

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 074 OF 2021

BETWEEN : STATE

AND : ATESHWAR PRASAD

Counsel : Ms K Semisi for the State
Mr I Khan for the Accused

Date of Hearing : 28 – 29 November 2022, 7– 8 December 2022.

Date of Judgment : 30 June 2023

JUDGMENT

[1] Charges

The accused is charged with one count each of rape [ss 207(1), (2)(a), (3) Crimes Act], sexual assault [ss 210(1)(a) & (2) Crimes Act], abduction of a person under 18 years of age with intent to have carnal knowledge [s 211(1) Crimes Act] and wrongful confinement [s 286 Crimes Act].

[2] Burden and Standard of Proof

The burden is on the prosecution to prove each charge beyond reasonable doubt. This burden never changes, never shifts to the accused.

[3] Rape – Count One

Count 1 alleges that the accused on 21 July 2018 at Navua had carnal knowledge of ARK, a child under the age of 13 years.

[4] Section 207(1) and 2(a) of the Crimes Act defines the offence of rape as follows:

A person rapes another person if —

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

[5] Section 207 (3) of the Crimes Act states:

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

[6] Carnal knowledge means sexual intercourse, that is, penetration of vagina with penis. It is not necessary to prove full penetration or ejaculation. Slight penetration is sufficient. What the prosecution must prove is that on the date and place alleged, the accused penetrated the vagina of the complainant with his penis, and that at the time, the complainant was under the age of 13 years.

[7] **Sexual Assault – Count Two**

Count 2 alleges that the accused on 21 July 2018 at Navua unlawfully and indecently assaulted ARK, a child under the age of 13 years by kissing her mouth, breasts and vagina.

[8] Section 210 (1) (a) and (2) of the Crimes Act defines sexual assault as follows:

(1) A person commits an indictable offence (which is triable summarily) if he or she—
(a) unlawfully and indecently assaults another person; or...

[9] An assault is the deliberate and unlawful touching of another person. The slightest touch is sufficient to amount to an assault and it does not have to be a hostile or aggressive act or one that caused the complainant fear or pain. An act is unlawful if it is done without a lawful excuse.

[10] The word "indecent" means contrary to the ordinary standards of respectable people in this community. For an assault to be indecent it must have a sexual connotation or overtone. If an accused touches the complainant's body or uses it in a way which clearly gives rise to a sexual connotation that is sufficient to establish that the assault was indecent.

[11] To prove sexual assault as charged in count 2, the prosecution must prove that the accused deliberately touched the complainant by kissing her mouth, breasts or vagina, without any lawful excuse, and that the act was contrary to the ordinary standards of respectable people.

[12] **Abduction – Count Three**

Count three alleges that the accused on 21 July 2018 at Navua abducted ARK a child under 13 years, with the intent to have carnal knowledge.

[13] Section 211(1) of the Crimes Act defines the offence of abduction as follows:

(1) 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.

[14] To prove abduction as charged in count three, the prosecution must prove that the accused without a lawful excuse and with the intention to have sexual intercourse, took the child complainant, out of the possession and against the will of her parent or guardian. The question of whether the complainant was in the possession of her parent or guardian is a question of fact. It is not necessary for the prosecution to prove that the complainant was taken by force or that the complainant consented or not (*R v Manktelow* (1853) 6 Cox 143). What the prosecution must prove is that the accused with the intention to have sexual intercourse with the child

complainant, substantially interfered with the possessory relationship of a parent and child.

[15] **Wrongful Confinement**

Count four alleges that the accused on 21 July 2018 at Navua wrongfully confined ARK a child under the age of 13 years.

[16] Section 286 of the Crimes Act defines the offence of wrongful confinement as follows:

A person commits a summary offence if he or she wrongfully confines any person.

[17] To confine means to restrain, restrict or hold someone against his or her will. Wrongful simply means without lawful authority or without legal justification.

[18] To prove wrongful confinement as charged in count four, the prosecution must prove that the accused without lawful authority or without legal justification restrained, restricted or held the child complainant against her will.

[19] **Prosecution Case**

To prove these charges, the prosecution led evidence from six witnesses. It is not necessary to reproduce the entire transcript of evidence in this judgment. I will summarize the salient features as they relate to issues for determination.

[20] The first prosecution witness was the complainant. Her evidence was received in closed court and using a screen. The purpose of the special measures was to put the witness at ease when giving evidence and not to prejudice the accused. I approach her evidence dispassionately, without sympathy or prejudice.

[21] The complainant's age was established through her birth certificate (PE 1). Her date of birth is 10 January 2006. At the time of the alleged incident in 2018, she was 12 years old. Her place of residence was Navua. She lived with her mother,

an elder sister and grandparents. She knew the accused. Both were from the same community. She used to call the accused Sonu.

- [22] On 21 July 2018, after lunch, the complainant accompanied her sister to Navua town to check the departure timetables for buses from Navua to Nadi on the request of their mother. They walked to the town and after checking the timetables they were walking back home when the accused stopped his vehicle and offered to drop them home after buying them fish and chips. Both girls got into the vehicle. The vehicle was being driven by a person named Munesh. The complainant sat at the back seat of the vehicle with her sister. They drove to Waidradra and the accused bought three serves of fish and chips.
- [23] After buying them fish and chips, the accused offered the complainant and her sister to show his farm. The complainant's sister told the accused to drop them at their home but the accused insisted that they go and see his farm. They then drove on a feeder road to a secluded location for about 20 minutes. When they arrived at the farm the accused and Munesh got out of the vehicle first and then told the girls to step out as well. The complainant saw the accused and Munesh talking among themselves and then they told the girls that they will drop them at their home. This time the accused drove the vehicle.
- [24] While they were returning, the complainant's mother called on their mobile phone and the complainant overheard her mother telling the accused to drop the girls at their home. While they were driving on the feeder road their vehicle got stuck three times. Every time the vehicle got stuck, the accused got Munesh and the complainant's sister to get out and give it a push while the complainant remained in the vehicle. The third time the vehicle got stuck the complainant saw the accused and Munesh mumble something between themselves but she didn't hear what had been said. On this occasion, the accused drove off with the complainant, leaving behind Munesh and the complainant's sister. The complainant got scared and when she asked him where he was taking her, he told her to his home to pack his bag so he can also accompany them to Nadi.

[25] When they arrived at his home, he got her to accompany him inside the house and then told her to go into a room where the bag was. When she entered the room he came from behind and locked the door. He then closed the curtains and told her to undress. When she refused he came closer to her and she started crying. He forcefully removed her clothes and ignored her pleas not to do that. He pushed her on a mattress that was on the floor and came on top of her. He had already taken off her dress. She was wearing her bra, panty and tights. He had his pants on but not his shirt. He kissed her on her lips. She resisted him by moving away her head. He held her hands and removed her bra and started kissing her breast. He then removed her tights and panty and licked her vagina. She begged him to stop but he did not listen. He told her that her sister had sold her for \$100.00. He then inserted his penis into her vagina and penetrated her. She couldn't bear the pain. When she continuously begged him to stop he took out a knife from a basket next to the mattress and placed it on the neck of the complainant. She was begging him to stop when she heard a knock at the door. She heard her sister calling out to the accused to let the complainant out of the house and that is when the accused got off her.

[26] The complainant quickly wore her panty, tights and bra and when the accused opened the door her sister came inside and rescued her. From there she accompanied her sister to the police station despite the accused's plea to settle the matter. When she was in the hospital she told her mother what Sonu had done to her?

[27] The second witness for the prosecution was the complainant's sister. She is now married with two children. In 2018 she was single. Her evidence is that on 21 July 2018 at about 1.30 pm she left her home with the complainant to Navua town to inquire about departure bus timetables from Navua to Nadi. After making the enquiries they were on their way to their home when the accused stopped his vehicle and offered them a lift. The vehicle was being driven by Munesh and the accused was a passenger in the front seat. She took the offer as she knew the accused well. The accused was known to her as Sonu. They went to Waidradra where the accused bought them fish and chips and then offered to show his farm.

While they were in the company of the accused their mother called on the complainant's mobile and the accused spoke to their mother and offered to drive them to Nadi that afternoon.

[28] From Waidradra they drove to a secluded location. She saw the accused and Munesh were drinking beer in the car. She felt that the accused got jealous when she was talking to Munesh and he started to argue with her. She told the accused to drop them at their home. He agreed. As they were returning, the car got stuck three times. On each occasion, she got out with Munesh to push the car. On the third occasion, she called out to the complainant to get out of the car but the accused insisted for her to stay in the car. When she got out of the car with Munesh the accused drove off with the complainant without saying anything. She walked up the hill and saw a police vehicle. The police dropped her at Pacific Harbour Police Post. She asked for police help but they did not help. She managed to flag down a vehicle driven by a person name Tomasi. Tomasi took her to the accused's house.

[29] When she arrived at the accused's house she saw the accused's vehicle there. She started knocking and banging on the door and calling out to her sister the complainant. The accused came out. He was wearing a towel and her sister was wearing her tights and bra only. She saw the complainant was distressed and crying. The complainant told her that the accused took out her clothes and did bad things. They went straight to the police and reported the incident.

[30] The third witness for the prosecution was the complainant's mother. She gave evidence that in 2018, she lived with her parents and her two daughters at Dalia Road, Navua. On 21 July 2018, she went to Suva and returned home at around 4.30 pm. When she came home, her two daughters were not there. She called them on their mobile and learnt that they were with the accused who she knew as Sonu. She spoke to the accused. He offered to drop them to Nadi in his vehicle but she refused. She told the accused to drop off her daughters at her home as they were getting late for Nadi. She waited for a while and when her daughters did not arrive she called them again on their mobile but the phone was switched

off. She then called on the accused's mobile but his phone was also switched off. She then left her home for Nadi after advising her mother that the accused would be dropping off her daughters to their home. Later the same night she learnt her daughters were at the police station. She returned to Navua the same night and when she arrived she went to the hospital. She met the complainant at the hospital. The complainant was in a distressed condition and was crying. The complainant told her that the accused took her to a room, placed a knife on her neck, pushed her on a mattress and came on top of her after undressing himself.

[31] The fourth witness for the prosecution was Tomasi Tabua. Tomasi's evidence is that he was driving a vehicle at Pacific Harbour at around 7.30 pm when an Indian girl requested him to drop her at a house that belonged to Sonu in Navua. He took her to Sonu's house and when they arrived there the girl got out and started searching for her sister. Tomasi saw that another young girl came running out of the house crying and that the owner of the house was with her. When he saw Sonu he was wearing a shorts and a towel on his shoulders. The girl who came out of the house was wearing her clothes but he could not recall what she was wearing except she was wearing a long t-shirt. From there he drove the complainant and her sister to Navua Police Station.

[32] The fifth witness for the prosecution was Dr Lee who medically examined the complainant at Navua Hospital on 21 July 2018 at about 9.30 pm. There was a small bruise like reddish lesion (Hickey) on the complainant's left breast, her hymen was ruptured and redness noted at 6 o' clock of perineum. The doctor did not find any bleeding on the complainant's genitalia or undergarment. She explained the absence of bleeding as follows:

...everybody is different, their vagina is different, their hymen is different, so in this case, her hymen for sure was not intact meaning that it's not there, so for her if her hymen structure is very small to begin with, if he had penetrated her there is a possibility that they could be like very small amount of blood and it could not have been seen and the other thing if her hymen is not there at all then there would be no possibility of bleeding.

[33] The sixth witness for the prosecution was the investigating officer, WDC Sylvia. When she attended the alleged crime scene she did see a bed and mattress in the room where the alleged incident took place.

[34] That is a summary of evidence led by the prosecution.

[35] **Defence Case**

The defence called a qualified gynecologist, Dr Pushpa Wati as an expert witness. She was asked for her expert opinions on the following:

Mr Khan - ... a child aged 12 years is forcefully raped by a man, big man 41 years old, what are the injuries you expect if you examine that child?

Doctor Pushpa: When a 12 year old is forcefully raped by anybody I would expect injuries near her vulva, her introits, especially I may expect a tear in the posterior frost and I would expect to see torn hymens but sometimes the tears that we have seen can be much more worse, there can be even internal tears of the posteria vagina extending right into the abdominal cavity also. Those are the things that I have seen from my experience.

Mr Khan: And from experience what about bleeding, blood?

Doctor Pushpa: Depends, the patient maybe actively bleeding if there is a vessel that is torn or she may have bled before or like there were some evidence of bleeding, there may be clots, its depends

Mr Khan: If a victim has been raped for example 6.30pm and examined at 9.30pm would you see any signs of blood?

Doctor Pushpa: Signs of blood may be there, she may not be bleeding and yes you will see signs of injuries, normally when we see a 12 year old girl who has been examined, you know because she is still a child, we have the mother

present with the child when we examine, a lot of times we take them to theatre and we do what is called examinations and anesthetic to check the extent of injuries if there is any

Mr Khan: And if there is an allegations of rape would you be able to find any sperms in the vagina?

Doctor Pushpa: We need to look for sperms. I think the protocol in Fiji is that from the sexual offence unit, the police will bring, they have a kit and we do sperm test, we look for DNA on sperms if there is allegation of rape

Mr Khan: And what about blood stains on undergarments, would you find some blood stains on undergarments?

Doctor Pushpa: If it's a 12 year old it's expected to find blood stains on the undergarment or whatever clothes she was wearing, we expect to find that.

[36] That is the evidence led by the defence.

[37] **Analysis**

The accused chose not to give evidence. That is perfectly his right and I draw no adverse inference against him for remaining silent.

[38] In deciding the facts in this case, it is my duty to decide which testimony to believe and which testimony not to believe. It is entirely up to me whether to believe everything a witness says, or part of it, or none of it. In considering the testimony of witnesses, I have taken into account:

The witness's opportunity and ability to see or hear or know the things testified to;

The witness's memory;

The witness's manner while testifying;

The witness's interest in the outcome of the case, if any;

The witness's bias or prejudice, if any;

Whether other evidence contradicted the witness's testimony; and
The reasonableness of the witness's testimony in light of all the evidence.

- [39] The weight of the evidence as to the fact does not necessarily depend on the number of witnesses who testify about it. What is important is how believable the witnesses are, and how much weight I think their testimony deserves.
- [40] The defence called a qualified and experienced gynecologist as an expert witness. Expert evidence is permitted in a criminal trial to provide the court with scientific information and opinion, which is within the witness' expertise, but which is likely to be outside the judge's experience and knowledge. I may consider the evidence of an expert to decide the facts of the case but I am not obliged to act upon it after having given the matter careful consideration. It is entirely a matter for me to decide whose evidence and whose opinions I accept.
- [41] In this case, the determination of the facts is substantially dependent on the credibility of the prosecution witnesses.
- [42] The complainant's account is that on 21 July 2018 the accused took her to his house in a vehicle without the consent of her mother or guardian, confined her inside a room, undressed her, kissed her on the lips and breast, licked her vagina and had sexual intercourse with her. I am mindful that her evidence need not be corroborated to be believed. If her account is true, than the accused is guilty of the charges. But if her account is false or may be false, than the accused is not guilty of the charges.
- [43] The complainant's account that the accused took her to his house without the consent of her guardian is supported by the complainant's sister. The sister's account is that the accused took the complainant out of her physical possession by driving off with the complainant in his vehicle and leaving her and a male companion behind at a secluded location. The sister found the complainant half naked and in a distressed condition with the accused inside his house later that same day.

- [44] The sister's account is supported by witness, Tomasi Tabua who saw the complainant coming out of the accused's house in a distressed condition.
- [45] The complainant's mother gave evidence that she did not give consent to the accused to take the complainant to his house for any purpose.
- [46] I find that there is consistency in the evidence of the complainant, her sister, her mother and Tomasi Tabua. It is not in dispute that the complainant was 12 years old on 21 July 2018. She gave evidence of an event that allegedly took place five years ago. Like all other witnesses, she relied upon her memory. She was cross-examined at length. On the material facts she was consistent in her evidence. If she omitted anything in her police statement it was peripheral and not relevant.
- [47] The medical evidence is that the complainant did not sustain serious physical injuries to her genitalia or bleeding. Dr Lee offered a reasonable explanation for her findings. She said that injuries and bleeding in rape cases depend on the body of the complainant and that every human body is different and may respond differently to sexual trauma. Dr Pushpa Wati did not disagree with this explanation but said that when a 12 year old child's vagina is penetrated with an adult penis, signs of bleeding and injuries may be present.
- [48] I do not make much of the fact that there was no serious physical injuries to the complainant's genitalia or bleeding. Dr Wati did not physically examine the complainant. Her evidence is of little probative value. Dr Lee's physical examination of the complainant may not have been thorough, but I find she acted in good faith in her examination of the complainant. Her medical findings are logical and consistent. She found a fresh small bruise like reddish lesion on the complainant's left breast and redness inside the vaginal area.
- [49] The complainant, her sister, her mother and Tomasi Tabua struck me as honest witnesses. I believe their evidence. I believe the evidence of the complainant that the accused took her out of the possession of her sister, confined her to a room, removed her clothes, kissed her on her lips and breast, licked her vagina and

penetrated her vagina with his penis. The intentions of the accused can be inferred from his conduct. He deliberately drove off with the complainant in his vehicle to his house and left the complainant's adult sister behind in a secluded location. The sister found the complainant half naked and in a distressed condition later in the same afternoon inside the accused's house.

- [50] On count one, I accept and I feel sure that on 21 July 2018 at Navua the accused penetrated the vagina of the complainant with his penis. Consent or lack of it is not an issue because the complainant was 12 years old at the time and lacked capacity to give consent.
- [51] On count two, I accept and I feel sure that on 21 July 2018 at Navua the accused deliberately and without any lawful excuse made sexual bodily contacts with the complainant's lips, breast and vagina with his mouth. I find that these sexual acts are contrary to the ordinary standards of respectable people in our community.
- [52] On count three, I accept and I feel sure that on 21 July 2018 at Navua the accused without a lawful excuse and with the intention to have sexual intercourse, took the 12 year old complainant, out of the possession and against the will of her parent or guardian.
- [53] On count four, I accept and I feel sure that on 21 July 2018 a Navua the accused without lawful authority or without legal justification restrained, restricted or held the 12 year old complainant against her will.
- [54] On each count the prosecution has proved the accused's guilt beyond a reasonable doubt.
- [55] **Verdict**
- On the first count of rape, I find the accused guilty and convict him accordingly.
 - On the second count of sexual assault, I find the accused guilty and convict him accordingly.

- On the third count of abduction, I find the accused guilty and convict him accordingly.
- On the fourth count of wrongful confinement, I find the accused guilty and convict him accordingly.



A handwritten signature in black ink, appearing to read "Daniel Goundar".

.....
Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State

Iqbal Khan & Associates for the Accused