

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 199 of 2017

STATE

V

UMENDRA KUMAR

Counsel : Ms. Mehzabeen Khan with Ms. Sadaf Shameem for the State
Ms. Lavinia David with Mr. Krisheel Chang for the Accused

Dates of Trial : 26, 29-30 January and 1-2, 12-16, 19-21 February 2018

Summing Up : 23 February 2018

Judgment : 26 February 2018

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

JUDGMENT

[1] As per the Amended Information the accused was charged with the following offences:

COUNT 1

Statement of Offence (a)

ABDUCTION OF YOUNG PERSONS: Contrary to Section 285 of the Crimes Act 2009.

Particulars of Offence (b)

UMENDRA KUMAR on the 10th day of January 2014, at Nasinu, in the Central Division, unlawfully took **RRD**, a young person being under the age of 18 years, out of the possession and against the will of her mother **RANITA DEVI**.

COUNT 2

Statement of Offence (a)

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

Particulars of Offence (b)

UMENDRA KUMAR between the 11th day of January 2014 and the 12th day of January 2014, at Nadi, in the Western Division, penetrated the vagina of **RRD** with his penis, without her consent.

COUNT 3

Statement of Offence (a)

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

Particulars of Offence (b)

UMENDRA KUMAR on the 12th day of January 2014, at Nadi, in the Western Division, penetrated the vagina of **RRD** with his penis, without her consent.

COUNT 4

Statement of Offence (a)

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

Particulars of Offence (b)

UMENDRA KUMAR on the 13th day of January 2014, at Rakiraki, in the Western Division, penetrated the vagina of **RRD** with his penis, without her consent.

- [2] As could be noted there is one count of Abduction of a Young Person, contrary to Section 285 of the Crimes Act No. 44 of 2009 (Crimes Act) and three counts of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act.
- [3] The accused pleaded not guilty to the charges and the ensuing trial was held over 13 days.
- [4] At the conclusion of the evidence and after the directions given in the summing up, by a majority decision the three Assessors found the accused guilty of all four counts.
- [5] I have carefully examined the evidence presented during the course of the trial. I direct myself in accordance with the law and the evidence which I discussed in my summing up to the Assessors and also the opinions of the Assessors.
- [6] During my summing up I explained to the Assessors the provisions of Section 285 of the Crimes Act.
- [7] The Assessors were directed that in order for the prosecution to prove the first count of Abduction of a Young Person, they must establish beyond any reasonable doubt that;
 - (i) The accused;
 - (ii) On the specified day (in this case the 10 January 2014);
 - (iii) At Nasinu, in the Central Division;
 - (iv) Unlawfully took RRD, out of the possession and against the will of her mother Ranita Devi; and
 - (v) The complainant was a young person being under the age of 18.
- [8] The Assessors were further directed that in order for the prosecution to prove the second count of Rape, they must establish beyond any reasonable doubt that;
 - (i) The accused;
 - (ii) During the specified period (in this case between 11 January 2014 and the 12 January 2014);
 - (iii) At Nadi, in the Western Division;
 - (iv) Penetrated the complainant's vagina, with his penis;
 - (v) Without the consent of the complainant; and

- (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.
- [9] Similarly, the Assessors were directed that in order for the prosecution to prove the third count of Rape, they must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) On the specified day (in this case the 12 January 2014);
 - (iii) At Nadi, in the Western Division;
 - (iv) Penetrated the complainant's vagina, with his penis;
 - (v) Without the consent of the complainant; and
 - (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.
- [10] Likewise, the Assessors were directed that in order for the prosecution to prove the fourth count of Rape, they must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) On the specified day (in this case the 13 January 2014);
 - (iii) At Rakirakiu, in the Western Division;
 - (iv) Penetrated the complainant's vagina, with his penis;
 - (v) Without the consent of the complainant; and
 - (vi) The accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting.
- [11] The above individual elements were further elaborated upon in my summing up.
- [12] I also directed the Assessors, in the event they have a reasonable doubt as to whether the prosecution has proven the two elements based on consent, which was explained to them in my summing up, beyond reasonable doubt and therefore the offence of Rape, in counts two, three and four is not established, as an alternative, they may consider whether the accused is guilty or not guilty of the lesser offence of Defilement of Young Person between 13 and 16 Years of Age, in respect of the said counts, though the accused is not formally charged in the Information for that offence.
- [13] I explained to the assessors that a person who penetrates the vagina of a complainant who is between the age of 13 and 16 with his penis is guilty of the offence of Defilement of Young Person between 13 and 16 Years of Age, under Section 215(1) of the Crimes Act.

- [14] I also explained that it is a defence to this offence if it appears to them that the accused had reasonable cause to believe, and did in fact believe, that the complainant was of or above the age of 16 years at the time.
- [15] In this case the prosecution relied on the evidence of the complainant, her mother, Ranita Devi, Dr. Brian Guevara and Viman Sonia Chand to prove its case. The defence relied on the evidence of the accused himself.
- [16] As at January 2014, the complainant was 14 years of age. She testified as to how she and her friend Sonia left Pastor James Lal's house at Matanikorovatu Road (8 Miles), at 11.00 p.m. on Friday 10 January 2014. The complainant stated that they were planning to walk back to her home at Navosai in Narere, using a short cut (through Muanikoso Road).
- [17] As they left the Pastor's house, a taxi came and stopped near them on the Matanikorovatu Road. The accused, who was the driver of the taxi, had asked where they were going. RRD had replied that they were going to her home at Navosai. The accused had said that he will go and drop them. However, she had said, it is okay, we are going to walk from here.
- [18] Then the accused had come out of the taxi with a knife in his hand. He had put the knife on her neck and told Sonia to get inside the taxi. The witness demonstrated in Court as to how the accused had held on to her with a knife in his hand. She said that they were shouting out for help, but there was nobody nearby. The complainant described the knife as something like a dagger knife. She said the shape of the knife was a bit strange. Not like a normal knife which is used in the kitchen.
- [19] After the accused had put the knife on her neck and grabbed her, he told Sonia to sit at the back seat of the taxi. Then he had pushed the complainant and told her to sit in the front seat. She had complied.
- [20] Thereafter, the complainant testified at length as to how she and Sonia were taken to Sonia's place of residence at Rewa Street. From there, the accused had driven to Lautoka. It was the next morning (Saturday morning), when they had reached Lautoka. The complainant testifies that when they reached Lautoka she was clearly able to identify the driver of the taxi as the accused.
- [21] They had stopped near Lautoka Town. A person, who the accused later identified as his friend Ron, had been waiting there with a carton of beer. Later, the witness testified that Ron was the accused's brother. Ron had got in and sat at the back seat of the taxi. Thereafter, the accused had driven to Nadi.
- [22] The witness testified, that throughout the journey from Suva to Lautoka, and thereafter to Nadi, the accused had kept the knife, which was originally shown to her, on the door by the driver's side (right side door).

- [23] The complainant clearly testified that the only person present in the house at Nadi was the accused's brother-in-law, who was known as Patru, and no one else.
- [24] She then went on to describe how the accused had forcefully had sexual intercourse with her that night (Saturday night). The witness said, that the accused had raped her. When asked to explain, she said the accused put his penis inside her vagina. She said it was painful. She was crying and shouting but nobody came to help her. The accused had been doing this for nearly ten minutes. He had also been kissing her all over her face and neck. The complainant testified that she had been crying and trying to push the accused away, and telling him to stop doing this as it was painful. However, the accused had continued. He had been swearing at her and saying, shut your mouth or I will throw you too into this bush.
- [25] Later on Sunday night, the accused came and pulled and dragged her from Sonia's room and took her to the room she had been the night before. The accused had then had forceful sexual intercourse with her that night as well. He had put his penis inside her vagina. He had done so for 10-15 minutes. While doing so, he had been pressing her neck and swearing at her. He had said, "Bitch I will cut you and throw you in this jungle". She had been afraid and was crying and calling for help. But nobody came to her assistance. The witness testified that the door to the room had been locked from inside and outside.
- [26] The next morning, (which was Monday morning), the accused had taken Sonia and her to Naria in Rakiraki (near the Malake Landing). The accused had said that they were being taken to his uncle and aunt's house. He had said if you tell anything to them, I am not scared of anyone. I will cut you two and dig one hole inside the mountain and bury you two. He had said so by pointing towards her and Sonia.
- [27] On reaching Rakiraki, the accused ordered the complainant and Sonia to get off from the taxi and took them inside the house. The accused's uncle and aunt had been present in that house. The accused had introduced the complainant as his wife, and Sonia as Ron's wife. The witness testified that she was afraid to say anything to the accused's uncle and aunt at the time as the accused had threatened her and Sonia.
- [28] Later that night the accused came into the room she was in and closed the door of the room. The accused had then pressed her neck and sworn at her. The accused had said, remember what I said before, if you tell something to uncle and aunty, remember I am not scared of anyone, not even uncle and aunty. I will kill all of you. He had then had forceful sexual intercourse with the complainant. The accused had put his penis into her vagina. He had been doing this for 10-15 minutes. He had also been kissing the complainant on her neck. She had been crying, as it was very painful. She said she had also been very scared due to the threats made to her by the accused. She had been pushing the accused and telling him to go away. But the accused did not comply.

- [29] Prosecution witness Viman Sonia Chand testified that in January 2014, she was 17 years of age. She was residing at Ritova Street off Rewa Street, with her grandmother's sister. Both her parents had passed away. She testified that on 10 January 2014 she had been at Pastor James Lal's house. Her friend, RRD, was also there with her. She had known the complainant for one year at the time.
- [30] The witness testified to the events that took place on the night of 10 January 2014, upto the point where the Police had come and rescued her and RRD in Rakiraki on the night of 15 January 2014.
- [31] Sonia testified that prior to leaving the Pastor's House on the night of Friday 10 January 2014, the complainant had given her a taxi driver's number and asked her to call. Thus she testified that when the accused arrived in his taxi she had initially thought that it was the taxi she had called for.
- [32] Sonia also stated that whilst in Lautoka the accused had taken them to Ron's house. Further, Sonia's evidence was that they were taken to Rakiraki on Sunday, and not on Monday as stated by the complainant in her evidence.
- [33] Sonia's evidence was otherwise consistent with the evidence given by the complainant.
- [34] In this case, the accused is taking up a total denial of all the charges against him. His position is that Sonia has stopped his taxi on Friday (10 January 2014) night. The complainant and Sonia had got into his taxi as passengers and on their own free will. He states that due to the manner in which they had been behaving he had thought that the complainant and Sonia were big girls; and that the complainant was over 20 years of age.
- [35] Although the accused admits that the complainant and Sonia were with him until Wednesday (15 January 2014), he totally denies having sexual intercourse with the complainant on any occasion, either in Nadi or in Rakiraki. His position is that while at Nadi he was with his family and that his mother, step-father, sister, brother-in-law and their two children were present at home. Similarly, while at Rakiraki his uncle and aunty and their son were present at home. Thus, his position is that there was no possibility for him to have sexual intercourse with the complainant.
- [36] In this case, by a majority decision the Assessors have found the accused guilty of all four counts. Which means that they have believed the evidence of the prosecution witnesses as truthful and reliable in respect of proving the said four counts. Therefore, it is clear that the Assessors have rejected the evidence of the accused in this regard.
- [37] In my view, the Assessor's opinion is justified. It was open for them to reach such a conclusion on the available evidence. Therefore, I concur with the majority opinion of the Assessors in finding the accused guilty on all four counts.
- [38] In conclusion, considering the totality of the evidence presented before this Court, it is my considered opinion that the prosecution has proved its case beyond any

reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the offence of Abduction of a Young Person and the three counts of Rape against the accused.

[39] In the circumstances, I find the accused guilty of all four counts as charged.

[40] Accordingly, I convict the accused on all four counts.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 26th Day of February 2018

Solicitor for the State : Office of the Director of Public Prosecutions, Suva.
Solicitor for the Accused : Office of the Legal Aid Commission, Suva.