

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 74 of 2020

STATE

V

KRISHNEEL KAUSHAL NAIDU

(FIRST ACCUSED)

AND

KARTIK KUMAR

(SECOND ACCUSED)

Counsel : Mr. U. Lal for the State.
: Mr. N. Chand and Mr. P.R. Sharma for the First
Accused.
Mr. J. Reddy for the Second Accused.

Dates of Hearing : 12, 13, 14, 15 September, 2023
Closing Speeches : 20 September, 2023
Date of Judgment : 21 September, 2023

JUDGMENT

(The name of the complainant is suppressed she will be referred to as "N.N")

1. The Director of Public Prosecutions charged the accused by filing the following information:

FIRST COUNT

Statement of Offence (a)

ABDUCTION OF YOUNG PERSONS: contrary to section 285 of the Crimes Act, 2009.

Particulars of Offence (b)

KRISHNEEL KAUSHAL NAIDU AND KARTIK KUMAR, on the 18th day of March, 2020, at Malau, Rakiraki in the Western Division, unlawfully took “N.N”, being under the age 18 years, out of the possession and against the will of her mother.

SECOND COUNT

Statement of Offence (a)

RAPE: contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009.

Particulars of Offence (b)

KRISHNEEL KAUSHAL NAIDU, on the 18th day of March, 2020, at Malau, Rakiraki in the Western Division, had carnal knowledge of “N.N” without her consent.

THIRD COUNT

Statement of Offence (a)

RAPE: contrary to section 207(1) and (2) (a) of the Crimes Act, 2009.

Particulars of Offence (b)

KRISHNEEL KAUSHAL NAIDU, on the 18th day of March, 2020, at Malau, Rakiraki in the Western Division, on an occasion different from count two, had carnal knowledge of “N.N” without her consent.

FOURTH COUNT

Statement of Offence (a)

RAPE: contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009.

Particulars of Offence (b)

KRISHNEEL KAUSHAL NAIDU, on the 18th day of March, 2020, at Malau, Rakiraki in the Western Division, on in occasion different from count three, had carnal knowledge of "N.N" without her consent.

FIFTH COUNT

Statement of Offence (a)

RAPE: contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009.

Particulars of Offence (b)

KARTIK KUMAR, on the 18th day of March, 2020, at Malau, Rakiraki in the Western Division, had carnal knowledge of "N.N" without her consent.

SIXTH COUNT

Statement of Offence (a)

RAPE: contrary to section 207 (1) and (2) (a) of the Crimes Act, 2009.

Particulars of Offence (b)

KARTIK KUMAR, on the 18th day of March, 2020, at Malau, Rakiraki in the Western Division, on an occasion different from count five, had carnal knowledge of "N.N" without her consent.

2. In this trial, the prosecution called four witnesses and after the prosecution closed its case, this court ruled that both the accused persons had a case to answer in respect of count one abduction of young persons.

The first accused for lesser offence of defilement in count two and for rape in count three. The second accused for rape in counts five and six as charged.

BURDEN OF PROOF AND STANDARD OF PROOF

3. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused persons. There is no obligation on the accused persons to prove their innocence. An accused person is presumed to be innocent until he or she is proven guilty. The standard of proof is one of proof beyond reasonable doubt.

ELEMENTS OF THE OFFENCE

ABDUCTION OF YOUNG PERSONS

4. In respect of the first count the prosecution must prove the following elements of the offence of abduction of young persons beyond reasonable doubt:
 - (a) The accused persons;
 - (b) unlawfully takes or causes to be taken;
 - (c) the complainant being under the age of 18 years;
 - (d) out of the possession and against the will of her mother who had the lawful care or charge of the complainant.
5. "Taking" need not be by force. It could be either actual or constructive. It is immaterial whether the girl consents or not. In a 'constructive taking' it is not necessary to take the complainant out of the possession of her mother physically. It is sufficient that the accused persons, by some act, by some words or by some conduct, caused the complainant to leave her mother. Evidence of "substantial interference with the possessory

relationship of mother and the complainant” is sufficient to constitute the element of “taking”.

6. The complainant was under 18 years of age.
7. The prosecution alleges that both the accused persons took the complainant out of the possession and against the will of her mother. At the time of the allegation the complainant was 15 years of age.

DEFILEMENT OF YOUNG PERSON BETWEEN 13 AND 16 YEARS OF AGE

8. To prove the lesser offence of defilement of young person between 13 and 16 years of age in count two (section 215 of the Crimes Act) the prosecution must prove the following elements of this offence beyond reasonable doubt:
 - a). The first accused:
 - b). unlawfully and carnally knows or attempts to have unlawful carnal knowledge of the complainant;
 - c). the complainant was above the age of 13 years and under the age of 16 years.
9. To prove the offence of defilement, the prosecution must prove beyond reasonable doubt that the first 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 the accused person’s reasonable cause to believe, and he did in fact believe, that the complainant was over the age of 16 years is a defence.

RAPE

10. In respect of the counts of rape the prosecution must prove the following elements beyond reasonable doubt:
 - (a) Both the accused persons respectively;
 - (b) penetrated the vagina of the complainant with their penis;
 - (c) without her consent;
 - (d) the accused persons knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

11. In this trial, both the accused persons have denied committing the offences of rape as charged. It is for the prosecution to prove beyond reasonable doubt that it was both the accused persons respectively who had penetrated the vagina of the complainant with their penis without her consent and both the accused persons knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

12. The first element of the offence is concerned with the identity of the persons who allegedly committed this offence. This element of the offence is not in dispute.

13. The second element is the act of penetration of the complainant's vagina by the penis. This element of the offence is also not in dispute.

14. The third element is of consent, this element is in dispute. Consent means to agree freely and voluntarily and out of her free will. If consent was obtained by force, threat, intimidation or fear of bodily harm or by exercise of authority, then that consent is no consent at all. Furthermore, submission without physical resistance by the complainant to an act of another shall not alone constitute consent.

15. If this court is satisfied that both the accused respectively had penetrated the vagina of the complainant with their penis and she had not consented, then this court is required to consider the last element of the offence that is whether the accused persons knew or believed that the complainant was not consenting or did not care if she was not consenting at the time.
16. To answer the above this court will have to look at the conduct of both the complainant and the accused persons at the time and the surrounding circumstances to decide this issue.
17. If this court is satisfied beyond reasonable doubt that the prosecution has proven beyond reasonable doubt that both the accused respectively had penetrated their penis into the complainant's vagina without her consent then this court must find either or both the accused persons guilty as charged.
18. If on the other hand, there is a reasonable doubt with regard to any of those elements concerning the offences of rape, then this court must find either or both the accused persons not guilty.
19. The slightest of penetration of the complainant's vagina by the accused penis is sufficient to satisfy the act of penetration.
20. As a matter of law, I direct myself that offences of sexual nature as in this case do not require the evidence of the complainant to be corroborated. This means, if this court is satisfied with the evidence given by the complainant and accepts it as reliable and truthful then this court is not required to look for any other evidence to support the account given by the complainant. It is kept in mind that the complainant in respect of

the first count of abduction of young persons is the mother of the complainant.

21. In this case, both the accused persons are charged with more than one offence, I have borne in mind that the evidence in each count and each accused is to be considered separately from the other. It is not to be assumed that because one accused is guilty of one count that he must be guilty of the others as well. This also applies to the outcome of not guilty.

ADMITTED FACTS

22. In this trial, the prosecution and the defence have agreed to certain facts titled as Admitted Facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
23. I will now remind myself of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

PROSECUTION CASE

24. The complainant informed the court that in the year 2020 she was 15 years of age and a year 11 student. She was residing with her parents, grandparents and siblings in Rakiraki. Her date of birth is 23rd May, 2004. The birth certificate of the complainant was marked and tendered as prosecution exhibit no. 1.

25. On 18th March, 2020 at 8.30 pm the complainant left home to meet the first accused Krishneel. At about 8.45pm the complainant arrived at the junction, prior to this the complainant and Krishneel were communicating with each other through text messages. Krishneel asked the complainant to meet him during night time and the complainant agreed.
26. As the complainant walked to the junction a car came and stopped a bit further away from the junction. Krishneel opened the back door of the car since he was seated at the back, the complainant went and sat beside Krishneel. The complainant also knows the second accused Kartik who was the driver of the car.
27. As the car started to move Krishneel removed the complainant's clothes she then laid on the seat the accused went on top of her and they had sexual intercourse. The accused made love bites on the neck of the complainant. The sexual intercourse lasted for about 5 to 10 minutes. According to the complainant when she was having sex with Krishneel the vehicle was parked near a temple. The complainant had consented to have sex with Krishneel.
28. Thereafter Kartik the second accused drove the car to another place the complainant saw it was a bushy area. Krishneel's phone started ringing so the car was stopped and Krishneel left the car to talk outside. At this time the complainant was lying on the seat naked.
29. Kartik came and kissed her on her mouth, the complainant had not allowed Kartik to do this to her. Kartik said that he also wanted to have sex with her since she had allowed Krishneel, he asked that he be allowed as well. The complainant was sitting when Kartik came into the car, he then pushed her on the seat and kissed her.

30. The complainant did not want Kartik to have sex with her. Kartik after opening his pants pressed her hand and forcefully had sex with her. At this time Krishneel was standing outside the car. Kartik had sexual intercourse with the complainant for about 10 to 15 minutes.
31. The complainant did not consent for Kartik to have sexual intercourse with her. The complainant said she told Kartik that she does not want to have sex with him. After Kartik finished Krishneel came and sat in the car beside the complainant. The complainant was lying on the back seat and Kartik started to drive the car.
32. Kartik drove the car to a third place and sat outside the car. At this time Krishneel started to have sexual intercourse with the complainant. This time the car was parked near some houses far from the left hand side of the road.
33. The complainant stated that she told Krishneel to stop but he did not and she had not consented for him to have sexual intercourse with her. When questioned why she was not consenting on this occasion the complainant said her body started to pain and she was about to get unconscious. When the complainant told Krishneel to stop he was getting angry and he bit her left shoulder. The complainant yelled and the accused said yell more.
34. Krishneel had sexual intercourse with the complainant for about 5 minutes on this occasion. When Krishneel said yell more she told Krishneel continuously not to do it but Krishneel did not stop. According to the complainant the vehicle was driven by Kartik while Krishneel was having sex with her. After Krishneel finished he left the car.

35. After this Kartik came on top of the complainant and started having sexual intercourse with her at this time she was feeling like she will faint since by this time the sexual intercourse on her by the two accused persons was four times. Kartik held her hand when he had sex with her after he finished he went outside the car. The complainant said she did not consent for Kartik to have sex with her again.
36. After sometime Krishneel came and sat in the back seat and Kartik started to drive towards her home on the way the police stopped the car and one police officer questioned Kartik and opened the rear door of the car. The complainant was told to wear her clothes and come outside. The complainant's brother was present, by this time it was about 11pm the complainant was taken to the police station. When the car was stopped by the police officers she was not asked anything by the police officer. They were talking with Krishneel and Kartik. The same night the complainant was taken to the hospital for medical examination.
37. The complainant knows both the accused persons. The sister in law of Krishneel was schooling with the complainant in year 11 and it was Krishneel's sister in law who had told the complainant about Krishneel. Furthermore, once prior to 18th March, 2020 the complainant had met Krishneel at the bus stand when she had returned from school and at this time she was in her school uniform.
38. The complainant also knows Kartik through his sister who was a student in another school she recognized both the accused persons in court.
39. In cross examination by Krishneel's counsel the complainant stated that when she left home her mother did not know about it. She did not like Krishneel and she did not speak to him on the phone. When questioned why did she go and meet Krishneel the complainant said when she had

met Krishneel on an earlier occasion he had told her to meet him so she went to meet him.

40. The complainant agreed that she enjoyed having sex with Krishneel near the temple and she had her mobile phone with her but as soon as she sat in the car Krishneel took away her phone. According to the complainant the police officers took out her phone from the car and gave it to her.
41. The complainant agreed she was naked when police stopped the car. In 2020 her physique was the same as she is now. When it was put to the complainant that on all occasions she had sex with Krishneel she had consented the complainant said she had consented on one occasion only. When asked why she had only consented on one occasion the complainant said after Kartik had sex with her she did not feel good and did not like it.
42. The complainant agreed that just because Kartik had sex with her she did not feel good, and also when both the accused had sex with her. She would have liked it if only Krishneel had sex with her. The complainant also agreed that on that night she went to meet Krishneel to have sex. She also did not want her mother to know that she went to meet Krishneel. When the car was stopped by the police Krishneel was with her in the back seat.
43. In cross examination by Kartik's counsel the complainant agreed she had left her house that night at about 8.30pm on her own. The complainant agreed she was under the care and control of her mother and she had not sought her mother's permission to leave the house.

44. On this night Kartik had not asked her to meet him and since it was dark the complainant had used her phone torch light when leaving her home and walked to the junction. The complainant stated when she boarded the car and saw Kartik in the driver's seat she had asked Kartik "*what you are doing here*". The reply was that he was just the driver since Krishneel had brought him. In the car only Krishneel had asked to have sex with her and she agreed. When it was put to the complainant that both Krishneel and Kartik had asked her to have sex with both of them the complainant said only Krishneel had asked.
45. The complainant agreed she gave a statement to the police on 19th March, 2020 when it was put to the complainant that in her police statement it was stated that whilst she was in the car both the accused persons had asked her for sex in the car. The complainant agreed.
46. When it was put to the complainant that she had agreed to have sex with Kartik the complainant said she did not and she had not demanded for any money to be paid to her by Kartik. When Krishneel was having sex with her on the first occasion Kartik went outside the car but he came and opened the door where her head was and in full view of Kartik Krishneel was having sex with her. According to the complainant she did not feel good about this. Upon further questioning the complainant stated that when Krishneel was having sex with her on the first occasion Krishneel had told Kartik to hold her hands so that Krishneel can have sex and that was the reason why Kartik had opened the door and was holding her hand.
47. In respect of the issue of consent to have sex with Krishneel on the first occasion the complainant was questioned that to the police in her police statement she had mentioned that she did not consent but in her evidence in court she said that she had consented. The complainant

agreed that there were two versions but she maintained that whatever she told in court was the truth.

48. The complainant stated that in total Kartik had sex with her twice and on both occasions she did not consent. When Kartik was having sex with her on the first occasion Krishneel was outside the car talking on the phone. Kartik had sexual intercourse for about 10 to 15 minutes.
49. The complainant agreed that she told the police when Kartik was having sex with her Krishneel was holding her hands. However, she explained she got confused that is why she said this to the police, at the time of giving her police statement she was weak since it was four times of sexual intercourse on her. When Kartik had sex with her it was only vaginal penetration by the penis.
50. The complainant was referred to her police statement dated 19th March, 2020 page 2, line 13 which was read as:

While on our way back, Kartik turned me around and again inserted his erected penis inside my anus.

51. The complainant agreed that she told the police that Kartik had inserted his penis into her anus. The reason according to the complainant was that when she was taken for medical examination she came to know that her anus was also penetrated and this is what Kartik wanted to do. When questioned that she could not make out whether her anus was penetrated or not the complainant said *"I felt pain that is why I shouted but I could not know that somebody had done it there too."*
52. When it was put to the complainant that in her police statement she had stated that Kartik had penetrated her vagina once, the complainant

maintained that he had done so twice. When it was put to the complainant that the police statement was not correct the complainant said something's were true and something's were not true. When suggested that she lied to the police the complainant said *"whatever they have asked me only those things I have answered."*

53. The complainant was again referred to her police statement line 14 which was read as: *but Kartik kept on pulling and pushing my body.* When questioned that it was Kartik who was with her in the back seat before the police stopped the car the complainant said that she was confused so instead of telling the police officer it was Krishneel she said it was Kartik.
54. The complainant denied that on the night of 18th March, 2020 she had agreed to have sexual intercourse with Kartik upon payment of money she said there was no discussions about payment of \$100.00 to her. The complainant maintained that Kartik had sexual intercourse with her twice. The complainant denied that it was Kartik with her in the back seat and that she was sitting on his lap facing him and both were kissing each other.
55. The complainant denied that Kartik had only tried to have sex with her at the back seat of the car when the police stopped the car. The complainant maintained that it was Krishneel with her and not Kartik when the police stopped the car. The complainant also denied the proposition that at this time Kartik's erected penis was touching her vagina when the police had stopped the car. The complainant denied that she had consented to the acts of Kartik and had consensual sex after receiving \$100.00 from Kartik.

56. In re-examination the complainant clarified that by saying she fainted she meant her body was loosening and giving up and had started to ache.
57. The second witness Rozina Anisun the mother of the complainant informed the court that in the evening of 18th March, 2020 at about 8.45 to 9pm she went to sleep with her youngest daughter and the complainant who was nearing 16 years of age.
58. The witness slept on one bed and her two daughters on the other bed in the same room. After sometime her son woke her and inquired who had left the house back door open. The witness responded that she did not know.
59. When the light in the bedroom was switched on it was discovered that the complainant was missing. After a search in the house a missing person's report was lodged at the Rakiraki Police Station. Later the same night the complainant was located and she came home. According to the witness the complainant was drunk and the complainant did not say anything to the witness. The witness further stated that she did not allow or give permission to the complainant to go anywhere that night. The complainant was in the care of the witness at that time.
60. In cross examination by Krishneel's counsel the witness stated that she did not know where the complainant had gone that night and since the light in the bedroom was switched off she did not know when the complainant had left the bedroom.
61. The third witness PC 5403 Toma told the court he was on night patrol with PC Pita and PC Kameli when they received a missing person's report that a 15 year old girl was missing. The team met the brother of the

complainant and as the police vehicle was pulling out of the junction where the house of the complainant was one white vehicle was coming from the opposite direction.

62. The driver PC Kameli stopped the oncoming vehicle. When the vehicle stopped the witness spoke to the driver and asked him where he was going. At this time PC Kameli showed his torch light at the back seat of the white car. The witness saw a girl and an Indian guy hiding in the back seat of the car and both were naked.
63. The witness suspected the girl in the back of the car to be the missing person. The witness when talking to the driver of the car smelt liquor. The witness observed that the girl and the Indo Fijian guy were shocked. The witness later came to know that the name of the driver of the car was Krishneel and the person with the girl in the back seat of the car was Kartik. According to the witness when he saw the girl he suspected her to be underage who was reported to be missing. The two suspects were escorted to the Rakiraki Police Station.
64. In cross examination by Krishneel's counsel the witness said Krishneel was the driver of the white car and all the occupants of the car were drunk.
65. In cross examination by Kartik's counsel the witness said he had spoken to the girl and the two suspects but they did not say anything, they were shocked. The girl did not make any complaints according to the witness the girl was scared and silent.
66. In re-examination the witness stated that he was sure that Kartik was naked at the back seat of the car and smelt of liquor.

67. The final witness Dr. Jonathan Avoc who was the replacement doctor for Dr. Sajeshni Chand informed the court that he graduated with an MBBS degree from the University of Fiji and he also graduated from the Fiji National University with Post Graduate Diploma in NCD and Masters in Public Health and NCD.
68. This witness was called to read the medical report of the complainant since Dr. Chand who had examined the complainant was not available. The defence did not have any objections for the replacement doctor to be called and read the medical report of the complainant.
69. I would to state here that the complainant in her evidence did not mention anything about penetration of her anus by any of the accused persons. It was only during the cross examination of the complainant by Kartik's counsel that this issue was brought up. In order to avoid any prejudice or unfairness to any of the accused persons this court has disregarded all reference made in respect of anal penetration.
70. On 19th March, 2020 the complainant was examined at the Rakiraki Hospital. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no.2.
71. The specific medical findings of the examining doctor were:
- (a) Extensive bruises on the neck;
 - (b) Extensive bruises on the breast;
 - (c) Hymen not visible, however, there was dried blood noted around the vagina.
72. The witness with reference to appendix 1 explained that in respect of (a) and (b) above the causes could be from blunt force injury or love bites, sucking of the skin and scratches. In respect of (c) the blood noted could

have been by forceful penetration of penis or finger resulting in loss of intact hymen.

73. In cross examination by Krishneel's counsel the witness agreed that there was no specific illustration in respect of the anus in appendix 1.
74. In cross examination by Kartik's counsel the witness stated that the bruises on the neck could be from love bites and that the medical report did not show any vaginal injuries. The witness stated that there is a possibility the blood noted could have been from menses or intact hymen getting damaged.

DIRECTION ON EXPERT EVIDENCE

75. This court has heard the evidence of Dr. Avoc who had been called as an expert on behalf of the prosecution in place of the examining doctor. Expert evidence is permitted in a criminal trial to provide the court with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called and it is important that this court should see it in its proper perspective. The medical report of the complainant is before this court and what the doctor said in his evidence as a whole is to assist this court.
76. An expert witness is entitled to express an opinion in respect of his or her findings and I am entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the replacement doctor. When coming to my conclusion about this aspect of the case this court should bear in mind that if, having given the matter careful consideration, this court does not accept the evidence of the expert it does not have to act upon it. Indeed, this court does not have to accept even the unchallenged evidence of the doctor.

77. This evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to this court in reaching its decision, this court must reach a decision having considered the whole of the evidence.
78. This was the prosecution case.

DEFENCE CASE

79. At the end of the prosecution case, both the accused persons were explained their options. They could have remained silent but both chose to give sworn evidence and be subjected to cross examination. This court must also consider their evidence and give such weight as is appropriate.

FIRST ACCUSED

80. The first accused informed the court that during the morning of 18th March, 2020 he received a message from the complainant on his phone. The accused also stated that the complainant used to call him on prior occasions and say that she wants to meet him and that she loves him a lot but he had not seen or met her. On the 18th the complainant messaged him to the effect *"you always told me that I don't want to meet you just meet me once then from there on I won't hassle you again."*
81. The accused did not reply to the message, however, at midday he received another message from the complainant stating *"today I will come and meet you and then I will never meet up and never hassle you again."*
82. The complainant during her phone conversation had told the accused that she was living in Malau, staying home and was 19 years of age. The accused agreed to meet her, at 7pm the complainant messaged stating

that she will be leaving her house at a particular time and if he does not pick her she will come to town and/or will inform the police that he is hassling her. Before leaving her home the complainant again messaged that she has left her home. The accused had not met the complainant before but they were only messaging each other.

83. In the afternoon after work the accused with his friend Kartik (the second accused) went to a wine and dine restaurant where both drank one bottle of beer and it was Kartik who drove his car to Malau. The accused was seated in the front passenger seat, the complainant was at the junction to her house. She came and sat at the back seat upon seeing Kartik she said "*what are you doing here*" Kartik said he is the driver.
84. After a while the complainant asked the accused to come to the back seat and have sex with her. The accused asked the complainant why she wanted him, the complainant said "*you look nice and I just want to be with you*" and she said this will be the first and the last time I will be meeting you.
85. When the accused went to the back seat the complainant held and kissed him, opened his shirt buttons, and he opened her top. The accused removed his pants and made love bites on the complainant while the car was moving thereafter he penetrated her vagina with his penis. According to the accused the complainant was happy and she enjoyed the sexual intercourse.
86. The car was driven to the Dugapatu roundabout stopped for a few seconds and then proceeded towards the temple. At this time the accused received a call on his mobile phone. The accused wore his clothes and left the car and was talking with his wife for about 10 minutes about 5 meters away from the car.

87. When the accused went back to the car he saw Kartik and the complainant in the back seat of the car he overheard the complainant saying to Kartik that they were okay and they will do something in the car. The accused started driving and as they reached the complainant's house junction he saw a police vehicle. The police officer in the driver's seat waived for the car to be stopped.
88. One police officer asked the accused where he was coming from and whether he was alone. The accused told the police officer that he was coming from Dugapatu with his two friends. One officer showed the torch at the rear car window since the car had dark tint and opened the door. The officer said "*are you two naked, what are you doing inside the car naked?*" The first accused had sex with the complainant once only.
89. In cross examination by the state counsel the accused stated that the complainant was calling him from different sim numbers because once the complainant called him he blocked the sim number. The accused did not report to the police because he thought by blocking the sim numbers the complainant won't call him but they were messaging each other on their Facebook account.
90. The accused stated that he did not know that the complainant was a school student because when they met the complainant was not schooling. Upon further questioning the accused said the complainant had told him that she was a school student. The accused had met the complainant that night to have sexual intercourse because the complainant had asked him to come.
91. The accused agreed that he went to meet the complainant to have sex with her for the first and the last time and he had mentioned this in the text message. He did not inform the complainant's mother because the

complainant had told him that she has already told her mother. The accused further said the complainant had messaged him about this. The accused said they had sex near Dugapatu temple and he had made love bites on the complainant's neck and breast. The accused agreed that the car was driven near the bushes but he did not force the complainant to have sex with him.

92. In cross examination by the second accused counsel the accused said he was caution interviewed by the police and he told the truth to the police. Question and answer 65 of the caution interview was read as follows:

Q: It is stated in the statement of "N.N" that you after having sex with her you stood up and at this time Kartik came and started having sex with her what can you say about this?

A:No it's not true it was after we moved the car a little bit in front when she ask Kartik to have sex with her then Kartik stopped the car and sat at the rear seat then I drove the car and they had sex at the rear seat.

93. When the police stopped the car the accused was driving while the second accused and the complainant were in the back seat and the complainant was okay.
94. In re-examination the accused said he did not know the mother of the complainant.
95. This was the case for the first accused.

SECOND ACCUSED

96. The second accused informed the court that after finishing work in the afternoon of 18th March, 2020 he went to a wine and dine restaurant with Krishneel. Both drank one bottle of beer, whilst drinking Krishneel told him that a girl is texting him and would he go with Krishneel to meet her.
97. Furthermore Krishneel said he has told the girl so she knows that the second accused will be coming as well. The accused drove the car with Krishneel in the front passenger seat. At about 8.45pm he saw a girl beside the road.
98. The complainant went and sat in the back seat of the car. At this time she said "*Kartik what are you doing here.*" The accused said Krishneel has already told you that one his friends will be accompanying Krishneel.
99. As the car was driven away the complainant asked Krishneel to come and sit at the back and talk. Krishneel went to the back seat the accused did not know the complainant before this day. When questioned how the complainant knows him, the accused said in the vehicle the complainant said that she knew his sister.
100. While driving the accused saw in the rear vision mirror that the complainant was kissing Krishneel and then he felt that Krishneel and the complainant were having sex.
101. At the Dugapatu roundabout he stopped the car and went to urinate at the rear bumper of the car. The accused again drove the car when they were about to reach Dugapatu temple Krishneel said a call was coming on his phone.

102. The accused stopped the car near the temple after Krishneel wore his clothes the complainant asked him *"will you come and enjoy with me."* The accused did not respond after Krishneel left, the complainant again asked him to enjoy with her. The accused agreed, the complainant asked him to pay something and she will think about it. The accused gave her \$100.00 and went to the back seat, the complainant was naked. When Krishneel came back he said *"what is happening and what are you doing to the complainant."*
103. The complainant said everything is okay you drive the car. The complainant came and sat on his lap facing him she started kissing, opened his shirt buttons he got his penis erected, opened his trousers buttons and the complainant pulled down his trousers and under garments.
104. The complainant sat on his lap placed his penis on her vagina to start having sex and she sat on his penis after a while Krishneel said there is police in front. The accused and the complainant got scared and both hid in between the front and the back seat.
105. The police stopped the car and told them to come out and they were taken to the police station. The accused said he did not know the age of the complainant and she had not spoken to him about her age and he had not asked her age.
106. The accused does not know the mother of the complainant he stated that he had sexual intercourse with the complainant only once that night before the police stopped the car. The accused stated that the complainant had given her consent to have sex with her.

107. In cross examination by the state counsel the accused stated that when he and Krishneel left the restaurant to meet the complainant Krishneel was sitting in the front passenger seat. The accused was referred to his caution interview from question and answers 42 to 45 which were read as follows:

Q42: Did you know which girl you were going to meet?

A: He only told me that girl is living in Malau.

Q43: How did you go to Malau?

A: In Kushal's car.

Q44: Who was driving the car?

A: I was driving the car.

Q45: Where was Kushal sitting?

A: Kushal was sitting in the rear.

108. When questioned that he told the police officer writing his police statement that Krishneel was sitting in the rear seat of the car. The accused said he got scared during his caution interview so he told the police officer that Krishneel was sitting at the back since this was the first time he was in such a situation.

109. The accused accepted that he did not tell the police about the \$100.00 he had given to the complainant since the police had not asked him. When questioned why the police should ask him the accused said he forgot and he was scared at the time. The accused also agreed that he did not know the age of the complainant at the time.

110. The accused was referred to question and answer 84 of his caution interview which was read as:

Q84: Then why did you had sexual intercourse with Fazila?

A: I thought Fazila was 19 years old.

111. The accused agreed that he was hiding in the back seat when stopped by the police since he did not want the police to see the complainant and him. When it was suggested that he knew the complainant was underage that's why he did not want the police to see the complainant and him the accused said he did not know that the complainant was underage.

112. The accused denied that they first went near Dugapatu temple where Krishneel had sexual intercourse with the complainant. The accused maintained that from near the Dugapatu temple they did not go to another isolated place. He said that after the complainant came into the car they went to the Dugapatu roundabout.

113. The accused denied that at the isolated place he had forceful sexual intercourse with the complainant. He maintained that the complainant had asked for the money and he gave her money then she said okay so he went to the back seat.

114. The accused said the complainant was lying when it was put to him that before his forceful sexual intercourse he had said "*allow me to do it as well since you allowed Krishneel to have sex.*"

115. The accused denied the car was driven to the other place where there were houses and Krishneel and he did not have forceful sexual intercourse with the complainant at any time he said the complainant

was lying. The accused did not ask the complainant whether her parents knew where she was.

116. The accused only had sexual intercourse with the complainant after she had asked him, he did not know she was under age and that she had not informed her parents.
117. In cross examination by the first accused counsel the accused said Krishneel was having sexual intercourse in the moving car as they were approaching the Dugapatu roundabout after picking the complainant. The accused did not hear any sound between the complainant and the Krishneel in the moving car. The accused and Krishneel had sexual intercourse with the complainant only once.
118. This was the case for the second accused.

PREVIOUS INCONSISTENT STATEMENT

119. This court directs its mind to the fact that the defence counsel during cross examination of the complainant and the state counsel during the cross examination of the second accused Kartik had questioned these witnesses about some inconsistencies in the complainant's police statement and Kartik's caution interview which they had given to the police when facts were fresh in their minds with their evidence in court.
120. This court is allowed to take into consideration the inconsistencies or omissions between what these witnesses told the court and their police statement and caution interview when considering whether these witnesses were believable and credible. However, the police statement and/or the caution interview are not evidence of the truth of its contents.

121. It is obvious that passage of time can affect one's accuracy of memory. Hence it cannot be expected for every detail to be the same from one account to the next.
122. If there are any inconsistencies or omissions, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the witness. If it is significant, then it is for this court to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, then this court may conclude that the underlying reliability of the evidence is unaffected. If the inconsistencies or omissions are so fundamental, then it is for this court to decide to what extent that influences the reliability of the witness evidence.

ANALYSIS

123. The prosecution states that the complainant in the year 2020 was 15 years of age and the two accused persons were known to her. The complainant and Krishneel were in contact by mobile phone, Facebook and messenger platforms. The complainant had met Krishneel on an earlier occasion before the night of the allegation at the bus stand since Krishneel was a bus driver after she returned from school and was in her school uniform.
124. On 18th March, 2020 there was an exchange of messages between the accused and the complainant and in one of the messages Krishneel had messaged the complainant to meet him later in the night. The complainant was under the care of her mother since her father was in Suva. The complainant without telling her mother or seeking her mother's permission at about 8.30 pm left her house from the back door to meet Krishneel.

125. It is alleged that as soon as the complainant arrived at the junction a car came driven by Kartik. Krishneel was in the back seat so the complainant went to the back seat and sat beside Krishneel. When the complainant saw Kartik whom she was not expecting she asked Kartik what he was doing in the car. Kartik responded by saying that he was the driver.
126. The prosecution submits that both the accused persons were aware that they were picking the complainant who was under the age of 18 years. The accused persons had jointly taken away the complainant who was under the care of her mother. The mother of the complainant had not permitted her daughter to be with both the accused persons that night. The law on joint enterprise applies and both the accused persons are liable for the abduction of the complainant.
127. Furthermore, the prosecution alleges that when the car was stopped near Dugapatu temple Krishneel had sexual intercourse with the complainant in full view of Kartik. The car was driven further to an isolated place near the bushes whereby Krishneel left the car to answer his mobile phone. The complainant was still naked in the back seat when Kartik seeing the complainant alone came and forcefully had sexual intercourse with the complainant.
128. The complainant did not like what Kartik was doing and she told Kartik to stop but he did not. The complainant did not consent to have sex with Kartik. When Kartik left Krishneel came to the back seat. The car was driven to another isolated place where houses were far away on the left side of the road where the car was parked.
129. Here Krishneel had forceful sexual intercourse with the complainant. The complainant did not want to have sex with Krishneel on this occasion and she was continuously telling Krishneel to stop but he did not. The

complainant was yelling Krishneel told the complainant to yell as much as she wants.

130. After Krishneel finished, Kartik came on top of the complainant and had forceful sexual intercourse with her, at this time she was feeling like she will faint since by this time the sexual intercourse on her by the two accused persons were four times. Kartik held her hand when he had sex with her, after he finished he went outside. The complainant did not consent for Kartik to have sex with her the second time.
131. In the meantime a missing persons report was lodged with the Rakiraki Police Station and when the complainant was about to be dropped home the police stopped the car and arrested both the accused persons. PC Toma observed the complainant to be an underaged girl which confirmed the report of a 15 year old girl missing from home.
132. The complainant was medically examined a few hours later and the examining doctor had observed extensive bruises on her neck and breast, and upon vaginal examination dried blood was seen around the vaginal area as a result of forced penetration.
133. On the other hand, both the accused persons say the allegations raised by the complainant are lies and a made up story. The defence is asking this court to look at the evidence objectively. In respect of count one both accused persons did not do anything wrong.
134. The complainant sneaked out of her home and took the risk by walking for 15 minutes past the rugged terrain to meet Krishneel. The accused persons did not know the complainant's mother or the age of the complainant. The complainant in any event had told Krishneel that she

was 19 years of age and her appearance matched a 19 year old since she looked older and mature.

135. Both the accused persons were deceived by her physique and they honestly believed her to be 19 years of age. The accused persons did not act in concert to abduct the complainant. She came to the car on her own accord opened the door and sat at the back seat. The second accused stated that he was only the driver of the vehicle and he did not know what was planned by the first accused and the complainant.
136. In addition to the above the first accused says he was forced by the complainant to meet her that night after she had threatened him if he does not meet her she will make a false complaint against him. He had sex with the consent of the complainant once only and not twice as mentioned by her. He had no idea that the complainant was 15 years of age because the complainant had told him that she was 19 years of age and was staying home.
137. In respect of the count of defilement the first accused states that the appearance of the complainant was such that he had a reasonable cause to believe and he did in fact believe that the complainant was over 16 years. The complainant did not look like under 16 years from any angle.
138. The second accused also says that he had consensual sexual intercourse with the complainant only once and not twice as mentioned by her. He further states that he did not do anything to the complainant as alleged she is lying and making up stories. For instance it was the complainant who had asked the second accused to enjoy with her and she had asked the accused to pay \$100.00 for her services which he did.
139. The accused did as he was invited to do by the complainant, he had sexual intercourse only once with her consent. This was the reason why the

complainant was not wearing her clothes when they were stopped by the police.

140. Both the accused persons are also saying that the complainant made up a story to implicate both of them falsely since her brother saw her naked with two boys at the time the police stopped the car. They are asking this court to consider the fact that the complainant did not say that she was assaulted or harmed by any of the accused persons to submit to them because she had consented.
141. The medical report is not conclusive since the blood noted around the vagina could have been as a result of other causes most of all from menses. The medical report does not in any way connect either or both the accused persons to the medical findings.
142. Moreover, when the police stopped the car the complainant did not make any complaints against the accused persons because there was nothing to complain about. Finally, the defence submits that this is a case of betrayal of trust by the complainant towards both the accused persons. The chain of events expressed by the complainant does not make sense and at its best not probable. It is unbecoming of an alleged victim of rape to hide from the police officers if what she told the court had happened.
143. The defence is asking this court to believe both the accused persons who were forthright and honest in telling the court what they had encountered that night.

DETERMINATION

144. I would like to once again remind myself that the burden to prove the accused persons guilt beyond reasonable doubt lies with the prosecution

throughout the trial and it never shifts to the accused persons. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt.

145. The issue in respect of count one is whether both the accused persons had jointly abducted the complainant from the possession and against the will of her mother and that the complainant was under 18 years of age. In respect of count two whether the first accused had sexual intercourse with the complainant who was between 13 and 16 years and count three whether the first accused had sexual intercourse without the complainant's consent.
146. For the second accused counts five and six whether the accused had sexual intercourse without the consent of the complainant.

JOINT ENTERPRISE

147. In respect of count one the prosecution is alleging that both the accused persons committed the offence of abduction of young persons jointly. This means the prosecution is relying on the concept of joint enterprise.
148. Joint enterprise is when an offence is committed not just by the person who actually does the act, but also by the person who assists him to commit the offence. Here both the accused persons have been jointly charged with the offence of abduction. The law is if two or more people jointly commit a crime, each one is responsible and liable for the actions of another.
149. In this trial both the accused persons have denied committing the offence of abduction as charged. It is for the prosecution to prove in respect of each accused beyond reasonable doubt that it was the accused persons

who had unlawfully taken the complainant being under the age of 18 years out of the possession and against the will of her mother.

150. In respect of count one I accept the evidence of Rozina Anisun the mother of the complainant that her daughter in 2020 was nearing 16 years of age. I also accept that Rozina had the care of the complainant and she had not allowed the complainant to leave home that night.
151. In my considered judgment I accept that both the accused had unlawfully taken the complainant out of the possession and against the will of her mother who had the lawful care of the complainant. I reject the assertion by both the accused persons that they were told by the complainant that she was 19 years of age. The fact that the complainant left home to meet the first accused on her own is not relevant to the charge.
152. PC Toma also gave a credible and reliable observation of the complainant that she was underage and the missing person as per the report received. The first accused was in communication with the complainant and he had in his message asked her to meet him that night and the second accused was the driver of the car that took the complainant away. This court accepts that both the accused persons had acted jointly in taking the complainant out of the possession and against the will of her mother and the complainant at the time was 18 years of age.
153. In respect of the other counts after carefully considering the evidence adduced by the prosecution and the defence, I accept the evidence of the complainant as truthful and reliable. She gave a comprehensive and clear account of what both the accused persons had done to her. The complainant was also able to withstand cross examination and was not discredited as to the main thrust of her allegations. She was unwavering about what the accused persons had done to her that night.

154. Although there were some inconsistencies or omissions between what the complainant told the court and her police statement, however, those discrepancies or omissions must be considered in light of the passage of time which is 3 years now. It is not expected that a person will give evidence dot to dot in line with what is mentioned in the police statement. I would have been surprised if the complainant had given evidence which would have been a carbon copy of her police statement.
155. The discrepancies and omissions were based on human memory and in any event were not significant to adversely affect the credibility of the complainant. In any event a police statement is an out of court statement written by police officers as per their own interpretation of events. I have also taken note of the fact that during cross examination the complainant had said that something's in her police statement were true and some not. This assertion on its own does not make the complainant an unbelievable witness one has to look at the totality of the evidence. In my considered judgment the evidence before this court supports the complainant's version.
156. The complainant was not shaken as to the basic version of her allegations. The Court of Appeal in *Mohammed Nadim and another vs. State* [2015] FJCA 130; AAU0080.2011 (2 October 2015) had made the following pertinent observations about the above at paragraph 16 as follows:

[16] The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in Bharwada Bhoqinbhai Hirjibhai v State of Gujarat (supra):

"Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by

the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; ... (3) The powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder;"

157. Another pertinent observation was also made by the Court of Appeal in *Joseph Abourizk vs. The State*, AAU 0054 of 2016 (7 June, 2019) at paragraph 107 in the following words about deficiencies, drawbacks and other infirmities in evidence by taking into account the comments made by the Indian Supreme Court in *State of UP v. M K Anthony (1985) 1 SCC 505*:

'While appreciating the evidence of a witness the approach must be to ascertain whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, then the court should scrutinise the evidence more particularly to find out whether deficiencies, drawbacks and other infirmities pointed out in the evidence is against the general tenor of the evidence. Minor discrepancies on trivial matters not touching the core of the case should not be given undue importance. Even truthful witnesses may differ in some details unrelated to main incident because power of observation, retention and reproduction differ with individuals...'

158. In respect of the lesser offence of defilement of a young person between 13 and 16 years in count two this court accepts that the first accused had sexual intercourse with the complainant in the car near the Dugapatu temple. The statutory defence raised by the first accused in respect of the lesser count of defilement that the complainant had told him that she was

19 years of age and her appearance made him believe and he had in fact believed that she was over 16 years is unworthy of belief. The evidence of PC Toma that the complainant looked underage and her appearance was in accordance with the report received that a 15 year old girl was missing is an honest and reliable observation.

159. Furthermore, I accept that the complainant had not consented to have sexual intercourse with the first accused the second time and on two occasions by the second accused. I also observed that the complainant had a strong view against the conduct of both the accused on her and she had expressed herself clearly that she did not want them to do what they were doing to her.
160. The totality of the complainant's evidence suggests forceful sexual intercourse by the first accused as per count three and by the second accused as per counts five and six.
161. Even though the complainant did not tell PC Toma anything against the accused persons at the time both the accused persons were arrested does not affect the credibility of the complainant's evidence. It is not expected of a 15 year old child who has just had a series of unexpected sexual encounters to tell the first person she meets everything about what had happened to her in the presence of others (here other police officers and her brother).
162. Experience has shown that individuals differ in terms of how they react after an unexpected happening. Some display obvious signs of distress and some not. The circumstances of the complainant ought to be considered holistically. It cannot be ignored that the complainant was a 15 year old child who was oblivious to an unexpected conduct by both the persons she knew.

163. The complainant struck me as a simple person who was able to recall what the two accused persons had done to her in an orderly and coherent manner. I have no doubt in my mind that the complainant told the truth in court. Her demeanour was consistent with her honesty. I also accept that the injuries seen around the vagina of the complainant were consistent with forceful trauma.
164. I have also directed my mind to the fact that the complainant was naked when the vehicle was stopped by the police. When one looks at the series of events that had taken place the complainant never got the opportunity to wear her clothes. The two accused persons never gave her the chance to do so. PC Toma in his evidence said that the complainant looked scared and shocked gives further credence to her evidence. I accept she was feeling weak, her body was paining and giving up on her as a result of what had happened to her in a short time.
165. On the other hand, both the accused persons did not tell the truth they gave a version of events which is too good to be true or put simply did not have an iota of truth about what they forcefully did to the complainant that night. I do not accept that the complainant had at any time told the first accused that she was 19 years of age or consented for the first accused to have sex with her at the third isolated place (count three) or had consented for the second accused to have sex with her near the bushy area and then at the final place where there were houses far away.
166. It appeared to me that both the accused persons were narrating what they had planned to tell the court. Both the accused persons were assisting each other with a view of absolving each other's conduct. In addition to this, both the accused persons were also presenting themselves as

responsible individuals that whatever they did was with the complainant's consent is also rejected as not worthy of belief (counts three, five and six).

167. The second accused did not tell the truth when he said he paid the complainant \$100.00. When the accused was caution interviewed by the police the facts were fresh in his mind yet he did not tell the police about this crucial piece of information is unthinkable. After seeing the demeanour of both the accused persons in court they struck me as bold persons who will do anything to protect their interest. I reject the defence of consent by both the accused persons in respect of counts three, five and six as not plausible on the totality of the evidence.
168. The defence has not been able to create a reasonable doubt in the prosecution case in respect of count one abduction (both accused persons jointly), lesser offence of defilement in count two and count three rape for the first accused and counts five and six rape for the second accused.

CONCLUSION

169. This court is satisfied beyond reasonable doubt that both the accused persons on 18th March, 2020 had unlawfully taken the complainant a girl under the age of 18 years out of the possession and against the will of her mother who had the lawful care of the complainant.
170. This court is also satisfied beyond reasonable doubt that the first accused on 18th March, 2023 had unlawful sexual intercourse with the complainant who was above the age of 13 years and under the age of 16 years.

171. This court rejects the statutory defence raised by the first accused that the complainant was over the age of 16 years as unbelievable and a made up story. The prosecution has been able to rebut the defence raised by the accused beyond reasonable doubt that the complainant was 15 years old at the time and she appeared so.

172. Finally this court is satisfied beyond reasonable doubt that the first accused on one occasion as mentioned in count three and the second accused on two occasions in counts five and six had sexual intercourse with the complainant without her consent. Furthermore, both the accused persons knew or believed the complainant was not consenting or didn't care if she was not consenting at the time.

173. In view of the above:

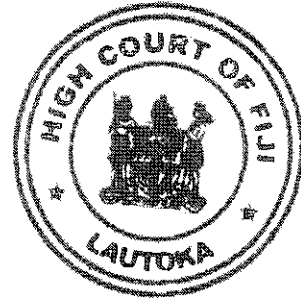
- a). I find both the accused persons guilty of one count of abduction of young persons as per the first count;
- b). I find the first accused guilty for the lesser offence of defilement of any person being of or above the age of 13 years and under the age of 16 years as per the second count;
- c). I find the first accused guilty for the offence of rape as per the third count; and
- d). I find the second accused guilty for two counts of rape as per counts five and six.

174. Both the accused persons are convicted accordingly. In respect of the second and fourth count of rape the first accused is acquitted due to lack of evidence.

175. This is the judgment of the court.



**Sunil Sharma
Judge**



At Lautoka

21 September, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs Law Parmendra, Rakiraki for the First Accused.

Messrs Jiten Reddy Lawyers, Suva for the Second Accused.