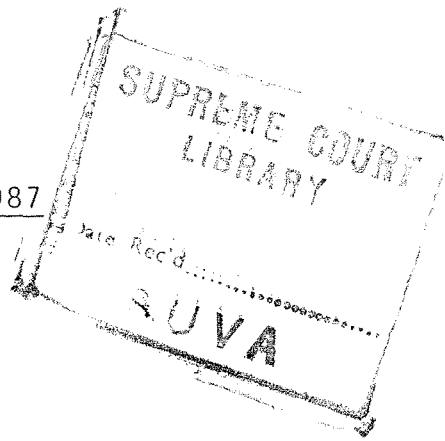


IN THE FIJI COURT OF APPEAL
CRIMINAL APPEAL NO. 69 OF 1987



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Between:

MATAIASI CURUSESE

Appellant

- and -

THE STATE

Respondent

Appellant In Person
Mr. Babu Singh for the Respondent
Mr. I. Mataitoga, Acting D.P.P. (On Re-argument)

Date of Hearing: 25th August 1988 and 8th November 1988

Delivery of Judgment: 2nd December 1988

JUDGMENT OF THE COURT

The appellant, who was unrepresented in this Court and the Court below, was on the 11th day of June 1987 convicted of rape contrary to Section 149 and 150 of the Penal Code and sentenced to seven years imprisonment.

He appeals against both conviction and sentence.

In his grounds of appeal he raises (inter alia) two complaints against the trial Judge. One that hearsay evidence was accepted and the other that the summing up by the learned Judge was biased implying it was unfair.

There is an instance of serious misdirection in the summing up. When directing the assessors on the vital issue of consent the learned Judge said:-

"Another matter on the issue of consent can be quickly disposed of now. This relates to the age of Litia. 25.10.86 she was 15 years 11 months and 15 days. In other words just 16 days from her 16th birthday.

Now it is an offence called defilement for a man to have sexual intercourse with a girl under the age of 16 years. The law protects girls under that age by stipulating that they are unable to consent to sex.

But the charge here is rape. There is no alternative charge of defilement laid by the prosecution seeking a conviction based on the fact of some spurious consent by a girl 16 days short of 16 years. The prosecution does not and cannot place any reliance on that presumption of law. You may therefore disregard that factor in considering the issue of consent in charge before you. The prosecution must prove its contention beyond doubt that Litia herself did not consent to sexual intercourse. She was unwilling, she was compelled by the accused to have sexual intercourse."

The learned Judge erred in stating as a fact that the complainant was 15 years and 11 months old on 25.10.86, the day of the alleged rape. The complainant had stated that that was her age. Her statement was hearsay evidence and would not have been admissible without proper evidence of age had the appellant been charged with the offence of defilement. There was no other evidence as regards her age. The criticism we have to this reference to the offence of defilement is firstly that it was highly prejudicial to the appellant's defence and should not have been raised at all. The prosecution had not charged the appellant with that offence or referred to it. But for this reference the assessors may not have been aware of the fact that, if the appellant was not convicted of rape, he could escape all punishment for a crime he may have committed. He had admitted carnal knowledge. This misdirection created a situation which could have made it difficult for any assessor to keep an open mind particularly as the issue was the credibility of the accused's story against that of the complainant's.

Nor did the learned Judge point out that there could be a legal defence to a charge of defilement if an accused charged with that offence believed on reasonable grounds that the girl was over 16.

Not only should it not have been raised but as a direction on the law it was patently incorrect and might have impaired any chance of the appellant's defence, that the complainant consented, being fairly considered by the assessors.

There were other instances of admission of hearsay evidence which we do not find necessary to point out in view of the decision we have come to.

There was in our view the serious instance of prejudicial reference to the girl's age and the offence of defilement of a girl under the age of 16 years which could have deprived the appellant of a fair trial. It follows that the conviction must be quashed.

The appeal against conviction is allowed. The conviction is quashed and a new trial is ordered.

T. J. J. J. J.

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President Fiji Court of Appeal

R. S. S. S.

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Justice of Appeal

M. S. S. S.

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Justice of Appeal