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IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: AAU0014 OF 2008
(HIGH COURT CRIMINAL ACTION NO.: HAA 148 OF 2006S)

BETWEEN:

YASIN ALI

-Appellant-

AND:

THE STATE

-Respondent-

Coram: Pathik, JA
Goundar, JA
Powell, JA

Hearing: Wednesday 2nd July, 2008

Counsel: Mr. A. Singh for the Appellant
Ms. A. Prasad for the State

Date of Judgment: Friday 11th July, 2008

JUDGMENT OF THE COURT

Background

[1] The appellant was charged with the following offence:

Statement of Offence (a)

RAPE: Contrary to Sections 149 and 150 of the Penal Code, Cap.17.

Particulars of Offence (b)

YASIN ALI s/o ASHIK ALI on the 1st day of September 2005 at Suva in the Central Division, had unlawful carnal knowledge of a girl namely NANISE KULAVERE without her consent.

[2] Following a trial in the magistrate's court at Suva, the appellant was acquitted of the charge.

[3] The State appealed against the acquittal to the High Court on two grounds, namely:

“(a) that the learned Magistrate erred in law and fact when he found the respondent not guilty of the charge preferred against him, contrary to the weight of the evidence

(b) the learned Magistrate in the alternative, erred in law when he failed to convict the respondent on another offence open to him in law.”

[4] On appeal, both grounds of appeal were upheld by Winter J, but for reasons not clear in the judgment, his Lordship convicted the appellant of defilement contrary to section 156(1) of the Penal Code, and not rape, as charged.

[5] The appellant was ordered to be remanded in custody to be sentenced on 21 September 2007, but he absconded from the court premises when the case was

stood down. The sentencing was delayed because the appellant could not be located. Eventually, the appellant was apprehended. By that time, Winter J had left the bench. The case was assigned to Shameem J who on 21 January 2008 sentenced the appellant to a term of 3 years imprisonment. The appellant appeals against conviction and sentence.

[6] The grounds of appeal are:

- (i) That the learned Judge erred in law in quashing the acquittal by the Magistrate and convicting the appellant for defilement contrary to section 156 of the Penal Code without allowing him the right to argue a defence under the proviso to section 156(1) of the Penal Code;
- (ii) That the learned Judge erred in law when she sentenced the appellant for an offence where another Judge heard the appeal and entered a conviction;
- (iii) That the learned Judge erred on a principle of sentencing when the appellant was sentenced to 3 years imprisonment.

Conviction of Kindred Offence

[7] This ground of appeal presents a question of law. The question is whether the High Court in its appellate jurisdiction could convict of the kindred offence of defilement contrary to section 156 of the Penal Code without giving the accused an opportunity to raise the statutory defence provided by that section?

[8] Section 156 states:

Defilement of girl between thirteen and sixteen years of age

(1) Any person who –

- (a) unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years; or

is guilty of a misdemeanour and is liable to imprisonment for five years, with or without corporal punishment:

Provided that it shall be a sufficient defence to any charge under paragraph (a) if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of sixteen years.

- (2) No prosecution shall be commenced for an offence under paragraph (a) of subsection (1) more than twelve months after the commission of the offence.
- (3) It is no defence to any charge under paragraph (a) of subsection (1) to prove that the girl consented to the act.

- [9] The power to convict of a kindred offence on a charge of rape is expressly provided by section 176 of the Criminal Procedure Code. Section 176 states:

Conviction of kindred offence on charge of rape

When a person is charged with rape and the court is of opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections 154(1), 155, 156, 158 and 178 of the Penal Code, he may be convicted of that offence although he was not charged with it.

- [10] We take that 'the court' as referred in section 176 to mean 'the trial court'. In this case the trial court was the magistrate's court.

- [11] The powers of the High Court on an appeal from a judgment of the magistrate's court are contained in section 319 of the Criminal Procedure Code. Section 319 provides:

Powers of High Court

At the hearing of an appeal, the High Court shall hear the appellant or his barrister and solicitor, if he appears, and the respondent or his barrister and solicitor, if he appears, and the Director of Public Prosecutions or his representative, if he appears, and the High Court may thereupon confirm, reverse or vary the decision of the magistrate's court, or may remit the matter with the opinion of the High Court thereon to the magistrate's court, or may order a new trial, or may order trial by a court of competent jurisdiction, or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the magistrate's court might have exercised.

- [12] We note that section 319 does not give an express power to the High Court to convict on appeal, of a lesser or kindred offence when the appellant had been acquitted of a serious charge. However, the powers of the High Court on appeal are wide. The Court may make such other order in the matter as to it may seem just, and may by such order exercise any power which the magistrate's court might have exercised. We therefore conclude that the High Court has the power to convict of the kindred offence of defilement on appeal against acquittal on a charge of rape, pursuant to section 176 of the Criminal Procedure Code, provided no injustice is caused to the accused by such order.
- [13] The law is that where an accused is unrepresented, any statutory defence should be brought to his attention by the court. In *Bari v R*, Labasa Criminal Appeal No. 11/75, Grant CJ in reference to the statutory defence available in the case of defilement, said:

“I might add for the guidance of Magistrates that, in the case of an unrepresented accused, any statutory defence should be brought to his attention. For instance, on a charge of this nature, the accused should be informed that he is charged with unlawful carnal knowledge of a particular girl of a specific age and that he had no reasonable cause to believe that she was of or above the age of sixteen years; and the record should disclose that the charge was explained accordingly.”

- [14] This passage was adopted by Pathik J in a later case of *Karikari v The State* [1999] 45 FLR 310. In *Karikari*, Pathik J held that an available statutory defence must be raised by the court even if not raised by an unrepresented accused.
- [15] The appellant was unrepresented at trial and on appeal. Albeit he was caution interviewed for defilement, he was not specifically asked whether he knew the complainant to be under age or whether he believed her to be over the age of sixteen years at the time of sexual intercourse. At trial, the charge was rape. Before the commencement of the trial, the Magistrate enquired from the prosecution whether they were relying on an alternative charge of defilement to which the prosecution replied in negative. At trial the appellant raised the defence of consent which was an available defence on the charge of rape. The appellant succeeded in his defence and he was acquitted of rape.
- [16] On appeal, without any notice as to the nature of the charge, the appellant was convicted of defilement which is considered a kindred offence to rape.
- [17] Whilst the High Court had the jurisdiction to convict the appellant for defilement, the power could only have been exercised if it may have seemed just. The appellant who was led to believe by the prosecution that he only had a rape

charge to defend, after an acquittal of that charge, was convicted on appeal for defilement without being notified of an available statutory defence, lead us to conclude that we cannot rule out the possibility of injustice being done to the appellant.

[18] We propose, therefore, to allow the appeal and order a new trial on the original charge of rape. It will be for the Director of Public Prosecutions, in his discretion, to determine whether, in all the circumstances, he will proceed. That concludes that matter as far as this appeal is concerned. We do not, in those circumstances, need to consider the remaining grounds of appeal.

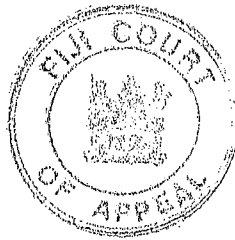
Orders


[19] We make the following orders:

1. Appeal allowed.
2. The conviction and sentence for the offence of defilement are quashed.
3. New trial before another Magistrate on the original charge of rape.
4. The appellant is released on cash bail of \$100.00 with conditions as follows:
 - (a) Appear at the Suva Magistrates' Court at 9.15am on 25th July, 2008.
 - (b) Attend court when required and keep the peace and be of good behaviour.
 - (c) Not to meet or contact the complainant, or any prosecution witness directly or indirectly and no pressure to be brought on the complainant or her relatives in any way.

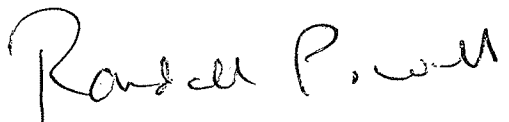


Pathik, J





Goundar, JA



Powell, JA

At Suva
Friday 11th July, 2008

Solicitors:
Messrs A.K. Singh Law, Lawyers, Nausori for the Appellant
Office of the Director of Public Prosecutions, Suva for the State