

IN THE MAGISTRATES' COURT OF FIJI
AT TAVUA
CRIMINAL JURISDICTION

Criminal Case No: 88 - 2020

STATE

-v-

MOHAMMED GEORGE RAVULA ALI

For Prosecution : Mr. Kumar A. and Ms. Uce R. [ODPP]

For the defendant : Mr. Yunus M. [MY Law]

Trial Date : 13th April 2021

Date of Judgment : 15th February 2022

JUDGMENT

BACKGROUND

1. This decision has been delayed due to the disruptions in 2021 largely attributable to the COVID-19 pandemic.
2. The defendant has pleaded not guilty to the following charge preferred by the prosecution:

Particulars Of Offence

ABDUCTION OF PERSON UNDER 18 YEARS OF AGE WITH INTENT TO HAVE CARNAL KNOWLEDGE: Contrary to section 211(a) of the *Crimes Act 2009*.

Statement Of Offence

MOHAMMED GEORGE RAVULA ALI between the 1st day of August 2016 and the 28th day of February 2017 at Tavua in the Western Division, with intent to have carnal knowledge of L, an unmarried girl below the age of 18 years, unlawfully took the said L, out of the possession and against the will of her mother R.

3. I have redacted the name of the alleged female victim intentionally due to her purported age at the material time and that this is an allegation of a sexual nature. I will refer to her as PW1 or L.

4. During the trial, the prosecution called three witnesses and closed their case.
5. Thereafter I found that there was a case to answer for the defendant.
6. The defendant after being advised of his options, elected to give evidence alone.
7. I summarise the oral evidence of all the witnesses below.

PW1

8. Prosecution Witness 1 [PW1] is L, 21 years old, domestic duties.
9. Her date of birth is 07-08-1999.
10. In 2016 she was 17 years old.
11. In August 2017, she would have turned 18.
12. In 2016, she attended a secondary school.
13. In 2016 she resided with her mother.
14. In 2017 she resided with her uncle.
15. She went to stay with her uncle because that year there was exams.
16. She knows the defendant.
17. She met the defendant in 2016 near the Tavua court house.
18. The defendant had approached her.
19. The defendant was wearing his police uniform.
20. They spoke to each other and then exchanged numbers and called each other on their mobile phones.
21. They used to meet up after that during weekends in town.
22. They also met up at the defendant's barracks.

23. They were in a 'relationship'.
24. She did not tell the defendant her full name only her nickname which was 'Dolly'.
25. She also did not tell the defendant her age but did tell the defendant that she was not 18 yet and she will turn 18 in August.
26. One weekend she spent Saturday and Sunday with the defendant.
27. At the time she was living with her mother.
28. She did not tell her mother.
29. She thinks that her mother thought that she was at her uncle's place.
30. During that weekend, she drank alcohol and had sexual intercourse, that is, the defendant's penis penetrated her vagina.
31. It was the defendant's idea but she still gave consent.
32. She thought the defendant really wanted her and the feeling was mutual.
33. She did not tell anyone about that weekend.
34. She is not aware whether the defendant obtained consent from her mother.
35. She did not want her mother to find out about her relationship with the defendant.
36. Her relationship with the defendant was between 2016 and maybe until January 2017.
37. She heard that the defendant had impregnated other girls but had not told her.
38. The matter was reported by nurses from the hospital as L was pregnant and gave birth on the 26th of November 2017.
39. The defendant is the father but this is not registered in the birth certificate of the child.
40. Her uncle did a 'sevusevu' to her mother to inform her mother of what had happened.

41. When cross-examined, PW1 accepted that she met the defendant for the first time in 2016 but it was not January 2016.
42. PW1 repeated that the defendant took her to the barracks even on the first day they met up.
43. PW1 denied that she told the defendant that she turned 18 years a month earlier.
44. PW1 found out in August 2017 that she was 6 months pregnant.
45. PW1 accepted that she told the defendant that she was 18 but that she was not 18 yet.
46. PW1 accepted that she did not tell the defendant her exact date of birth.
47. PW1 accepted that she loved the defendant.
48. In her opinion, the defendant had the same feeling for her.
49. She knew the defendant was a police officer.
50. She accepted that the defendant cared for her.
51. PW1 accepted that she did not want to 'lose' the defendant.
52. PW1 accepted that that is the reason she told the defendant that she was 18 years old.
53. When re-examined, PW1 accepted that she did not tell the defendant that she was 17 years old as she did not want to lose the defendant.

PW2

54. PW2 is the uncle of PW1,
55. PW2 is a teacher.
56. PW2 says that PW1 was in form 7 in 2017.

57. PW1 stayed with PW2 as PW1 is related to PW2's wife and PW1 was there for her studies.
58. In August 2017, PW2 heard rumours that PW1 was pregnant.
59. PW2 told PW1 to get tested to see if it is true.
60. It was discovered later PW2 was pregnant and so PW2 took yaqona and presented it to PW1's family so that they can understand PW1's situation.
61. PW2 described that PW1's family took the news very hard as PW1 was a promising young student.
62. When PW1 stayed with PW2, the arrangement was for PW1 to stay with PW2 during the weekdays and to return to the village or her home during the weekend.
63. When cross-examined, PW2 accepted that PW1 stayed with him from August 2017.
64. PW2 could not tell from PW1's appearance at the time whether she was pregnant.
65. PW2 described PW1 to be fit.
66. PW2 described that PW1 was slimmer back then and was a small girl.
67. PW2 said that her mother or he would not have allowed PW1 to see a boyfriend at the time.

PW3

68. PW3 is the biological mother of PW1, 40 years, domestic duties.
69. PW1 is her eldest child.
70. PW3 is a single parent.
71. In 2016 PW1 was schooling and was staying with PW3.
72. PW1 was 17 years old at the time and was going to turn 18 years old.

73. In the first term of school in 2017, PW1 stayed with PW3 and then PW1 went to stay with PW2.
74. In August 2017, PW2 was informed by PW3 that PW1 was pregnant.
75. PW3 was sad about the news.
76. PW3 asked her daughter or PW1, who was the father of the child and PW1 informed her that it was a police officer at Tavua.
77. In 2016, PW1 would disappear on some weekends and PW3 thought that PW1 was with PW2.
78. PW3 was not informed by PW1 where she went.
79. PW1 did not inform her that she had a boyfriend.
80. PW3 did not consent for her daughter to have a boyfriend or see a boyfriend in 2016.
81. PW3 wanted her daughter to finish her studies.
82. When cross-examined, PW3 said that she did not allow her daughter to come to town in 2016.
83. When her daughter went missing, PW3 would look for her.
84. PW1 would disappear in the 2nd term of school during the holidays.
85. In 2016, PW3 was in Nadi looking for work and so PW3's mother and PW2 would help look after PW1.
86. PW3 accepts that PW1 is physically 'well built'.
87. PW3 accepts that her daughter looks the same as on the day she gave evidence and in 2016.
88. When re-examined, PW3 said that PW1 is fatter now.

DW1

89. Defence witness 1 [DW1] is the defendant, 29 years, police officer.
90. Currently holds the rank of police constable but is interdicted at the moment because of this pending charge.
91. The defendant joined the police force in 2014.
92. Most of the time he is based at the Tavua Police Station.
93. The defendant knows PW1.
94. They started their relationship in August 2016.
95. They met outside the courthouse.
96. It was a random meet-up.
97. They conversed and then the defendant left for work.
98. The defendant was in police uniform on that day and PW1 was in 'outing'.
99. After that day, they continued talking and communicating over the phone.
100. Sometimes when he is on patrol, he would see or meet PW1.
101. The defendant denied that they went to the barracks in 2016.
102. It was in March 2017 when PW1 came to the barracks and has gone there three to four times.
103. The first time at the barracks, they had tea.
104. The second time, then they had consensual sex.
105. In the weekends, PW1 would come over to the barracks.
106. The defendant denied that PW1 will sleep over.

107. In August 2016 the defendant asked PW1 about her age and she said that she was about to reach 18 years old.
108. When the defendant took PW1 in March 2017, PW1 told him that she turned 18 the previous month.
109. The defendant said that he waited for months as he knew it was unlawful.
110. The defendant enquired with PW1 whether her parents knew and she said that her mother was in Nadi.
111. From her appearance, the defendant said that PW1 looked about 18 years old.
112. If she told him about her date of birth, he would not have had sex with her.
113. The defendant knows that PW1 has given birth.
114. The defendant accepts that he is the father.
115. The defendant is supporting the child.
116. The defendant sends PW1 money.
117. The defendant said that his intention was to be friends with PW1 when they first met.
118. The defendant did not know that PW1 was schooling in 2016 and did not see her in school uniform.
119. The defendant says that if he knew she was 17 years, he would have contacted PW1's mother.
120. The defendant and PW1's relationship ended in November or December 2017 after PW1 gave birth.
121. The defendant denies having sexual intercourse with PW1 between August 2016 until February 2017.
122. When cross-examined, the defendant accepts that he saw a future with PW1 being his girlfriend when they first met.

123. He accepts that he approached PW1 on their first meeting.
124. The defendant accepts that PW1 was pretty.
125. The defendant asked PW1 her age and she said told him that she was about to turn 18 years old.
126. The defendant said that this meant that he only had to wait for 1 month.
127. The defendant asked for PW1's age as it would be unlawful if she was under 18 years old.
128. The defendant accepts that he met up with PW1 three to four times in August and September 2016.
129. They had sex for about two to three times.
130. In 2016, the defendant would have been 26 or 27 years old.
131. The defendant denied lying about his age to PW1.
132. The defendant denied knowing that PW1 was schooling but only came to know after they had sex.
133. The defendant accepts that he did not have consent from PW1's mother to meet PW1.

BURDEN AND STANDARD OF PROOF and ELEMENTS

134. The defendant is presumed innocent until proven guilty [section 14 (2) (a) of the *2013 Constitution of the Republic of Fiji*].
135. The burden is on the party that seek to rebut this presumption. In this case, it is the prosecution.
136. The prosecution rebuts this presumption when they successfully persuade the court beyond a reasonable doubt or make the court sure that the defendant committed the offence [Leon Marseu Cornibeer v The State Criminal Petition Number CAV 0024 of 2017 (26th April 2018)].

137. The defendant has elected to give evidence. His evidence could be immaterial or neutral, it could exonerate him and it could even be used against him.
138. Even if I do not accept the defendant's evidence or version of the events, this does not necessarily mean that he is guilty or that the prosecution has proven their case. The prosecution still carries the burden.

ELEMENTS

139. The elements for abduction all of which the prosecution must prove beyond a reasonable doubt are:
- a. The defendant
 - b. Takes or causes L to be taken
 - c. Out of the possession and against the will of L's mother who had lawful care or charge of L;
 - d. Intending to have carnal knowledge of L;
 - e. L was under 18 years old; and
 - f. L was unmarried;
140. Abduction contrary to section 211 under the incumbent **Crimes Act 2009** mirrors section 153 of the repealed **Penal Code Cap 17**.
141. Although dealing with abduction under the *Penal Code*, it is helpful if I recite what her Ladyship Justice Shameem N. mused in **Ali v The State** [2003] FJHC 67; HAA 0008J.2002L (14 March 2003);

*This offence is similar to the offence of "Abduction of unmarried girl under eighteen" under the Sexual Offences Act 1956 in England. The offence is committed when a girl under the age of eighteen, is taken out of the possession of her parents against their will for the purpose of sexual intercourse. In **R -v- Manktelow** (1853) 6 Cox 143, it was held that the "taking" need not be by force, either actual or constructive and it is immaterial whether the girl consents or not. There must be some evidence... that there was a "substantial interference with the possessory relationship of parent and child" (**Jones** supra). In **R -v- Timmins** (1860) 8 Cox 401, the accused planned with the victim to meet and stay away from her home for several days. They did so meet and had sexual intercourse. The father did not consent, and the accused knew he did not consent. It was held that accused was rightly convicted of Abduction. It is a defence for the accused to show that he did not know, and had no reason to know that the girl was*

under the lawful care of her parents, or that he had reasonable cause to believe that she was over the age of eighteen. And, it was held in R –v- Mycock 12 Cox 28 that where the girl has already left her father's house for a temporary purpose, intending to return to it, she is still in her father's care within the meaning of the offence, and if whilst out of the house the accused induces her to go away with him, he is guilty. The question of whether the girl was in the possession of her parents is a question of fact.

142. For abduction, it is not necessary that the prosecution prove that there was actual carnal knowledge of PW1. Only the intention to have carnal knowledge of PW1.
143. Carnal knowledge is sexual intercourse [Concise Oxford English Dictionary, 12th eds, 2011 at page 215].
144. Someone's intention can be gauged from surrounding circumstances or circumstantial evidence or from direct evidence such as a confession [Kural v. The Queen (1987) 70 ALR 658].
145. It is inevitable in every case that there is some circumstantial evidence.
146. Circumstantial evidence can be powerful evidence but it must be considered with care. It is evidence from which a reasonable inference can be drawn linking the defendant to the offence and must negative any other reasonable conclusion that may exonerate the defendant. Drawing a reasonable inference should not be confused with conjecture or guessing. Timing, motive, opportunity amongst other factors assist in determining whether there is sufficient circumstantial evidence. At the end of the day, the court must be convinced beyond a reasonable doubt [Varasiko Tuwai v. The State Criminal Appeal Number CAV 13 of 2015 (26th August 2016) at paragraph 51 to 53].
147. There is a specific statutory defence available for this offence of abduction.
148. If it shall be made to appear to the court that the defendant had reasonable cause to believe and did in fact believe that L was or above the age of 18 years [section 211(2) of the Crimes Act 2009], then the defendant is entitled to an acquittal.
149. If the defendant relies on this defence, then he has the evidential burden of putting sufficient evidence before the court to suggest that he had reasonable cause to believe and did in fact believe that L was or above the age of 18 years.
150. The standard of proof in-order for this defence to succeed is on the balance of probabilities [section 61 of the Crimes Act 2009].

151. This however does not prevent prosecution from adducing evidence touching on this defence.
152. If sufficient evidence is adduced by the prosecution to make this defence worth considering, then the defendant no longer carries the evidential burden [section 59 (5) of the Crimes Act 2009].
153. If the evidential burden has been discharged, the prosecution still carries the legal burden of disproving or negating that defence and they must disprove it beyond a reasonable doubt [section 57 (2) of the Crimes Act 2009] .
154. I bear the above principles in mind when preparing this decision.

FINDINGS

155. It may be helpful if I summarise some of the facts and or elements that are not disputed or I find proven beyond a reasonable doubt.
156. PW1 was born on the 07-08-1999.
157. In 2016 she was 17 years old and would have turned 18 years old on the 07-08-2017.
158. The defendant in 2016 and 2017 would have been around 26 or 27 years old.
159. PW1 and the defendant met up near the courthouse in August 2016 and began their relationship.
160. They had sexual intercourse more than once. It was all consensual.
161. The defendant was a police officer at the time.
162. PW1 eventually became pregnant and gave birth to a child on the 26-11-2017. The defendant being the father of the child.
163. A person 18 years or older can get married. It is invalid if the person is not of this age criteria [section 12 of the Marriage Act 1968].
164. It is undisputed that PW1 would turn 18 years by 07-08-2017.

165. There was no evidence led before me that PW1 was unmarried or otherwise but her age at the material time which I accept would have been 17 years old and the state of the law in relation to marriageable age are strong reasons why I presume that PW1 was unmarried at the time.
166. The particulars of the charge drafted by the prosecution covers between the period of 01-08-2016 until 28-02-2017.
167. PW1 in her evidence relates that she went to the defendant's barracks on the first day they met near the courthouse in 2016.
168. I believe her and I prefer her evidence on this point rather than the defendant.
169. She is unclear though when in 2016 she first met the defendant.
170. However, the defendant in his own evidence, he relates that they first met up in August 2016.
171. I believe him and I also do not find any reason to reject his timeline for being unreliable.
172. The defendant in his own evidence accepted that he saw a future with PW1 who he wanted to be his girlfriend even, on the first day they had met up. He was the one who approached her.
173. They met up in town and in the barracks. They would communicate via phone. They drank alcohol together.
174. I do not think that PW1 would have gone or be allowed access inside the barracks without the approval and arrangement by the defendant.
175. I have no hesitation in accepting that the defendant had taken or caused PW1 to be taken.
176. The expression by the defendant that he wanted a relationship with PW1, their communication and the frequency of their meetings and especially with the defendant inviting her to the barracks and the parties eventually having sexual intercourse, are all strong circumstantial evidence and probative evidence over a span time that the defendant intended to have sexual intercourse with PW1.
177. Although PW2 the uncle gave evidence, I find that it was the biological mother or PW3 whose will or permission takes precedence here.

178. PW3 or the mother did not give permission for PW1 to be engaging in any relationship with the defendant or going to the defendant's barracks. The focus at the time was school or studies.
179. I find all the elements of the offence of abduction proven beyond a reasonable doubt.
180. Moreover, PW1 in her evidence accepts that she was not forthright with the defendant regarding her age. She was being intentionally vague or deceptive with the defendant. She said that she was 18 years old but is yet to be 18 years.
181. She did not want to lose the defendant which was understandable as she was passionate about their relationship.
182. She even said when cross-examined that she told the defendant that she was 18 years old.
183. Someone's age can be determined in various ways. Testimony from the biological mother regarding the date of birth or testimony from a member of the witnessing and attending medical personnel during birth, production of a registered birth certificate, evidence from the subject person regarding the number of birthdays they have had amongst other life experiences, level of education, mental acuity, employment, independence, physical appearance or physique *inter alia*. It is not necessary to have all of these presented or adduced and even one factor could be sufficient for a court to determine age.
184. There is no contemporaneous photo or film of PW1 at the material time. This is not necessary but can be helpful.
185. We do have oral evidence of for example, PW2 and PW3 who describes PW1's physique at the time.
186. PW2 described PW1 to be slim and small built.
187. Her mother described PW1 to be well built and looks the same now as she did in 2016.
188. I prefer PW3's description and it is more persuasive as I have had the opportunity of observing PW1 too when she gave evidence.

- 189.** Although their evidence is opinion evidence, I see no reason to rule them inadmissible as their description could be admissible as if it were a photo or film. After all, these witnesses would have observed and seen PW1 over months and especially the biological mother, a lifetime.
- 190.** When she gave evidence before me, PW1 appeared to me to be well more than 18 years old.
- 191.** I have considered that 2016 is about 5 years earlier and that for instance PW1 has given birth since. I have absorbed these when considering her mother's description that her daughter still looked the same back then.
- 192.** Still, I make the finding that PW1 would have appeared to be 18 years or older in 2016.
- 193.** As I have stated earlier, she was not forthright about her age with the defendant.
- 194.** I believe the defendant that if he knew her actual age, he would have waited.
- 195.** I believe the defendant that at the material time, PW1 appeared to him to be about 18 years old.
- 196.** I am satisfied on the balance of probabilities that the defendant had reasonable cause to believe and did in fact believe that PW1 was or above the age of 18 years. This is not disproved by the prosecution's evidence.

CONCLUSION

- 197.** Based on the aforementioned reasons, although the prosecution has proven all the elements of abduction beyond a reasonable doubt, I find that the statutory defence available in section 211(2) of the **Crimes Act 2009** exists and succeeds here.
- 198.** Consequently, I do not find the defendant guilty of the charge and I acquit the defendant of the charge of abduction accordingly.
- 199.** 28 days to appeal



A handwritten signature in blue ink, appearing to read "Lisiate T.V. Fotofili".

LISIATE T.V FOTOFILI
Resident Magistrate

At Tavua this 15th day of February, 2022.