

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 72 of 2021

STATE

vs.

ATESHWAR PRASAD

Counsel: Ms. J. Fatiaki with Ms. S. Bibi for the State
Mr. A. K. Singh for Accused

Dates of Hearing: 08th, 9th, 10th, 11th and 12th April 2024

Date of Closing Submission: 29th April 2024

Date of Judgment: 20th June 2024

JUDGMENT

Introduction

1. The Acting Director of Public Prosecution, on the 8th of April 2024, filed this Information, charging the Accused with one count of Abduction with Intent to Confine a Person, contrary to Section 281 of the Crimes Act, one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act and one count of Aggravated Robbery, contrary to Section 311 (1) (a) of the Crimes Act. The Particulars of the offences are:

COUNT 1

Statement of Offence

**ABDUCTION WITH INTENT TO CONFINE A PERSON: *Contrary to*
*Section 281 of the Crimes Act 2009.***

Particulars of Offence

ATESHWAR PRASAD and two others on the 16th day of February 2021 at Navua in the Central Division abducted **SHAHIZA NEEHA RAUF NAIKER** and **ZAHIR ZUHAN NAIKER** with intent to cause the said **SHAHIZA NEEHA RAUF NAIKER** and **ZAHIR ZUHAN NAIKER** to be secretly and wrongfully confined.

COUNT 2

Statement of Offence

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

Particulars of Offence

ATESHWAR PRASAD on the 16th day of February 2021 at Navua in the Central Division unlawfully and indecently assaulted **SHAHIZA NEEHA RAUF NAIKER** by biting her cheek, neck and breasts.

COUNT 3

Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311 (1) (a) of the Crimes Act 2009.

Particulars of Offence

ATESHWAR PRASAD and two others on the 16th day of February 2021 at Navua in the Central Division in the company of each other stole one S10E branded mobile phone, one gold chain, one gold bracelet, two rings and cash monies of \$650, one Samsung J2 prime mobile phone, one gold watch, two gold chains and one crystal jewelry set, the property of **SHAHIZA NEEHA RAUF NAIKER** and **SALVEEN NAIKER** and immediately before committing theft used force on **SHAHIZA NEEHA RAUF NAIKER** by punching her on her stomach and tying her to a tree.

2. The Accused pleaded not guilty to these offences; hence, the matter proceeded to the hearing. The hearing commenced on 08.04.2024 and concluded on 12.04.2024. The Prosecution presented the evidence of five witnesses, and the Accused gave evidence to the Defence and called four witnesses. Subsequently, the Court heard the closing submissions of the parties. The learned Counsel for the Prosecution and Defence also filed written submissions. Having carefully considered the evidence adduced during the hearing and the parties' respective oral and written submissions, I now pronounce the judgment on this matter.

Burden and Standard of Proof

3. I first draw my attention to the burden and standard of proof. The Accused is presumed to be innocent until he is proven guilty. The burden of proof of the charge against the Accused is on the Prosecution. It is because the Accused is presumed to be innocent until he is proven guilty. The standard of proof in a criminal trial is "proof beyond reasonable doubt". The Court must be satisfied that the Accused is guilty of the offence without any reasonable doubt.

Admitted Facts

4. The Prosecution and the Defence tendered the following facts as admitted facts under Section 135 of the Criminal Procedure Act.
 1. *The 1st complainant is Shahiza Neeha Rauf Naiker, 30 year old female of Tokotoko Back Road in Navua and the 2nd complainant is the 1st complainant's son, Zahir Zuhaan Naiker, 4 year old child of Tokotoko Back Road, Navua. The Accused is Ateshwar Prasad, 43 year old male of Tokotoko Back Road in Navua.*
 2. *The 1st complainant is married to one Salveen Sachine Naiker and together they have three children.*

3. *The 1st complainant and accused began a friendship which developed into a relationship and the 2nd complainant referred to the accused as "Uncle".*
4. *On the 16th February 2021, the 1st complainant and the 2nd complainant went to the Naitonitoni jetty in Navua to meet the accused.*
5. *The accused hired a private car to drop him off at the Naitonitoni jetty in Navua.*
6. *The 1st and 2nd complainants went to the Naitonitoni jetty in Navua in a Black Fielder branded vehicle with the registration of "SNEHZZ" which belonged to the 1st complainant.*
7. *The two complainants were taken to the Namosi Road area where the 1st complainant was tied up to a tree and left at the Namosi Road area.*
8. *There is no dispute regarding the identification of the accused person in this matter and the two complainants and the accused person are known to each other.*
9. *The following documents are also agreed to by the Prosecution and Defence:-*
 - (i) *Birth Certificate of Zahir Zuhaan Naiker;*
 - (ii) *Photographic booklet;*
 - (iii) *Rough and Fair Sketch plans; and*
 - (iv) *All exhibits uplifted by police on the 16th February 2021 which include:-*
 - a) *1 x grey long pants and 1 x white and black vest owned and identified by the complainant, Shahiza Neeha Rauf Naiker.*

- b) *2 x seat belts owned and identified by the complainant, Shahiza Neeha Rauf Naiker*
- c) *1 x Fusion branded speaker owned and identified by the complainants, Shahiza Neeha Rauf Naiker.*

Evidence of the Prosecution

5. The Prosecution alleged that the Accused, with the assistance of two other accomplices, forcefully abducted the Complainant, Ms. Shahiza Neeha Rauf (hereinafter referred to as the Complainant) and her son and took them to the Namosi area, where he left the Complainant after tying her up to a tree in the middle of nowhere. Before he left her in that place, he had taken her ring and other jewellery. The Accused and his two accomplices then went to her house, where they had ransacked the place and left the son inside the house. Once again, before leaving the son at home, the Accused had taken the gold chain of the son.
6. According to the Complainant, the Accused was a neighbour. The Complainant and the Accused started a relationship in 2020, and as per the Complainant, that relationship lasted till the 8th of January 2021. The behaviour of the Accused began to change and become very aggressive, and that was the reason for her to end their relationship. In the meantime, her husband came to know about this relationship as the Accused came to her home one day and fought with her husband. Irrespective of these issues, the Complainant and the husband eventually reconciled and decided to continue their marriage.
7. Meanwhile, in February, she became pregnant. The Complainant met the Accused on the 15th of February 2021 at her home and informed him about her pregnancy and her plan to continue her marriage with her husband. The Accused calmly listened to her and left the house. On the morning of the following day, the 16th of February 2021, she received a call from the Accused. The Complainant told him she was planning to go to Suva for errands. The Accused then asked her whether she could drop something off to his relative in Suva if she was going to Suva. The Accused asked her to come to Naitonitoni jetty (hereafter referred to as the jetty) so he could give her the item. The Complainant accordingly went

to Naitonitoni jetty with her son, where the Accused asked her to come along a narrow road where he could meet her. The Complainant followed it as requested by the Accused. When she met the Accused, he came towards her car and asked her to get out of the car and open the back booth. When she went and opened the back booth, the Accused punched her on her stomach and then pushed her into the booth. Suddenly, two masked men came from behind and held her and assisted the Accused in putting her in the booth and tied her legs and mouth. The Accused took a knife and threatened her son, who was seated in the back passenger seat. The Complainant decided to follow what they asked her to do as she feared for her and her son's life.

8. One of the masked men then got into the driver's seat and the other got into the booth and sat next to her. The Accused sat next to her son in the back passenger seat. The Complainant was lying facing upwards. They then took the Complainant and her son to the Namosi area, where they stopped at a location a little away from the road. On the way to this location, the Accused turned and bit her neck, cheek and breasts. The Accused and his accomplices then took her out of the car and dragged her to a nearby tree, where they tied her up to the tree. They put leaves and parts of tree branches on her and a sack of sand on her stomach. The three assailants then got into the car and left the place with her four-year-old son.
9. The Complainant managed to release herself by untying her hands. She then walked to the road, where she found a carrier. She came to the junction of the main road, where she met one of the people known to her. The Complainant contacted her husband using his mobile phone and informed him what had happened. She then went to the Police Station in the same vehicle.
10. At the Police Station, she was asked to go to the hospital as she was injured and bleeding. On her way to the hospital in a police vehicle, she saw the car the accused usually travels in. She informed the Police Officers about it. The Police overtook the said car near the Navua hospital, and she showed the Accused was in that car. The Police vehicle then stopped at the hospital and the car that the Accused was traveling overtook the Police car and continued. The Police vehicle then started to follow the car and stopped it when the car was about to turn at Nabukavesi junction. When they stopped the car, the Complainant

found that her husband also came in his vehicle and parked beside them. The Police then arrested the Accused and the driver of the said car. The Police advised the Complainant to proceed to the hospital for the medical examination.

11. On their way to the hospital, the Complainant and her husband received a message that their son was home. Instead of going to the hospital, they headed home directly. The Police also followed them. At home, they found their son and the car parked outside.

Evidence of the Defence

12. The Accused vehemently denied this allegation and alleged that the Complainant and her husband planned and orchestrated this incident to blame him. Apparently, there was no significant difference in his version of the event besides his allegation that the Complainant called him to Naitonitoni jetty to meet her on the morning of the 16th of February 2021. When he went to the jetty, he found the Complainant had come with two masked men and her little son in her car. The masked men threatened him with the knife, asking him to follow what they were asking him to do. They forcefully put him in the car. They then put the Complainant in the back booth and took them to the Namosi area, where they took the Complainant out and tied her up to a tree.
13. They left the location, leaving the Complainant there. The two men then brought the Accused and son of the Complainant to the Complainant's house. They left the son inside the house and parked the Complainant's car. The men then asked the Accused to arrange transport for them to go to Suva. Out of fear, the Accused arranged for Navin, a taxi driver, to take them to Suva. The Accused arranged for another car to return to Namosi and check on the Complainant. On his way to Namosi in that car, he was stopped by the Police and arrested.

Evaluation of the Evidence

14. According to the evidence presented by the parties and the admitted facts, there is no significant divergence between the Accused and the Complainant regarding the nature of the events that took place at the Naitonitoni jetty and Namosi on that day. The main dispute

is whether it was planned and carried out by the Accused or by the Complainant so as to blame the Accused. The Complainant alleged that it was the Accused who requested her to come to the jetty and then carried out this alleged incident of abducting the Complainant and her son. Conversely, the Accused claims that the Complainant called him asking him to meet her at the jetty. When he reached the jetty, he found that the Complainant came with two masked men and then executed this false abduction of her so that she could put the blame on the Accused.

15. In such circumstances as explained above, the Court must consider all the evidence adduced in the trial, including the evidence of the Defence, to determine whether the Prosecution has proven beyond reasonable doubt that the Accused had committed these crimes. The task of the Court is not to decide who is more credible, the Complainant or the Accused.
16. Brennan J in Liberato and Others v The Queen ((1985) 159 CLR 507 at 515) has succinctly discussed the appropriate approach in directing the Jury in a case where there are conflicting versions of evidence given by the Prosecution and the Defence. Brennan J held that:

“When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question; who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that; even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did

not make clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is "a gross simplification."

17. Basnayake JA in **Goundar v State [2015] FJCA 1; AAU0077.2011 (2 January 2015)**, while accepting the principle expounded in **Liberato (supra)** and **R v Li (supra)** held that:

"The learned judge directed the Assessors to find the appellant guilty or not guilty by considering whose evidence they believe. By so doing the Assessors have been misdirected with regard to the burden of proof, and thereby caused a miscarriage of justice. The Assessors may believe the evidence of Emma and disbelieve the evidence of the appellant. It does not mean that the case has been proved beyond a reasonable doubt. If, after considering the evidence of the whole case, a reasonable doubt is created in the minds of the Assessors with regard to the guilt of the appellant, the appellant is entitled to the benefit of that doubt and entitled to an acquittal. The courts have held in a series of cases that it is not correct to find the guilt of the accused by allowing the Assessors to believe either party."

18. The Accused is not required to give evidence. He does not have to prove his innocence as his innocence is presumed by law. However, in this case, the Accused decided to give evidence and called four witnesses for his defence. Therefore, such evidence presented by the Accused needs to be considered when determining the facts of this case.
19. There is no legal burden on the Accused to prove his innocence by providing evidence. The archaic but highly distinguished passage of Lord Reading C.J. in **Abramovitch (1914) 84 L.J.K.B. 397** adverted that:

"If an explanation has been given by the accused, then it is for the jury to say whether on the whole of the evidence they are satisfied that the accused is guilty. If the jury think that the explanation given may reasonably be true,

although they are not convinced that it is true, the prisoner is entitled to be acquitted, inasmuch as the crown would then have failed to discharge the burden impose upon it by our law of satisfying the jury beyond reasonable doubt of the guilt of the accused. The omus of proof is never shifted in these cases; it always remains on the prosecution."

20. The effect of Lord Reading CJ's passage in **Abramovitch (supra)** was emphasized by the New Zealand Court of Appeal in **The Queen v Strawbridge — [1970] NZLR 909**, where North P discussing the scope of Woolmington guideline adopted the passage from **Rex v. Greenacre 8 C. & P. 35**, highlighting the effect of **Abramovitch (supra)**, where it observed that:

".....In our opinion the true ratio of Woolmington's case emerges in the following passage from the opinion of the Lord Chancellor when he was discussing Rex v. Greenacre 8 C. & P. 35. He said:

"... But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence, This is the real result of the perplexing case of Rex v Abramovitch.

21. Premathilaka RJA in **Naidu v State [2022] FJCA 166; AAU0158.2016 (24 November 2022)** accentuated the importance of modifying the **Liberato (supra)** guideline where Premathilaka RJA held:

[29] On the other hand Liberato has not uttered the final word on this issue. In Johnson v Western Australia [2008] WASCA 164; (2008) 186 A Crim R 531 at 535 [14]- [15] Wheeler JA identified one possible shortcoming in using Brennan J's statement in Liberato as a template for the direction; a jury may completely reject the accused's evidence and thus find it confusing

to be told that they cannot find an issue against the accused if his or her evidence gives rise to a 'reasonable doubt' on that issue.

[30] For that reason, it was usefully held in Anderson [2001] NSWCCA 488; (2001) 127 A Crim R 116 at 121 [26] that it is preferable that a Liberato direction be framed along the following lines (i) if you believe the accused's evidence (if you believe the accused's account in his or her interview with the police) you must acquit; (ii) if you do not accept that evidence (account) but you consider that it might be true, you must acquit; and (iii) if you do not believe the accused's evidence (if you do not believe the accused's account in his or her interview with the police) you should put that evidence (account) to one side. The question will remain: has the prosecution, on the basis of evidence that you do accept, proved the guilt of the accused beyond reasonable doubt?

22. Accordingly, if the Court believes the evidence given by the Accused is true or may be true, then the Court must find the Accused not guilty of the offences. Even if the Court rejects the Accused version, that does not automatically imply that the Prosecution has established that the Accused is guilty of the crime. The Prosecution must satisfy that it has established, on the evidence accepted by the Court, beyond a reasonable doubt, that the Accused committed these offences as charged in the information. (**vide; Naidu v State [2022] FJCA 166; AAU0158.2016 (24 November 2022), Liberato and Others v The Queen ((1985) 159 CLR 507 at 515), Abramovitch (1914) 84 L.J.K.B 397**)
23. Comprehending the preceding legal principles and the precedence on the onus of the Prosecution in proving the case beyond a reasonable doubt, I now evaluate the evidence presented by the parties to determine the testimonial trustworthiness of the evidence. The Court needs to consider two aspects in deciding the testimonial trustworthiness of the evidence: the credibility of the witness evidence and the reliability of the evidence. Credibility is linked to the correctness or the veracity of the evidence, while reliability is related to the accuracy of the evidence. In doing that, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency,

contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. (vide; **Matasavui v State [2016] FJCA 118; AAU0036.2013 (the 30th of September 2016, State v Solomone Qurai (HC Criminal - HAC 14 of 2022).**

24. Gamlath JA in **Abourizk v State [2019] FJCA 98; AAU0054.2016 (7 June 2019)** observed the duty of the trial Court in evaluating the evidence, where Gamlath JA outlined that:

[1] The trite law dictates that in considering the culpability of an accused person, the paramount duty of a court of law is to consider whether, on the whole, the evidence led in a trial has the strength to meet the standard of proof cast upon the prosecution to prove the case beyond any reasonable doubt. If the weight attached to a set of evidence in its totality is unsatisfactory, saddled with irreconcilable inconsistencies, improbabilities or any other inherent, incurable weakness, such infirmities should endure to the benefit of the accused person. These legal propositions need no elaboration. A trial judge dealing with evidence of a case should carefully examine the weight to be attached to such infirmities. If there are infirmities perceivable having regard to the evidence, a trial judge is duty bound to examine them carefully and to evaluate them for the purpose of determining their final effect on the credibility of the relevant evidence. This is a mandatory requirement for it is only through a process akin to that, that the weight to be attached to evidence could be determined.

25. As discussed above, I shall endeavour to evaluate the evidence presented by the Prosecution, especially the Complainant and her husband, keeping in mind the evidence presented by the Defence insofar as they are related to the issues I am considering. In doing that, I shall discuss the evidence pertaining to the events that occurred before the alleged incident, the evidence relating to the incident and the evidence explaining the event that took place after the incident in seriatim.

26. There is no dispute between the parties that the Accused and the Complainant had a relationship prior to this alleged incident. According to the Complainant, it ended on the 8th of January 2021, whereas the Accused claimed it continued as they were still communicating and meeting. Besides her claim of ending the relationship, the Complainant maintained communication with the Accused and also met him in Suva. According to the Complainant, the Accused used to come to her home and fight with her husband, who wanted her to go and stay with him. I will reproduce the Complainant's answer explaining the Accused's behaviour.

Ms Fatiaki: So when the relationship you said toxic, it became toxic what do you mean by that ?

Neeha: My Lord, he used to come home and fight with my husband and he wanted me to go and stay with him but I was not ready in life since I had my family and two kids with me My Lord.

27. She indicated in this answer that the Accused had come to her home and created issues with her husband more than once, creating a hostile and tense situation between them and also putting her in a situation of choosing between the two men. According to the Complainant, the Accused came home in January 2021 and fought with her husband, creating a commotion, and her children woke up because of that. On that day, she confessed to her husband about her relationship with the Accused.
28. The Complainant then took time to explain her love and commitment to her husband and stated that they both promised each other to be faithful and committed to their marriage after her revelation about her relationship with the Accused. Irrespective of her claim, the evidence shows that she still maintained contact with the Accused. There is no stereotype of human behaviour when they encounter emotional dilemmas involving their feelings. Hence, I will not make any adverse inferences or conclusions about her conduct in maintaining contact and communication with the Accused after she stopped her relationship with him, as she claimed. However, such conduct could indeed be taken into consideration in evaluating the probability and possibility of her narration of events in order to determine the credibility and reliability of her evidence. In doing that, it is essential not

to taint the evaluation process with any pre-conceived stereotypical views of the above-discussed behaviour of humans when they are dealing with emotional feelings under similar circumstances that the Complainant was in.

29. The Complainant found that she was pregnant on the 13th of February 2021 and broke the happy news to her husband on the 14th of February 2021. According to her evidence, the Accused came to her home when no one was home on the morning of the 15th of February 2021. She did not expressly state whether the Accused came home on his own accord or if she invited him. On that day, she told the Accused that she was pregnant with a child with her husband and wanted to continue her marriage with the husband. The Accused was calmed and said, "Okay". All the more so, the husband of the Complainant testified that he was not aware of the meeting that happened between the Accused and the Complainant at his home on the 15th of February 2021, hence, indicating that the Complainant had kept the said meeting with the Accused as a secret from her husband.
30. On the following morning, the 16th of February 2021, when she was getting ready to go to Suva to buy certain items for her daughter's school function, she received a call from the Accused at around 8.30 a.m. The Complainant then told the Accused that she was going to Suva to buy "Salusalu" for her daughter's badging ceremony at school; after hearing that, the Accused asked her if she could take something to his family in Suva, and for that, the Complainant agreed. The Accused asked her to meet him at the jetty so he could hand it over to her. The Complainant then got ready and informed her husband at about 9.30 a.m. that she was going to meet the Accused at the jetty. When she reached the jetty, she found the Accused had not yet arrived. According to the husband, the Complainant said she arrived at the jetty around 9.47 a.m. She received a call from the Accused asking her to come to a narrow road she had never been. While she was following his direction to enter the narrow road, she saw the car of her neighbour Rajiv Singh coming out of the narrow road. She let his vehicle go past her car. At that location, she eventually met the Accused.
31. On the contrary, the Accused denied that he called her on the morning of the 16th of February 2021. According to him, the Complainant contacted him on his phone, asking him to meet her at the jetty as she wanted to discuss her pregnancy and their future. The

Accused offered to come and meet her at her home, which she refused, stating that if her husband found out, there would be a problem. She even declined to meet him in the town for the same reasons. The Accused then asked Dhirendra Prasad to drop him at the jetty in his car, which he did as the Accused requested.

32. The issue of who arranged the meeting, calling the other person to meet at the jetty, should be evaluated, taking into consideration the circumstances and the stale and hostile nature of the relationship between the Complainant, the Accused and her husband that prevailed, as explained by the Complainant.
33. The Accused resides just a few minutes from the Complainant's place and the jetty is about 8 minutes' drive from her house. The Court needs to consider her allegation that the aggressive behaviour of the Accused, which eventually made her decide to end their relationship, his visits to her home fighting with her husband and asking her to come and stay with him, and also her decision to be faithful with her husband, when evaluating whether the reason explained by the Complainant to go and meet the Accused at the jetty with her four years old son was improbable and impossible, thus determining the credibility of her evidence.
34. The Complainant gave no valid reasons for going to the jetty to meet him instead of meeting at a place closer to her home or a public location. She explained that:

"My Lord, I think we are all human beings we still have heart and the thing is that I never thought he will do something like this to me. I still trusted him some part and that's why I went."

35. It appears that the Complainant still trusted him irrespective of his alleged aggressive conduct, as claimed by the Complainant. Taking into consideration the above reasons together with the version of the evidence given by the Accused regarding this meeting, it creates reasonable doubt whether they were still discussing the future of their relationship. There is reasonable doubt about her explanation for going all the way to a location near the jetty to pick up something from the accused and take it to Suva. If she had met the Accused

at her home on the morning of the 15th of February 2021, she could have easily asked the Accused to come and drop that something at her place. It would have been easier than the previous day as she informed her husband this time about the Accused's request.

36. What she tried to portray about the aggressive behaviour of the Accused that led her to end her relationship with him clearly dissonance with her reasons given for meeting him at such a location with her four-year-old son. Considering all these reasons, there is a reasonable doubt about her claim that the Accused asked her to meet him at the jetty. All the more so, this leads to a further reasonable doubt whether the version of the event explained by the Accused may be true. Hence, there is a reasonable doubt whether the Complainant's evidence regarding this issue is credible and trustworthy.
37. I shall now proceed to the *locus* of the first incident. It is materially essential to determine who actually planned the meeting. The Complainant said that:

*"It was a normal day My Lord, I went to drop my daughter in school since Zuhan was just 4 years of age. After that I came home My Lord, and a call from Ateshwar came at around 8.30 a.m. I had informed Ateshwar that I will be going to Suva to buy "Salusalu" for my daughter because the following day was my daughter's badging. And then he asked me that before going to Suva that I go and meet him at the jetty as he has to pass me something. To bring that stuff that he will be giving me to his family in Suva My Lord."*¹⁰

38. In view of the above explanation by the Complainant, the Court could draw several inferences. One of them is that the Accused came to know that the Complainant was going to Suva when he called her around 8.30 a.m. He then arranged this sinister attack on her with two unidentified masked men. If the Court accepted that version, the Accused had little over one hour to plan and organize the attack with two accomplices. The other inference is that the Accused planned the attack and then called the Complainant to lure her out of her home. He then found the Complainant was going to Suva and asked her to

meet him at the jetty. Considering the earlier conclusion in paragraph 36 and the reasons I will provide below, there is reasonable doubt in each of these inferences.

39. The Complainant testified, saying that the Accused and the two accomplices pushed her inside the trunk of the car and then tied her mouth and leg with cloth. She said she cooperated with them as she was scared for her life and her son's. The Complainant said:

Ms Fatiaki: What happened when they pushed you inside the trunk?

Neeha: They very quickly try to tie my mouth and the leg.

Ms Fatiaki: And were they able to tie your mouth?

Neeha: Yea Mam, I cooperated with them My Lord.

Ms Fatiaki: Did you know what they used to tie your mouth and the leg?

Neeha: It was a cloth. They used the cloth to do that.

Ms Fatiaki: What happened after they tied you with the cloth?

Neetha: And then Ateshwar, like they didn't blind fold me. So I can like see but my face was on the driver side and one boy was like with me in the trunk"

40. It appears that the Accused and the two accomplices had not tied her hand when they allegedly put her inside the trunk of the car and tied her legs and mouth. She never mentioned that her hands were tied at the beach or on their way to the location at Namosi during the evidence-in-chief. It was the learned Counsel for the Accused who suggested to her during the cross-examination whether her hands were tied by the Accused and the two accomplices at the beach, for which she answered affirmatively, contradicting her earlier version given in evidence in chief.

41. At the place of the second incident, which was at Namosi, the Complainant was dragged to a tree and forced to sit down. They then tied her to the tree. Her hands were tied to the tree. Once the Accused and the two masked men left the place in her car with her son, she

managed to free herself. The Complainant explained in her evidence that she held the wrist of her one hand over the wrist of her other hand when the Accused tied her to the tree, which helped her to twist the wrists to the other side and get her hands free.

42. The Complainant did not explain how she was tied to the tree, whether she was facing the tree while her hands were tied around the tree trunk or just to the tree. It is unclear whether she was sitting against the tree while her hands were tied to the tree on her back. Be that as it may, the Court heard no evidence from the Complainant explaining that the Accused or the two accomplices untied the knot at Namosi, which they made when they tied her hands at the beach, before she was dragged and tied her hands to the tree. There is no evidence to confirm whether her hands were tied to the tree with the knot tied at the beach. If so, there is a doubt whether it was improbable for her to manoeuvre her hands the way she demonstrated in her evidence, which eventually assisted her in freeing her hands from the tree.
43. This uncertain nature of the Complainant's evidence leads to a reasonable doubt as to whether the two masked men were actually carrying out a plan made by the Complainant, as alleged by the Accused, making sure that they would not leave the Complainant firmly tied to a tree alone at that isolated location in Namosi.
44. Once she managed to free herself and found help from the driver of the vehicle, she made no effort to contact the Police about this incident, especially when she knew that the Accused and the two masked men had fled the scene in her car, taking her four-year-old son. According to the vehicle's driver, she only inquired him, asking for a mobile phone when they reached the junction at the main road. He then told her that he had no credit on his mobile phone. According to the Complainant and the Driver, some people were in the vehicle. Still, she made no effort to check if any of them had a mobile phone for her to immediately alert the Police about the Accused and two masked men who had fled in her car with her four-year-old son. The driver explained that she looked shocked and disturbed. At the junction, she found a mobile phone from a bystander and still did not call the Police but her husband.

45. As testified by the Complainant, she managed to maintain sufficient fortitude and focus on making sure to place her wrists of hands in a position that she could eventually untangle the knot easily and get her hands free once the assailants left the place, even though she claimed that it was the most horrific experience in her life. Notwithstanding such fortitude and focus she displayed during the alleged ordeal, she made no effort to alert the Police when she found the first opportunity to do so, thus creating a reasonable doubt whether she did not alert the Police immediately to give the two masked men time to return her son home and leave the area safely.
46. Eventually, she managed to reach the Police Station at Navua. The Police then took her to the Navua Hospital in a Police vehicle. By then, as per the evidence from the Accused and the taxi driver, Mr. Navin, the two masked men had left the area in Navin's taxi. On their way, she saw a car the Accused usually travels in. She informed the Police to overtake the vehicle to clarify whether the Accused was in it. The Complainant testified that:

Ms Fatiaki: So Neeha, just before we took that break, we were talking about you in the Police vehicle and you had seen Ram Singh with Ateshwar in his vehicle,

Neeha: Yes My Lord,

Ms Fatiaki: Tell us after you saw that vehicle

Neeha: And My Lord, then the Police stopped the vehicle at the Navua Police Hospital to go and we will follow the vehicle and they did not stop like what they wanted. And we tried to follow them.

Ms Fatiaki: So I will pause you just we can clarify. What was you just say? The police stopped at the Navua Hospital?

Neeha: Navua Hospital for the vehicle because they overtake at the passing Zone.

Ms Fatiaki: Yes, So who had overtaken who?

Neeha: The Police vehicle they overlook the KB188,

Ms Fatiaki: So the Police vehicle overtook?

Neeha: And that's when we were like had our fair idea that he was inside. Ateshwar was inside that vehicle,

Ms Fatiaki: So when the Police had overtaken the vehicle, that's when you saw Ateshwar in the other vehicle?

Neeha: Yes My Lord,

Ms Fatiaki: What happened after you saw him in the other vehicle?

Neeha: And then the Police vehicle, they stopped at the Navua Hospital for them to just pass and that's what happened and we followed the vehicle,

Ms Fatiaki: You followed?

Neeha: Yes, we were following the vehicle where they were going

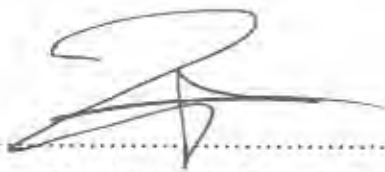
47. On account of the above evidence of the Complainant, it appears that when they saw the Accused inside the car when the Police vehicle overtook it near Navua Hospital, neither the Complainant nor the Police made any effort to stop it and arrest the Accused. In lieu of stopping the said car, the Police let it pass them and then started to follow it to see where they were heading.
48. It was the first time the Complainant saw the Accused after he left that location at Namosi with the two masked men in her car, taking her four-year-old son. As per her evidence, her only concern was to find out what happened to her son. Still, she made no effort to stop him instantly with the assistance of the Police when she saw him travelling in another car alone without her son. As it appeared from this conduct of the Complainant, together with her failure to immediately seek assistance to alert the Police at the first opportunity she had, creates reasonable doubt whether she knew that her four-year-old son was safely returned to their home by the two masked men.

49. Meanwhile, the husband was driving in his office car with the company logo towards Navua Police Station from Wainadoi Police Post after receiving the call from the Complainant about this incident. On his way, he received another call informing him that the Complainant was coming to Navua hospital in a Police vehicle, so he then stopped at Navua hospital, awaiting the Complainant and the Police. If he was waiting at the Navua hospital in his company car, it was a non sequitur to find that the husband did not see that the car that the Accused was travelling overtook the Police vehicle. Then the Police vehicle let it go and started to follow near the hospital. As per his evidence, he only received another call telling him that the Police vehicle was following the car, and he started driving in that direction.
50. Moreover, the husband admitted in his evidence that a dash-cam was mounted on the dashboard of the Complainant's car, which was working on the 16th of February 2021. He testified, stating that the Complainant said that the Accused forcefully removed the dash-cam and threw it away at the beach. On the contrary, the Complainant uttered no word about the dash-cam during her evidence. She mentioned that the Accused removed and threw away the subwoofer but did not mention about the dash-cam. Furthermore, the Police never found the dash-cam, though they managed to find the subwoofer at the beach with some other items allegedly used for this crime. The photograph of the Complainant's car tendered in evidence does not specifically show any sign of a dash-cam being removed from the dashboard of the vehicle.
51. In consequence of the foregoing evaluation of the evidence, I am content to find that the evidence of the Complainant and her husband are infested with irreconcilable inconsistencies and improbabilities, urging me to conclude that their evidence, when taken into consideration with all the evidence adduced, creates a reasonable doubt whether the Accused had carried out this crime of abducting the Complainant and her son with the help of two accomplices and sexually assaulted her as she claimed. Accordingly, I find there is a reasonable doubt whether the evidence of the Complainant is credible and reliable.
52. I am now considering the evidence of the Complainant's son, Dhirendra Prasad and Ajith Singh, within the context of the above conclusion of the Complainant's evidence.

53. There is no dispute that the Complainant's son was present at the scene of this alleged incident. In his evidence, he explained what he had observed on the 16th of February 2021. He was four years old at that time. However, during the cross-examination, the son admitted that his mother and father had spoken to him the previous day and told him what he should testify to in Court. He then said that what he was telling in Court was the one his parents asked him to tell. I noticed that the learned Counsel for the Prosecution clarified this issue to a certain extent, asking him whether what he testified in evidence in Court was the one which happened on that day, to which he answered affirmatively. However, taking his evidence with all of the evidence I discussed, I do not find the Court could safely conclude that his evidence is credible and reliable beyond a reasonable doubt.
54. Both Dharendra Prasad and Ajith Singh testified for the Defence, claiming that they saw two men inside the Complainant's car when she was reaching the narrow road near the location of the first incident. I take into consideration that none of them have expressly stated what they have observed about these two men inside the Complainant's car in their respective statements given to the Police during the Investigation. Aside from that, given the conclusion this Court reached regarding the credibility and reliability of the evidence given by the Prosecution, especially the Complainant, her son and her husband, I find that the evidence of Dharendra Prasad and Ajith Singh, though may not be true, is capable enough to create a reasonable doubt insofar as to the credibility of the Complainant's claim that it was the Accused who arranged this assault on her with the help of two unidentified masked men.
55. It is not necessary to traverse much further in respect of the allegation of robbery of two mobile phones, three gold chains, one gold bracelet, two rings, one crystal jewellery set, and cash of \$650 as no evidence presented apart from the stealing of one gold chain from the son and the wedding ring and bracelet from the Complainant. Given the conclusion reached by this Court about the credibility and reliability of the Prosecution's evidence, I do not find the Prosecution successfully established this offence beyond reasonable doubt.

56. On the same note, the Court could not place much emphasis on the Medical Examination Report of the Complainant as the Complainant could have incurred such injuries in any way, irrespective of who culpably planned and carried out these events.
57. In consequence of the foregoing reasons discussed, I conclude that the Prosecution failed to prove the three counts as charged in the Information beyond reasonable doubt. I, hence, find the Accused not guilty of one count of Abduction with Intent to Confine a Person, contrary to Section 281 of the Crimes Act, one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Act and one count of Aggravated Robbery, contrary to Section 311 (1) (a) of the Crimes Act as charged in the Information and acquit of the same accordingly.
58. Thirty (30) days to appeal to the Fiji Court of Appeal.




.....
Hon. Mr. Justice R. D. R. T. Rajasinghe

At Suva

20th June 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

A. K. Singh Law for the Accused.