

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 269 OF 2020

BETWEEN : STATE

AND : SUDHIR KUMAR

Counsel : Ms S Shameem & Ms S Nisa for the State
Mr T Varinava for the Accused

Date of Hearing : 11 & 12 April 2022

Date of Judgment : 5 May 2022

JUDGMENT

Charges

- [1] The accused is charged with five representative counts of rape.
- [2] Counts one and two cover a period between 1 January 2014 and 19 October 2014, when the complainant was under the age of 13 years.
- [3] Counts three, four and five cover a period between 20 October 2014 and 10 August 2020.
- [4] Counts one, three and four alleges digital rape using finger and tongue. Counts two and five alleges sexual intercourse, that is, penetration of vagina with penis.

Burden and standard of proof

- [5] The accused has pleaded not guilty to the charges. The burden is on the prosecution to prove each charge beyond reasonable doubt. This burden never changes, never shifts to the accused.

Rape

[6] Section 207 (2) of the Crimes Act defines rape as:

A person rapes another person if —

- (a) the person has carnal knowledge with or of the other person without the other person's consent; or
- (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or
- (c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.

Subsection (3) states:

For this section, a child under the age of 13 years is incapable of giving consent.

[7] To prove the charge of rape, the prosecution must prove that the Accused:

Counts 1, 3 and 4

Penetrated the vagina of the complainant,
With a thing or part of his body which is not a penis,
Without the consent of the complainant.

Counts 2 and 5

Penetrated the vagina of the complainant,
With his penis,
Without the consent of the complainant.

[8] Slight penetration is sufficient. In case of sexual intercourse ejaculation is not necessary. Consent means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the submission without physical resistance by a person to an act of another person shall not alone constitute consent. If at the time of penetration the complainant was a child under

the age of 13 years, then it is not necessary to prove lack of consent because a child under the age of 13 years is incapable of giving consent.

- [9] In the present case, there is no suggestion that the accused mistakenly believed that the complainant consented to the alleged sexual acts. That is not an issue in this case. It is not necessary for the prosecution to prove that the accused knew that the complainant did not consent.

Prosecution case

- [10] At trial, the prosecution called three witnesses including the complainant. Her name is suppressed and special measures such as a screen and closed court were used to record her evidence. The purpose of special measures is not to prejudice the accused but to make the witness at ease when giving evidence.
- [11] Both parties have agreed to certain facts. The agreed facts are taken as true. The complainant's date of birth is 20 October 2001 (Birth Certificate PE 1). After her biological parents separated, her mother have been in a de-facto relationship with the accused since 2005. The couple have three children together, born after 2010.
- [12] It is not in dispute that the complainant was in Year 7 in 2014 and in Year 8 in 2015 at Narere Primary School. She lived with the accused and her mother in a two room house in Narere. One room was used as a bedroom and the other as a sitting room. The bedroom contained two beds. One bed was kept in the sitting room.
- [13] It is not in dispute that the complainant was in Year 9 in 2016, Year 10 in 2017, Year 11 in 2018 and Year 12 in 2019 at DAV College. In 2020, the complainant repeated Year 12 at DAV College.
- [14] It is not in dispute that on 10 August 2020, the accused picked the complainant from school at 3 pm.
- [15] It is not in dispute that since 19 August 2020, the complainant had been staying with her maternal aunt, Narvada Singh aka Kajal at Mead Road.

- [16] The complainant's evidence is that the abuse started in 2014 before her 13th birthday. At the time she was in Year 7 and residing with her mother, her stepdad (the accused) and her 4-year old stepbrother at Narere.
- [17] The complainant recounted an incident that occurred when she was practising Taekwondo outside on the porch after coming home from school. She said that the accused touched her vagina while working out with her. She said that her mother was inside the house with her younger brother.
- [18] The complainant said that on the same day another incident took place. She said that she was sleeping with her younger brother on the same bed in the sitting room when the accused returned home late night from a devotional meeting. The accused told the complainant to go and sleep in the bedroom. As she was getting up the accused made her lie down again. She said that the accused punched her thighs with his fist and she was not able to move. He then pulled down her tights and underwear halfway and inserted his finger into her vagina. After penetrating her vagina with his finger for about five minutes he penetrated her vagina with his penis.
- [19] The complainant said she recognized the accused by his voice because he spoke to her before the incident. She said that during the incident her younger brother was sleeping next to her and her mother was in her bedroom asleep.
- [20] After the incident the complainant said she went to the washroom when she noticed she was bleeding from her vagina. She used a pad and went to sleep with her mother. She said that she did not complain to her mother because the accused told her that her mother will not believe her. She was afraid that her mother won't believe her and that she knew her family trusted the accused.
- [21] The complainant recalled another incident that took place in a weekend in 2014 before she turned 13. On this day her mother had gone out shopping and she was at home alone with the accused. The complainant said that the accused made her massage his head inside his bedroom. When she was giving him a massage he started touching her vagina. He then pulled her and made her lie down straight on

the bed. When she resisted by pushing him away he held both of her hands tightly. He used his knees to press her knees down and then used one of his hands to pull down her tights and his shorts and underwear. He inserted his penis into her vagina and penetrated it for 3-4 minutes. He warned her that if she complained, nobody will believe her. She said that the accused penetrated her vagina with his penis on about 4 other occasions before she turned 13.

[22] The complainant said that after she had turned 13 in 2015 she had moved to Naidiri Settlement at Khalsa with her mother, stepfather and siblings. In 2016 the complainant started to attend DAV school in Nabua. At the time her stepfather worked as a machinist in Valelevu while her mother stayed home.

[23] The complainant recalled an incident in 2019 when she was about to sit for her FSLC examination. She was in the sitting room studying for her exams when the accused came and sat next to her and offered to teach her. While sitting next to her he touched her vagina with one hand and fondled her breast with the other hand. When she pushed his hands away he swore at her calling her a female dog and a prostitute. She told him not to do it but he did not listen.

[24] The complainant said that the accused made her lie on the settee and pressed her legs down with his knees while holding her hands with his one hand. He used his other hand to pull down her tights and panty halfway and his shorts and underwear. He penetrated her vagina for some time. She cried. She did consent to the act. He wiped his penis with his t-shirt after pulling it out from her vagina. He then penetrated her vagina with his tongue. The complainant said that when this was happening her mother was asleep in the bedroom after taking medications for migraine. The complainant said that she did not complain to her mother because she remembered what the accused had told her about not being believed if she complained. She said that year her FSLC examination marks were low.

[25] The complainant said that the last incident occurred on 10 August 2020 when she was repeating Year 12. She said that on this day the accused picked her from school at about 3 pm and brought her to their home. When she arrived home the accused told her he was going to drop her at her aunt's place where her mum had

gone to. She said that after making coffee for him she went to make the bed in his room on his instructions.

- [26] While she was in the bedroom he came and undressed himself and wrapped a towel around himself. She thought he was going to have his shower. He came from behind and fondled her breast and then tried to remove her clothes. She was wearing her school uniform. She said that when he was not able to remove her dress, he pushed her on the bed and lifted her legs up. He removed her tights and panty and inserted his penis into her vagina. He did not ask her for her consent. While this was happening he told her to be careful and that she should have interests in other boys so that nobody will suspect him.
- [27] The complainant said that after sexual intercourse, the accused licked her vagina and inserted his finger into her vagina. She said that she did not consent to these acts.
- [28] The complainant said that on 11 August 2020 she complained to her mother about these things. She said that her mother was expecting with a third child and that her mother assured her that she would make a decision after the baby was born.
- [29] The complainant said that on 12 August 2020 her mother was admitted to the hospital and the accused dropped her and her two siblings at her aunt, Kajal's place. Later that same night when her aunt questioned her whether something was happening between her and her stepfather she got emotional and nodded her head. She told her aunt that he has been doing since she was in Year 7. From that day she has been staying with her aunt and had not spoken to her mum.
- [30] Kajal's evidence is that on 10 August 2020 the accused dropped his family (wife, mother-in-law, and two children) at her place. Kajal said that the accused told her that he will go and pick the complainant from school and then drop her at her place. When the accused did not bring the complainant to her place by 4 pm, she got suspicious and got her sister (complainant's mother) to follow up with the accused regarding their whereabouts.

- [31] Kajal said that when her sister gave the accused a call on his mobile they learnt that the complainant was at her home with the accused and the accused was enquiring about the curtains so that the complainant could put them on. When the complainant was eventually brought to Kajal's place she appeared frightened.
- [32] Kajal said that the complainant was dropped off at her place on 19 August 2020 when her sister went in labour with her third child from the accused. She said that at around 10 pm she had a conversation with the complainant when she came to assist her to pack some sweats that she had made. She said that the complainant was reluctant to speak but when she assured her that she can confide with her about anything happening between her and her stepfather, the complainant nodded her head and broke down in tears. Kajal said that she immediately called the complainant's mother but she was in labour at the hospital.
- [33] Under cross examination Kajal denied instigating the complainant to fabricate the allegations against the accused because she was not happy with him for complaining to his wife about a drinking incident at his home. Kajal said that no such incident involving her ever took place at the accused's home.
- [34] On 25 August 2020, Dr Losana Burua medically examined the complainant at Medical Services Pacific Clinic. Upon physical examination of the complainant's genitalia the doctor found that the complainant's hymen (a thin layer of tissue covering the opening of the vagina for girls) was not intact. The perforated hymen indicated that sexual contact had been made and in the case of the complainant a finger could be easily inserted into her vagina. The doctor also found an old healed hymenal tear at 10 o' clock position. The doctor said that the old healed injury indicated blunt force trauma by erect male penis.
- [35] That summarizes the prosecution case.

Defence case

- [36] The accused does not deny that he was the complainant's guardian and that he took care of her since she was a small girl. He agreed that she trusted and respected him. He denies the allegations of rape. He thinks that Kajal has

instigated the complainant to fabricate the allegations because he had complained to his wife about Kajal's behaviour during a drinking party at his home.

[37] The complainant's mother gave evidence for the defence. Her evidence is that the complainant had never reported any incidents of abuse to her and while they were staying together she did not suspect anything unusual happening between the accused and the complainant. She said that on 10 August 2020 she did not go to her sister, Kajal's place but was at home with her two younger children. She said that on that day the accused picked the complainant from school and brought her home. She said that she only came know about the allegations on 19 August 2020 when she was in labour at the hospital with her third child from the accused.

[38] That summarizes the defence case.

Analysis

[39] The accused chose to give evidence. However, he does not have to prove anything. If the account given by him is or may be true, then he must be found not guilty. But even the account given by him is entirely rejected, that would not relieve the prosecution of its burden of making sure by evidence of the accused's guilt.

[40] The prosecution case is substantially dependent upon the complainant's evidence. She is an adult now. But when the allegations first arose she was a child. I approach her evidence without sympathy or prejudice. Her evidence does not require corroboration. If her account of the alleged incidents are true, then the accused is guilty of the charges. However, if her account is false or may be false then the accused is not guilty.

[41] The charges are representative counts. To put matters into context the prosecution led evidence of uncharged acts of the accused touching the complainant's vagina or breasts before or during the offences charged.

[42] The uncharged acts are relied upon by the prosecution to make the circumstances of the particular offences charged more intelligible. The uncharged acts are not relied upon to establish a tendency on the part of the accused to commit offences

of the type charged, and therefore, the uncharged acts cannot be used as an element in the chain of proof of the offences charged. The only use I make of the uncharged acts if I accept it to be true is to place the charged acts into a realistic context.

- [43] The complainant's account is that the first time sexual penetration took place is on the same date as the incident when the accused touched her vagina while she was doing physical workout on the porch after school. Her account is that the accused came home late and found her sleeping in the sitting room. He forcefully removed her undergarments and inserted his finger into her vagina. He then penetrated her vagina with his penis. Her mother was asleep in the bedroom. She recognized the accused because he spoke to her before and after the incident. This account, if true, proves counts one and two.
- [44] The complainant's account is that another incident occurred in a weekend in 2014 when her mother had gone out shopping and she was still under 13 years of age. The accused forcefully removed her undergarments and penetrated her vagina with his penis inside his bedroom.
- [45] The complainant's account of an incident in 2019 is that her mother was asleep when the accused forcefully penetrated her vagina with his penis and tongue while they were living at Khalsa.
- [46] The complainant's account of the last incident is that on 10 August 2020, the accused picked her from school and brought her home. Her account is that on this occasion he forcefully removed her undergarments and penetrated her vagina with his penis, finger and tongue, without her consent. This account, if true, proves counts three, four and five.
- [47] Overall the complainant struck to me as an honest and reliable witness. She gave evidence of events that took place over a period of seven years between 2014 and 2020. She was 12 years of age and in Year 7 in 2014. I do not expect her to remember details of every incident. Memories fade with time. She may be

confused with times and dates. But she gave a consistent account of the sexual acts that were committed on her by the accused, without her consent.

[48] The complainant's explanation for not reporting the incidents to her mother or anyone else until 19 August 2020 is reasonable in the circumstances of the case. She was a child and a female. The accused was an adult male. He was an authority figure in the house. He had instilled fear in her that nobody will believe her if she complained. She feared of not being believed if she complained. She only brought the abuse to the attention of her aunt when her aunt assured her that she can confide with her.

[49] When the complainant was medically examined, injuries were noted on her genitalia that were consistent with blunt force trauma. The medical evidence does not implicate the accused but the evidence is consistent with the complainant's account of being penetrated with a finger and penis.

[50] I do not accept the defence case that the complainant's aunt instigated the complainant to fabricate the allegations because the aunt had a grudge against the accused arising from a drinking incident at his home. There is no logic in the defence case. I do not accept the denials of the accused.

[51] I do not accept the complainant's mother as a credible witness. It is apparent that her loyalty lies with the accused from whom she now has three young children. She has cut off all her ties with the complainant and her sister, after they reported the accused to police. She tailored her evidence to support the accused.

[52] I believe the complainant's account of sexual penetration of her vagina by the accused with his finger and penis on a weekday after school when she was in Year 7 and residing in Narere.

[53] On count one, I feel sure that the accused between 1 January 2014 and 19 October 2014 at Narere, penetrated the vagina of the complainant, a child under the age of 13 years, with his finger.

- [54] On count two, I feel sure that that the accused between 1 January 2014 and 19 October 2014 at Narere, penetrated the vagina of the complainant, a child under the age of 13 years, with his penis.
- [55] I believe the complainant's account that on 10 August 2020 the accused penetrated her vagina with his finger, tongue and penis, without her consent, at her residence in Khalsa.
- [56] On count three, I feel sure that the accused on 10 August 2020, penetrated the vagina of the complainant, with his finger and that the complainant did not consent to the said penetration.
- [57] On count four, I feel sure that on 10 August 2020 the accused penetrated the vagina of the complainant, with his tongue and that the complainant did not consent to the said penetration.
- [58] On count five, I feel sure that on 10 August 2020 the accused penetrated the vagina of the complainant, with his penis and that the complainant did not consent to the said penetration.

Verdict

- [59] The verdict of the Court is:

Count 1 – Guilty – Convicted.
Count 2 – Guilty – Convicted.
Count 3 – Guilty – Convicted.
Count 4 – Guilty – Convicted.
Count 5 – Guilty – Convicted.



[Handwritten signature]

.....
Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the Accused