did not believe her. She said that her family members were waiting for her at the roundabout and she lied to them as well that she was at a friend's home.
- [26] Later in the afternoon, the complainant told her mother that she wanted to change her school and that the accused had been taking her to hotels. The complainant's evidence is that she did not tell anyone about these incidents with the accused because he told her not to tell anyone. She said that on all four occasions she went out with the accused she did not ask her parents' permission because he told her not to tell anyone.
- [27] The complainant's mother gave evidence that in 2019 she was residing with her husband and two children at Evetts Place. She is a full time stay home mum. She cannot recall the exact date but she gave evidence of an incident on a weekend in May 2019 (Sunday) when the complainant had disappeared without informing her while playing with other children from the neighbourhood. She had not given permission to the complainant to go anywhere.
- [28] When the complainant came back home that day, she did not say anything, but later in the evening the complainant told her mother that she wanted to change her school because her master had been sleeping with her. The complainant's mother could not remember the master's name but she identified the accused as the master because she met him in teacher parent meeting when he was the complainant's class teacher.
- [29] The witness said that she did not give permission to the accused to take her daughter anywhere. She said that the complainant used to leave home for school around 6.30 am and return in the afternoon around 4 pm. The witness said that when she heard from her daughter that the accused had been sleeping with her she reported the matter to police.

[30] The third prosecution witness was the complainant's Year 6 class teacher at Arya Samaj Primary School in 2019, Ms Fong. As a class teacher she was responsible to keep an attendance register for her students. Ms Fong said that the complainant was absent from school on Thursday, 28 February 2019, Tuesday, 12 March 2019 and Monday, 8 April 2019. In cross-examination Ms Fong said that whenever she asked the complainant for the reason for her absence, the complainant told her that she was sick.

[31] The fourth prosecution witness was the head teacher of Arya Samaj Primary School, Mr Kapoor. As the head teacher Mr Kapoor was responsible for the school administration including keeping attendance of teachers. Mr Kapoor's evidence is that the accused joined the school in term three of 2018 after graduating as a teacher. In 2018 the accused taught Year 5 and in 2019 he was Year 3 class teacher. Mr Kapoor's evidence is that according to their official records of teacher attendance (PE 2), the accused was absent from school on 28 February 2019, 12 March 2019 and 8 April 2019. The school records show that the reason given was that the accused was sick.

[32] That is a summary of the prosecution case.

Defence case

[33] The accused's evidence is that he is now 31 years old and that he was a school teacher but now unemployed. He started his teaching in Term 3 of 2018 after graduating from FNU. He admits that the complainant was his student and that he taught her in Term 3 of 2018 when she was in Year 5. He knew that in 2018 the complainant was 12 years old. He knew from the school report that the complainant resided somewhere near Mead Road. He admits that he had met the complainant's mother during teacher parent meeting in 2018. He said that in 2019 the complainant had moved to Year 6 and he became Year 3 class teacher. He said that although he was not directly teaching the complainant in 2019 he would meet her every now and then in school.

- [34] He said that the allegations of abduction, rape and defilement are false. He denies taking the complainant to hotels and having sexual intercourse with her.
- [35] The accused said that on 28 February 2019 his wife was sick and that he took her to hospital at 7 am and returned home at 1 pm. He did not go anywhere after returning from the hospital.
- [36] The accused said that on 12 March 2019 he was sick and that he called his head master and informed him that he won't be coming to school. He said that he went to a doctor at about 6.30 am and came back home at 9 am. He did not go anywhere after returning home.
- [37] The accused said that on 8 April 2019 he was sick and that he went to a doctor at 6.30 am and returned home at 9 am with a sick sheet. He did not go anywhere after returning home.
- [38] The accused said that on 5 May 2019 he spent the entire day with his wife because it was a Sunday. They went shopping, to movies, to a restaurant and then to a relative's home before going back to their home.
- [39] In cross-examination the accused admitted that his evidence is different from his police statement because his police statement was obtained by police using force and threats.
- [40] That is a summary of the defence case

Analysis

- [41] The accused chose to give evidence. However, he does not have to prove anything. If the account given by him is or may be true, then he must be found not guilty. But even the account given by him is entirely rejected, that would not relieve the prosecution of its burden of making sure by evidence of the accused's guilt.

- [42] The prosecution case is substantially dependent on the truth of the complainant's evidence. If her account of the four instances where she accompanied the accused to hotels without the permission of her parents and had sexual intercourse with him is true, then the accused is guilty of the charges. But if her account is false or may be false then the accused must be found not guilty.
- [43] I am mindful that the complainant is a child and special measures were used to receive her evidence. The purpose of the special measures was to put the witness at ease when giving evidence and not to prejudice the accused. Further, a decision was made to control objectionable cross examination, causing confusion to the child witness. The decision was made in fairness to the child complainant and not to prejudice the accused.
- [44] I approach the complainant's evidence dispassionately, without sympathy or prejudice. Her evidence need not be corroborated in order to be believed. In fact, there is no independent evidence that supports her account that the accused took her to hotels and had sexual intercourse with her.
- [45] The complainant gave evidence of events that allegedly took place three years ago. She was 12 years old in 2019 and a primary school student. When she gave evidence she was 16 years old. She was cross examined at length on all aspects of her evidence. She was inconsistent on certain peripheral matters such as her clothing and travelling routes when compared with her police statement, but that is to be expected from a child witness giving evidence of events that allegedly took place three years ago.
- [46] She is mistaken that the accused taught her in Year 3. I accept the accused's evidence that his first contact with the complainant was in 2018 when he taught her in Term 3 of Year 5. I accept that in 2019 the accused was the class teacher for Year 3.

- [47] The identity of the accused is not an issue. The issue for determination is whether the complainant accompanied the accused to hotels, without the permission of her parents, and had sexual intercourse with him as alleged in the charges.
- [48] The complainant was consistent regarding her account that she accompanied the accused on four separate occasions in 2019 when she was in Year 6, without the knowledge of her parents, and had sexual intercourse with him.
- [49] The prosecution led evidence of three occasions when both the complainant and the accused were absent from the school. The accused in his evidence did not dispute that on 28 February 2019, 12 March 2019 and 8 April 2019 he was absent from the school due to either his wife or him being sick. Ms Fong's evidence is that on these three dates the complainant was also absent from the school. There was no real challenge to Ms Fong's evidence. I accept that on 28 February 2019, 12 March 2019 and 8 April 2019, both the accused and the complainant were absent from the school.
- [50] I accept the evidence of the complainant's mother that she was not aware that her daughter did not go to school on 28 February 2019, 12 March 2019 and 8 March 2019. I also accept that on a Sunday in May 2019 the complainant disappeared from her home without the consent of her parents. The complainant's account is that she voluntarily accompanied the accused and had consensual sexual intercourse with him on four occasions.
- [51] The defence case is a complete denial. The defence case is that on the first three alleged instances the accused after seeing a doctor was at his home with his wife and grandparents. The defence case is that on the fourth alleged instance, which was a Sunday, the accused spent the entire day with his wife.
- [52] The denials of the accused are not entirely consistent with his police statement which he says was obtained involuntarily by police. Even if I accept the accused's reasons for the inconsistency, the suggestions put to the complainant by counsel

for the accused during cross examination, contradicts the accused's complete denial of the allegations. For example,

Mr Reddy: And I am putting it to you that you are the one who told Mr Raj to meet you at Shop & Save in Nabua, isn't that correct?

Complainant: Yes my Lord

[53] This particular question suggests that the idea to meet at the Shop & Save Supermarket, Nabua was of the complainant and not of the accused. The complainant's answer is consistent with her account that she was picked up by the accused from the Shop & Save Supermarket, Nabua car park on the first three occasions. Her account is that on these three occasions she voluntarily got off her school bus at the Shop & Save Supermarket car park and boarded the vehicle of the accused, without the approval or knowledge of her parents. From there she voluntarily accompanied the accused and had sexual intercourse with him in hotels.

[54] The complainant's account is that on the fourth occasion she secretly contacted the accused to collect her from the roadside near her home. From there they went to a place in Valelevu and had sexual intercourse. On this last occasion she got caught when her family realised that she had disappeared without letting anyone know that she was going out with the accused. When her mother prodded about her whereabouts she revealed to her that her master, the accused had been sleeping with her.

[55] I find the complainant's account to be consistent and credible. She struck me as a truthful witness. I find the prosecution has established beyond reasonable doubt that the accused took the complainant from the possession of her parents and did have sexual intercourse with her on four occasions as alleged in the charges. I find that on the first occasion in February 2019, the complainant was a child under the age of 13 years and on the other three occasions, she was above the age of 13 years and under the age of 16 years. I do not accept the accused's account that he was with his family on the four alleged occasions as true.

- [56] On count one, I feel sure that on 28 February 2019, the accused, without lawful excuse, took the complainant from the possession of her parents and against their will, with the intention to have sexual intercourse with her.
- [57] On count two, I feel sure that on 28 February 2019, the accused had sexual intercourse with the complainant, a child under the age of 13 years.
- [58] On count three, I feel sure that on 12 March 2019, the accused, without lawful excuse, took the complainant from the possession of her parents and against their will, with the intention to have sexual intercourse with her.
- [59] On count four, I feel sure that on 12 March 2019, the accused had sexual intercourse with the complainant, a girl above the age of 13 years but under the age of 16 years.
- [60] On count five, I feel sure that on 8 April 2019, the accused, without lawful excuse, took the complainant from the possession of her parents and against their will, with the intention to have sexual intercourse with her.
- [61] On count six, I feel sure that on 8 April 2019, the accused had sexual intercourse with the complainant, a girl above the age of 13 years but under the age of 16 years.
- [62] On count seven, I feel sure that on 5 May 2019, the accused, without lawful excuse, took the complainant from the possession of her parents and against their will, with the intention to have sexual intercourse with her.
- [63] On count eight, I feel sure that on 5 May 2019, the accused had sexual intercourse with the complainant, a girl above the age of 13 years but under the age of 16 years.

Verdict

[64] The verdict of the Court is:

Count 1 – Abduction – Guilty – Convicted.

Count 2 – Rape - Guilty – Convicted.

Count 3 – Abduction – Guilty – Convicted.

Count 4 – Defilement - Guilty – Convicted.

Count 5 – Abduction – Guilty - Convicted.

Count 6 – Defilement - Guilty – Convicted.

Count 7 – Abduction - Guilty – Convicted.

Count 8 – Defilement - Guilty – Convicted.



A handwritten signature in black ink, appearing to read "Daniel Goundar", is written over a horizontal dotted line.

Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State

Reddy Lawyers for the Accused