

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

CRIMINAL CASE NO: HAC. 314 of 2015

STATE

V

AVNEEL CHAND

Counsel : Ms. S. Serukai for State
Mr. J. Reddy for Accused

Dates of Hearing : 27th -29th September 2016

Date of Summing Up: 30th September 2016

Date of Judgment : 30th September 2016

Date of Sentence : 06th October 2016

(The name of the complainant is suppressed. Accordingly, the complainant will be referred to as SSL)

SENTENCE

1. Avneel Chand, you stand convicted of the offence of defilement contrary to section 215(1) of the Crimes Decree 2009.
2. You were charged with the offence of rape. However, the assessors unanimously opined that you are not guilty of rape but guilty of the lesser offence of defilement.

3. In brief, you had sexual intercourse with the complainant who was 15 years old at the material time with her consent on 19th September 2015 in the complainant's mother's bedroom. Your family and the complainant's family have been living in the same compound for about 10 years. According to you, the two of you were in a relationship for about one year before the incident you are convicted of took place. You were 19 years at the time of the offence.
4. It is pertinent to note that you have admitted that you had consensual sexual intercourse with the complainant in your cautioned interview. On 21/01/16 the court was informed by your counsel that you admit to having sexual intercourse with the complainant and you are willing to take a progressive approach if the state considers an alternative charge. The admitted facts signed on 12/02/16 clearly indicate that you agree that the complainant was 15 years old at the time of offence and that you had consensual sexual intercourse with her. Again on 27/05/16 the court was informed that your counsel had made representations to the Office of the Director of Public Prosecutions to reduce the charge to defilement which was not considered favourably.
5. Therefore, I find that you have accepted the responsibility to your action from the inception and that you have indicated your intention to plead guilty to the offence of defilement at a very early stage. This I find as a clear indication of your remorse.
6. Pursuant to section 215(1) of the Crimes Decree 2009 read with section 3(4) of the Sentencing and Penalties Decree 2009, the maximum punishment for defilement is an imprisonment for 10 years. In the case of *Donumainasava v The State* [2001] FJHC 25; Haa0032j.2001s (18 May 2001), 4 years imprisonment was taken as the upper end of the tariff. *Donumainasava* was a case where the accused was charged under section 156(1)(a) of the Penal Code where the maximum sentence was 5 years imprisonment. However, this court has applied the same tariff for the offence of defilement under section 215(1) of the Crimes

Decree. I have also noted that this court has shown an inclination to select 2 years as the starting point for the offence of defilement.

7. Therefore, I consider that the tariff for the offence of defilement is an imprisonment term between 2 to 4 years in view of the preceding cases.
8. I take 02 years imprisonment as the starting point of your sentence.
9. The prosecution has failed to present any credible and reliable evidence with regard to the nature of the offending in order for this court to consider whether there were any aggravating factors. The evidence given by you was the only reliable and credible evidence before this court and you are convicted based on your admissions. Therefore, I have to accept your version in that there was a relationship between you and the complainant.
10. In the circumstances I do not find any aggravating factors to increase your sentence.
11. I consider the following as mitigating factors;
 - a) You are a young first offender;
 - b) You have indicated your intention to plead guilty to the offence of defilement at an earlier stage;
 - c) You are remorseful; and
 - d) You have cooperated with the police.
12. Considering the above mitigating factors, I deduct 15 months of your sentence. Accordingly, your final sentence is 9 months imprisonment.
13. Your counsel submitted that you should be given a suspended sentence highlighting that you were in a relationship with the complainant for one year when this incident took place on 19th September 2015.

14. In the case of *Donumainasava* the court said thus;
- “A charge under section 156(1)(a) of the Penal Code is specifically designed for consensual sexual intercourse with girls under the age of consent. The offence is clearly designed to protect young girls, who have entered puberty and who are experiencing social and hormonal changes, from sexual exploitation.”*
15. Even though a young girl may be physically ready to have sexual intercourse with the onset of puberty, section 215(1) of the Crimes Decree makes it an offence to have sexual intercourse with a girl who is below the age of 16 years and above the age of 13 years, even with her consent. As the learned Judge noted in the case of *Donumainasava* this offence is designed to protect young girls until they attain a certain level of maturity.
16. Therefore, in my view, this offence should not be taken lightly and it is not appropriate to suspend the whole sentence. However, considering all the circumstances of the offending, I consider it appropriate to partly suspend your sentence. I order that you serve 03 months of the above sentence forthwith and the balance period of 06 months is suspended for 2 years.
17. Section 24 of the Sentencing and the Penalties Decree reads thus;
- “If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.”*
18. You have spent 7 days in remand pending your sentence. In view of the provisions of section 24 of the sentencing and Penalties Decree 2009 the period you have been in custody for this case shall be regarded as time already served by you. I hold that the period to be considered as served should be 1 month.

19. Accordingly, you are sentenced for 9 months imprisonment. You should serve 3 months of that sentence forthwith and the balance period of 06 months is suspended for 2 years. Considering the time spent in custody, the time remaining to be served forthwith is 2 months.
20. 30 days to appeal to the Court of Appeal.



Vinsent S. Perera

JUDGE

Solicitors for the State : Office of the Director of Public Prosecution, Suva.
Solicitor for the Accused : Jiten Reddy Lawyers, Nasinu.