

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 74 of 2020

THE STATE

vs.

DANIEL SINGH

Counsel : Ms. U.M.Tamanikaiyaroi with Mr. Balelevuka for State
Ms. D. Kumar for Defence

Dates of Hearing : 17, 18 August 2022

Date of Judgment : 23 August 2022

(Name of the Complainant is suppressed. She is referred to as NB)

JUDGMENT

1. The accused was charged with three counts of Rape, and one count of Sexual Assault. The amended information filed by the Director of Public Prosecution reads as follows:

Count 1
Statement of offence

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

Particulars of Offence

DANIEL SINGH sometime between the 1st day of January 2016 and the 31st day of December 2016 at Suva, in the Central Division, had carnal knowledge of NB, a child under the age of 13 year.

Count 2

Statement of Offence

SEXUAL ASSAULT: Contrary to Section 210 (1) (a) of the Crimes Act 2009.

Particulars of Offence

DANIEL SINGH sometimes between the 1st day of January 2016 and the 31st day of December 2016 at Suva, in the Central Division, unlawfully and indecently assaulted NB, by touching her breasts with his hands.

Count 3

Statement of Offence

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

Particulars of Offence

DANIEL SINGH sometime between the 1st day of January 2017 and the 31st day of December 2017 at Suva, in the Central Division, penetrated the mouth of NB, a child under the age of 13 years, with his penis.

Count 4

Statement of Offence

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

Particulars of Offence

DANIEL SINGH sometime between the 1st day of January 2018 and the 10th day of January 2018 at Suva, in the Central Division, had carnal Knowledge of NB, a child under the age of 13 years.

2. The accused pleaded not guilty to the charge. The trial commenced on 17 August 2022 and concluded on 18 August 2022. The Prosecution presented the evidence only of the complainant. At the end of the Prosecution case, the Court found no evidence to maintain Count 4 of the information. The accused was acquitted of Count 4. In respect of Counts 1, 2 and 3, the accused was put to his defence. The Accused elected to give evidence under oath and called his sister, wife and the police investigating officer. At the end of the Defence case, the Court heard oral submissions from both Counsel. Having carefully considered the evidence presented at the trial and the respective submissions, I now proceed to pronounce my judgment as follows.
3. The Prosecution bears the burden to prove all the elements of the offence and that proof must be beyond reasonable doubt. The burden never shifts to the accused at any stage of the trial. The presumption of innocence in favour of the accused will prevail until the charge is proved beyond reasonable doubt.
4. According to the information filed by the Director of Public Prosecutions, the complainant was under the age of 13 years at the time of the alleged offences. She did not possess the

necessary mental capacity to consent to any form of sexual activity. The offence of Rape as charged in Count 1 consists of the following elements.

- (a). The accused, Daniel Singh,
- (b). Penetrated of the vagina of the Complainant NB with his penis.

5. The offence of Rape as charged in Count 3 consists of the following elements.

- (a). The accused, Daniel Singh,
- (b). Penetrated of the mouth of the Complainant NB with his penis.

6. A slightest penetration is sufficient to prove the element of penetration.

7. To prove count 2 the prosecution must prove the following elements of the offence of Sexual Assault beyond reasonable doubt:

- (a) The accused, Daniel Singh;
- (b) Unlawfully and indecently;
- (c) Assaulted the complainant "NB".

8. The words "unlawfully" and "indecently" in respect of the second element of the offence of sexual assault means without lawful excuse and that the act has some elements of indecency that any right minded person would consider such conduct indecent. The final element -assault is the unlawful use of force on the complainant by the act of touching her breast.

9. The Complainant was 17 years of age at the time of her evidence. Considering that she is a child witness. Prosecution moved that certain special measures be taken to protect this vulnerable witness. The Defence did not raise any objection to this application. Accordingly, I took all protective measures available at my disposal to protect the child witness while ensuring a fair trial to the accused. That decision was made taking into consideration the rights of the witness and court's duty to ascertain the truth, and the rights of the accused to a fair trial. Although the screen blocked the accused's view of the complainant it did not preclude the accused from effective cross-examination. Main purpose of the criminal justice process is to get at the truth. If anything stands in the way in truth seeking exercise, that obstacle must be removed. None of those special measures prejudiced the accused and had nothing to do with my findings in this judgment.

10. Now I briefly summarise the salient parts of the evidence led in trial.

NB (The Complainant)

11. The complainant, NB testified that, her mother used to go to her cousin Fariza and her husband Daniel Singh's house to baby sit their daughter and do some domestic duties. During school holidays, she also accompanied her mother to Daniel's place where she watched movies and did picnics with them. She was happy in their company until 2016 when Daniel sexually abused her. The sexual abuse happened in night at Daniel's house during school holidays in 2016. During that time, she was staying at Daniel's house with her mother who was looking after Fariza's daughter. When she was doing homework, her aunty (Fariza) told her to tidy the bed in their bedroom. When Fariza left the room, Daniel entered the room. He threatened her and forced her to do all those things.

12. Daniel held her hand and put his hand on her mouth so she could not move anywhere. She started shouting but no one could hear her. At that time, her mother, Fariza and her daughter were in the kitchen. Kitchen is located right beside the dining table next to the sitting room. Daniel took off her clothes and started touching all her body and the breast in a bad way. She was on the bed. He did 'front part sexual assault' on her female front part. He inserted his penis into her vagina and had sex for 10 minutes. She was not feeling comfortable. She could not walk properly. Daniel didn't say anything to her at the time he was doing this to her. She was able to see Daniel because the light was on. She could not remember if the door to the room was closed. Then he took out his penis, *wiped out* the white things and asked her to leave the room. She went to have a bath because she could not feel well. She got sick that day.

13. After that incident, she told him that she will tell her mum and his wife. He then told her if she told anyone he will kill or do something to her. When she came to the sitting room, after having a bath, he came out from the room and sat in the sitting room. He again threatened to kill her when she complained about her body pain. So she didn't tell her mum or his wife. She didn't tell anyone about what Daniel did to her because all the time he was threatening to kill her. She was afraid that's why she couldn't tell her mother when she went back to Lokia with her mother.

14. In 2017, he did the same thing what he did in 2016. He sexually assaulted her in a different place. He put his penis in her mouth in the sitting room of Daniel's house. That time, Daniel's wife had gone to work and her mum was looking after her daughter. The attack occurred in a morning.
15. When she went to the sitting room to tidy and clean up, Daniel came out of the room and tied up her hands, put his penis on her mouth and sexually assaulted her from her back. He did it for 5 minutes. He was having sex from backside. She was not able to move because he had put her hands at the back and tied. She was shouting but no one could hear her. Daniel's grandmother was in the bed at the back side. She could walk only with a stick. After doing those things, Daniel took his car and went somewhere. Her mother called her to bring the daughter who was sleeping in the room. She didn't tell her mother about what Daniel had just done to her because Daniel had threatened to kill her.
16. When she was in school, she told her friend Adlina about what Daniel had done to her from 2016 until 2018. When she was sitting in the class room, Adlina asked what she is afraid of as she was not talking. Adlina asked her what really happened. That's when she had to share about what really happened to her. The matter was reported to the Police when Adlina told the teacher. The teacher reported to the head teacher. The counsel in school called the Nausori Police Station.
17. Under cross-examination, NB admitted that in 2016, Fiona and Daniel's sister Kashmirindar Kaur (Neha) were also staying at Daniel's house. She denied that in 2016, she came to Daniel's house in a taxi alone. She admitted having told Fariza, Neha and Fione that her private part was itchy. They just gave her powder, that's it. She said that itchiness started two days after the sexual assault. Itchiness stopped when she had a hot water bath.
18. She knew Abraal, her neighbour. She admitted that she was staying at Abraal's place until her mother was discharged from hospital. She can't remember when her mother left the work at Daniel's house. During the second incident, Daniel tied her hands. He didn't use anything but he used his own hands to tie her hands. All the time this sexual abuse was happening, he was standing at the back. When the second incident was happening in the sitting room, Neha was not at home. She got married and left the house. Daniel's grandmother Phul Kuar was in her room. She admitted that, in 2018, nothing happened.

19. She admitted that she did not tell police that Daniel tied her hands during the second incident because she didn't remember what really happened. She admitted that she told the police that Daniel had sex in the bathroom. When the first incident happened, she could remember where her mother was.

Case for Defence

Daniel Singh (The Accused)

20. Daniel testified that, in 2016, he was residing at his father's house at Davuilevu Housing. It is not a big house. He was there with his wife- Fariza, daughter-Shania, sister- Kashidar Kuar, (Neha) his grandmother Phul Kuar, and Fiona and sometimes Rafia and her daughter-NB. NB's mother Rafia was part time babysitting at Daniel's place.
21. From 2016 to 2017, he was working in Suva. He started work at 8.30 a.m. and finished at 6 p.m. He reached home sometimes after 8 p.m., depending on the traffic. His wife Fariza was working at Tapoos. They used to go together to work in their car. After work, he and his wife stayed together in one room. No one had access to that room and usually it is kept locked because it had jewellery and other valuables. He denied all the allegations that NB was making in her evidence. He said that if anybody was shouting in the sitting room, other people could hear.
22. Under cross-examination, Daniel admitted that he and his wife met NB for the first time in 2016. She admitted that his wife was buying uniforms and some other schools stationaries for NB. He admitted that NB sometimes used to come and stay at his place during school holidays in 2016 and in 2017 while her mother was babysitting. He admitted that he treated NB as his own daughter and she trusted him and his wife. He admitted that he would stay at home on public holidays when wife went for work at Tapoos.
23. He said that only he and his wife would go to his room and no one else would be allowed there. Her grandmother Phul Kuar would have been 85 plus in 2016. Daniel agreed that NB didn't complain to anyone until her teacher reported the matter to the Police.

Kashmidar Kaur (Neha).

24. Neha testified that she got married in April 2017 and went to Tacirua. In 2016, she was staying at her father's house at Davuilevu Housing with her brother- Daniel, Fariza, grandmother, Fiona, Fariza's baby, Rafia. Rafia's daughter-NB, occasionally used to come and stay with them during school holidays.
25. She recalls how NB came alone one day in a taxi with a big bag. NB seemed very restless and nervous and went to have a shower straightaway. NB complained of an itchininess in her private area. When grandmother questioned her, NB started crying and showed her private part which was red.
26. Daniel's house is a small one. The rooms, kitchen, and sitting room are situated side by side. Sitting room and kitchen are in an open area. She was home all the time and did not hear NB shouting or see Daniel doing anything wrong to NB at any time. Only the babysitter Rafia and no outsider had access to Daniel's room. Her grandmother could not walk and most of the time spent in the sitting room, watching TV.
27. Under cross Examination, Neha admitted that post April 2017, she would not know what actually happened at Daniels house. She admitted that the door to Daniel's bedroom was kept open and Rafia had access to it. She disagreed that she came to Court to help her brother. She told whatever the truth is. She admitted that she has an interest in her brother's case.

Fariza Fazleen Nafiz

28. Fariza, the wife of the accused, said that in the years 2016 and 2017, she was working for Tappoos from where she resigned on 25th May, 2017 to look after her baby when Rafia used to charge a high fee. Since the day she resigned, Fariza's service was no longer required. After a heated argument over the salary, Fariza was terminated. After that Fariza or her daughter never came to her house.
29. In the year 2016, NB came to her place alone in a taxi when Daniel was at work and NB spent the holiday with them. Upon her arrival, NB was complaining of an itchininess in her private

part. NB was advised to have a wash using hot water. After that, she called Rafia and told her what had happened to NB.

30. They lived in a four bedroom house. If somebody is shouting in the sitting room, people in the house will hear the voice.
31. Under cross-examination, Fariza said that she has been married to Daniel for 9 years. She admitted that she has an interest in this case as the accused's wife and agreed that she will do whatever it takes to get her husband out of prison. She admitted that being the cashier at Tapoos, she used to work occasionally on public holidays when Daniel was home. She agreed that she wouldn't know what would have happened at home when she was out at work. She agreed that NB sometime used to go into their room.

PC 4234 Vani Rogoimuri.

32. PC Vani was attached to the sexual offences unit of the Fiji Police Force for 12 years. She was the investigating officer in this case. The matter against Daniel Singh was reported in February 2018. She agreed that Daniel was charged a long time after the report was made. The reason for the delay being that she received instructions from the superior officers to summarise the file. She found that there was no sufficient evidence for the suspect to be charged for the offence of rape so she needed further clarification and instructions. She did only the interview and not charge the suspect. Under cross-examination, she agreed that the charges were filed in Court against Daniel Singh.
33. That's the case for the Defence.

Analysis

34. The birth certificate of the complainant tendered in evidence (PE1) was not challenged by the Defence. According to the birth certificate, the complainant was born on 10 January 2005. She was under the age of 13 years at the time of the offences alleged in counts 1, 2 and 3 (2016-2017) of the information. She did not have the necessary mental capacity to give consent to any sexual activity. Accordingly, the Prosecution, on counts 1 and 2, needed only

to prove that the accused in 2016 vaginally penetrated the complainant and touched her breast. And on count 3, that the accused in 2017, penetrated her mouth with his penis.

35. The identity of the accused was not in dispute. There is no dispute that the complainant used to come to the accused's house during school holidays while her mother was babysitting accused's daughter during the period between 2016 and 2017. According to the complainant, the first alleged incident occurred in a room of accused's house, during night time. The complainant said that the light was on and she could recognise the accused. The second alleged incident occurred in brought daylight. The Defence did not dispute the identity of the accused at all.
36. The Prosecution solely relies on the evidence of the complainant. She was a child of 13 years of age when the matter was reported to police in 2018. She was giving evidence in Court approximately five years after the second alleged incident which occurred in 2017. The Prosecution says that the child complainant is credible and reliable. The case for the Defence is one of complete denial; that the alleged offences never occurred.
37. The Defence ran the defence on the basis that the complainant was not consistent in her evidence and that her evidence was implausible that she did not tell the truth in Court. This a case of one word against the other and the decision turns on who told the truth in Court. However, I am mindful that the Prosecution has to prove the case beyond reasonable doubt and that burden never shifts to the Defence.
38. To challenge the credibility of the complainant's evidence, the Defence took up the position that the events the complainant described in Court were improbable and implausible. Let me now turn to the complainant's evidence. Her evidence was that, in 2016, when the 1st assault took place, she, on Fariza's instructions, had gone to the accused's bedroom to tidy the bed. When Fariza had left, the accused had entered the room. He had threatened the complainant and forced her to do the sexual activities she described in her evidence.
39. The complainant said that the accused held her hand and put his hand on her mouth so she could not move anywhere. She started shouting but no one could hear her. At that time, her mother, Fariza and Fariza's daughter were in the kitchen. Kitchen is located right beside the dining table next to the sitting room. The incident had occurred at night.

40. The Defence argues that it is highly unlikely that the accused was engaged in those sexual activities when his wife and the mother of the complainant were present at home. The complainant could not remember if the door was closed upon accused's entry into the room. The police investigators had not drawn a sketch plan of the house and no witness was called by the Prosecution to describe the layout of the house. There is no evidence to get an idea as to the exact distance between the room where the alleged incident occurred and the kitchen where Fariza and her mother had been at that time. According to the complainant, the kitchen is located right beside the dining table next to the sitting room. It is the evidence of the Defence that the house is not a big house. The fact remains that, at one time, altogether 7 -8 people lived in that house. That suggests that the house is not that small.
41. The argument of the Defence is that if the complainant had shouted, her voice should have alerted her mother and Fariza in that night. It is the evidence of the complainant that the accused put his hand on her mouth, forced and threatened her. Faced with such an unexpected attack from a person whom she had trusted so much, it is possible that a child of her age would have been shocked and frozen, rendering her completely mute. In such a scenario, it is possible that the incident described by the complainant to take place without it being noticed by Fariza and complainant's mother. It is highly unlikely that the accused, a sensible man he is, will choose to engage in a sexual activity with a child if he had slightest of doubt that his wife or complainant's mother will approach them.
42. The 2017 attack had occurred in the sitting room, an open area of the house. The attack had occurred in a morning. The complainant had shouted but no one had heard her voice. On that particular day, the accused's wife had gone to work. The complainant's mother was looking after the accused's daughter. Accused's grandmother was in her bedroom. She was in her late eighties and not able to walk properly without the support of a stick. It is possible that the accused was presented with an opportunity to penetrate complainant's mouth in the sitting room when he was sure that the complainant's mother would not approach them or hear them.
43. It is also contended that it is not possible for the accused to penetrate the mouth of the complainant if he at all times was standing at her back. The complainant in her evidence in chief did not say that the accused was standing at her back all the time. She only said that the accused came out of the room and tied up her hands, put his penis on his mouth. She also said

that the he was having sex from backside. In her cross-examination, she said that while the sexual abuse was happening, the accused was at all times standing at her back. It is clear that she was answering leading questions of the Defence Counsel and answering in a context where she was describing how the accused was having sex from backside. Even in her evidence-in-chief, she talked about 'backside sex' but the State Counsel did not dig into this incident perhaps because the accused was not charged for such an act.

44. This is a classic example that demonstrates how a defence counsel, in the course of cross-examination could achieve his or her objective in getting a child witness to answer the way the counsel wanted, in the absence of timely objection by a vigilant prosecutor. In another instance, the Defence Counsel asked the complainant whether she had come in a taxi to the accused's house alone. Her readily given was 'no'. Then the Defence Counsel asked her whether she could remember such an incident or not. Her answer was that she could not remember.
45. The complainant was a child. The alleged incidents had taken place approximately 5-6 years ago. She cannot be expected to give evidence from a photographic memory and describe each and every fine detail of an incident that took place 5-6 years ago, which even an adult witness is not capable of. However, she could very well remember how she was penetrated vaginally and orally and how she was fondled in a bad way by the accused whom she trusted very much and how the accused wiped out the white thing from his penis after the first incident. Although she was evasive in answering some of the immaterial questions, for example the question how old the daughter of the accused then was, I am confident that the complainant is an honest witness who told the truth in Court.
46. The complainant had not relayed any of the incidents to her mother or anybody until she opened up at school when she relayed the incidents to her classmate-Aldina in 2018. The Defence appears to argue that the complainant did not promptly complain because such incidents never happened. This argument is not sustainable in the circumstances of this case. There is a reasonable and plausible explanation for the delay. After the first incident, the complainant was threatened twice with death by the accused when she indicated that she is going to tell her mother. The accused had maintained that death threat for a considerable period of time.

47. There was not even a suggestion put to the complainant that she had fabricated her complaint or that she had an ulterior motive to make up these allegations. The circumstances under which the incidents eventually came to light negate the existence of any such motive. Those circumstances further bolster up the version of the complainant.
48. According to the complainant, she had first relayed the incidents to her classmate, Adlina. Adlina had noted the distressed condition of the complainant that she (complainant) was not talking to her as usual which behavior prompted Adlina to question 'what's the matter with her?' She had then told Adlina what happened and Adlina in turn reported the matter to her class teacher. Adlina or the teacher was not called by the Prosecution to support complainant's evidence. However, the Defence did not challenge this part of her evidence and the accused himself admitted that the complainant didn't complain to anyone until her teacher reported the matter to police.
49. By the time the complaint was made, she was no longer in the grips of the accused as her mother had terminated her babysitting job at accused's house. She was no longer under obligation to accused's wife-fariza who was buying uniforms and some other schools stationaries. In that context, she would have felt free to share the incidents with her close friend. The delayed complaint in this case, in my opinion, does not affect the credibility of the complainant.
50. Although the Defence had nothing to prove, it called three witness in addition to the accused who testified under oath. The accused denied all the allegations and tried to convince the Court that it was never possible for him to engage in the sexual conducts the complainant testified to, given the layout of his house, the number of people it occupied. His evidence that the door to his room was always kept closed and no outsider had access to it was contradicted by his wife Fariza. It is obvious that he was giving evidence to save his own skin.
51. Neha, the sister, and Fariza, the wife of the accused are not independent witnesses who obviously have an interest in this case. Fariza said she will do whatever it takes to get her husband out of trouble. Both of them were trying to convince the Court that it was never possible for the accused to engage in the sexual conducts the complainant testified to, given the layout of his house, the number of people it occupied. It is obvious that the accused will not engage in sexual activities with a child when his wife or sister was around. Therefore, they

are not in a position to say whether those incidents occurred or not. Fariza admitted that she on occasions went to work on public holidays while the accused stayed home. Neha got married in April 2017 and had left the house. She would not know what was happening at accused's house from May 2017.

52. Both Neha and Fariza testified to an incident in which the complainant had arrived in a taxi alone and complained of an itchiness in her private part. The complainant denied that she had come alone in a taxi with a bag. She was only 11 years old at that time and it is hardly believable that she took a taxi and came to the accused's house alone. The complainant however, admitted that she had an itchiness in her private part for which treatments were recommended by the ladies at the accused's house. According to her, she had encountered this itchiness two or three days after the sexual abuse. If the ladies had any doubt as to the cause of the itchiness, they should have reported the matter to police or any other authority in child protection. There is no evidence to that effect. The itchiness in complainant's private part 2-3 days after the sexual abuse is consistent with the Prosecution case that she was raped.
53. The last witness for Defence was PC Vani, the investigating officer of this case. She was attached to the Sexual Offences Unit of the Fiji Police Force for 12 years. The charges against the accused had been filed in the Magistrate Court in 2021, about three years after the matter was reported to police in 2018. The reason for the delayed arraignment was that she was not sure if the evidence was adequate to maintain charge against the accused. She had sought further instructions from her superiors.
54. This is a case where a complaint had been received from a school that a child has been raped by the employer of her mother. The statement of the complainant and that of her teacher had been recorded. In such a context, the investigating officer did not inform the Court what more evidence she required to charge the accused for Rape.
55. Evidence adduced for the Defence is not appealing to me. I reject the evidence of the Defence.
56. No corroboration is required to prove a charge of rape in Fiji even in cases where the complainant is a child. The charge can be proved without any supporting evidence if the Prosecution can establish that the version of the complainant is credible and believable. The

Prosecution in this case has discharged that burden. The evidence adduced for the Defence did not create any doubt in the Prosecution case that established the charges beyond reasonable doubt. I accept the version of the Prosecution.

57. The complainant said that the accused penetrated her vagina in 2016 and mouth in 2017 with his penis. She also said that the accused took off her clothes and fondled her breast. The elements of the offence of Rape and Sexual assault were established. I find the accused guilty on count 1, 2 and 3 as charged.
58. The accused is convicted accordingly.



A handwritten signature in black ink, appearing to read "Aruna Aluthge".

Aruna Aluthge
Judge

23 August 2022

At Suva

Counsel:

- Office of the Director of Public Prosecution for State
- Dharmendra Kumar Lawyers for Defence