

Neither accused gave evidence in the trial but both had been arrested by the police and interviewed. In his interview, Huni admitted the incident but claimed that the intimacies had all been consensual. He told the police that he did not know how old she was but he did know she was still at Apifo'ou College

Fale told the police that he had told the girl that he would take her to Fou'ui and then return her. He said he already knew that Huni had abducted the girl to have sexual intercourse and that he would return later to take her to her home. He agreed that, after he took them food in the bush allotment, he had left them there. He was not asked if he knew her age.

Neither accused called any witnesses.

I need not go into any more detail. The girl gave evidence and suggested initially that she had not been willing to kiss Huni, had been effectively forced into the van against her will and had not been willing to have sexual intercourse in the hut on the bush allotment. In cross-examination she wavered in that denial and the facts generally persuade me that she was not speaking the truth when she denied being willing.

I am satisfied beyond any reasonable doubt that she went with Huni willingly and knowing that his intention or hope was to have sexual intercourse. She was willing and consented to all the acts of sexual intercourse and the intimacies which went with them from the first kiss before going in the second accused's van.

Mr Tu'utafaiva for both accused puts their defence on two limbs. First he suggests that the prosecution has not proved the particulars of the indecent assault charged and second that this was not a taking sufficient to establish abduction.

The particulars of indecent assault charge that he indecently assaulted the girl "by touching her vagina". The defence points out that the evidence was of sexual intercourse and that is not an indecent assault. Mr Tu'utafaiva suggests that the prosecution had to establish a touching of the vagina by the first accused's hand. The sexual intercourse relates, he suggests to the second count of abduction.

I do not agree. The evidence as a whole satisfies me beyond any doubt that Huni did indecently assault her. Whether the touching of her vagina was by his hand or penis does not alter the fact that it was a touching. I accept she was willing partner but, by section 124(2), a girl under the age of 16 cannot give any consent which would prevent an act being an indecent assault.

Huni is convicted on count 1.

Mr Tu'utafaiva raises two matters in his submission in relation to the abduction. First, he suggests that there was not a taking in the terms of the section and, second, that the prosecution has failed to prove the girl was in the possession of her mother when she was taken.

Section 129 provides:

"(1) Any person who shall take or cause to be taken any girl being under the age of 14 years out of the possession and against the will of her father or mother or any other person having the lawful charge of her shall on conviction be liable ...

(2) It shall be no defence to any prosecution brought under this section to prove that the girl consented to being so taken or that the accused was told or reasonably believed the girl to be of or above the age of 14 years."

It is suggested that the girl was willing to get into the van and was never forced. In those circumstances Mr Tu'utafaiva suggests there was no taking. No force was used and she went of her own free will. He points to the wording of section 128 which establishes the offence of abduction of women where the reference is to taking by force and suggests that should also apply in the following section.

I am satisfied that the different wording of the two sections is deliberate because there is no need for force to prove abduction under section 129. In this case the accused suggested they went for a drive and they both knew the aim was to have sexual intercourse. The girl knew her mother would not agree and I have no doubt at all the accused knew that as well. That is a taking in terms of section 128.

The evidence was that the accused was a minor living with her mother and came to the market that day with her mother. Her mother told the court that she had agreed her daughter could go with the girl with whom the complainant was friendly and expected that they wander around the town until about 5.0 pm. I am satisfied beyond any doubt that the girl was in her charge and was taken from that charge against the will of the mother.

Huni is convicted on count 2.

Fale is charged with abetting the abduction. In his interview with the police, he said he knew she was being taken by Huni for sexual intercourse. He was not asked whether he knew her age but it is no defence even to have a reasonable belief that she was over 14.

I am satisfied beyond any doubt that he knew she was being taken against the will of her mother or the person having lawful charge of her and he is convicted as charged.



U. J. J.

NUKU'ALOFA: 13 December 2002.

CHIEF JUSTICE