

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

Criminal Review Case No. HAR 02 of 2019

BETWEEN : STATE

AND : SAIYASI KOROI

Counsel : Ms J Fatiaki for the State
Mr K Chang for the Accused

Dates of Hearing : 1 May 2019

Date of Judgment : 24 May 2019

JUDGMENT

- [1] On 8 June 2018, the Accused was charged with two counts of defilement of a 15-year old girl. The incidents occurred at Navaga Village, Koro Island between 1 January 2018 and 30 April 2018. On 22 August 2018, the Accused was arraigned on the charges in the Magistrates' Court at Suva. He pleaded guilty to both counts before the Chief Magistrate. The Accused was represented by counsel. The case was adjourned to 23 October 2018 for facts and mitigation. After the facts and mitigation were presented on 23 October 2018, the case was further adjourned on five occasions for various reasons.
- [2] On 24 December 2018, the Chief Magistrate sentenced the Accused to 20 months' imprisonment on each count of defilement, to be served concurrently. The sentence was partially suspended as follows: 2 months to serve in custody and 18 months suspended for 2 years. The media highlighted the sentence saying the victim was impregnated by the Accused. I called for the record of proceedings to examine the

correctness of the sentence imposed on the Accused. This is a power given by section 260(1) of the Criminal Procedure Act. Section 260(1) provides:

The High Court may call for and examine the record of any criminal proceedings before any Magistrates Court for the purpose of satisfying itself as to —

- (a) the correctness, legality or propriety of any finding, sentence or order recorded or passed; and
- (b) the regularity of any proceedings of any Magistrates Court.

[3] The State and the Accused were served with a notice of hearing and provided with a copy of the record of the proceedings in the Magistrates' Court. The Accused chose to be represented by counsel. I am grateful to both parties for their helpful submissions.

[4] I now proceed to examine the correctness of the sentence imposed on the Accused. In doing so I must consider the nature and the gravity of the offence.

[5] Defilement falls under the category of sexual offences. The relevant statutory provision, that is, section 215(1) of the Crimes Act reads:

A person commits a summary offence if he or she unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any person being of or above the age of 13 years and under the age of 16 years.

Penalty — Imprisonment for 10 years.

- (2) It shall be a sufficient defence to any charge under sub-section (1) if it shall be made to appear to the court that the person charged had reasonable cause to believe, and did in fact believe, that the person was of or above the age of 16 years.
- (3) It is no defence to any charge under sub-section (1)(a) to prove that the person consented to the act.

- [6] Clearly, the offence of defilement is designed to protect children between the age of 13 and 15 years from sexual exploitation. This is a period children go through puberty and therefore are vulnerable to exploitation by adults. As Shameem J said in *Donumainasava v The State* [2001] FJHC 25; Haa0032j.2001s (18 May 2001) at p 3:

The offence is clearly designed to protect young girls, who have entered puberty and who are experiencing social and hormonal changes, from sexual exploitation.

- [7] More recently, in *State v Chand - Sentence* [2016] FJHC 889; HAC314.2015 (6 October 2016) Perera J said at [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.

- [8] In the present case, the victim was a juvenile girl. She was 15 years of age and a Year 10 student when the Accused defiled her on two occasions over a span of four months. The Accused was 18 years old and unemployed. The Accused and the victim were not in a relationship. On the first occasion, the Accused convinced the victim to accompany him to a vacant house in the village. She agreed. They went inside the house and were having a conversation when the Accused moved closed to her and hugged her. He asked her to lie down. At first she was reluctant but later agreed. He had sexual intercourse and ejaculated inside her. They got dressed and left the house.
- [9] On the second occasion, the victim accompanied the Accused upon his request to another vacant house in the village. He had sexual intercourse with her and ejaculated inside her.
- [10] In mitigation, the Accused attempted to explain his conduct saying “it was curiosity that had driven his actions and can only apologise for the same”. In his sentencing remarks, the Chief Magistrate accepted that the Accused was genuinely remorseful.

The basis of that conclusion was that the Accused's early guilty plea was consistent with his admission to the police.

- [11] In his sentencing remarks, the learned Chief Magistrate referred to a letter from the victim's father that was provided to the court by the Accused. In that letter, the complainant's father stated that the Accused had reconciled with him in the traditional manner and that he had forgiven the Accused and was thankful to the Accused for giving him a grandson.
- [12] At the hearing, both parties conceded that the paternity of the child that the victim gave birth to has not been established and that there was no evidence that the Accused was responsible for impregnating the victim or was the father of the child. The letter from the complainant's father should not have been admitted in evidence. By referring to its contents in the sentencing remarks, the Chief Magistrate directed his mind to erroneous and inadmissible facts. He made an error in the exercise of his sentencing discretion.
- [13] The maximum penalty prescribed for defilement under the Crimes Act is 10 years' imprisonment. The tariff for this offence was established under the Penal Code in the case of *Domumainasava* when the maximum penalty was 5 years' imprisonment. In future, the court may consider a review of the tariff to reflect the legislature's intention to treat the offence seriously, but for the purpose of this case, the applicable tariff was from a suspended sentence to 4 years' imprisonment. In *Domumainasava*, the court said at p 3:

Reported cases in Fiji and abroad show that sentences passed range from suspended sentences (usually where the accused and victim are both of the same or similar age, and are in a relationship) to 3/4 years imprisonment where the accused is in a position of trust in relation to the victim, and much older than her.

In England the maximum sentence of this offence is two years imprisonment under Sexual Offences Act 1956. In *R -v- Taylor and Others* 64 Cr. App. R. 182, the English Court of Appeal laid down guidelines for the sentencing of persons convicted of having unlawful sexual intercourse with a girl under the age of 16. Lord Justice Lawton distinguished between cases of "virtuous

friendship” between young people of the same age which ended in sexual intercourse, and cases where a man in a supervisory capacity set out to seduce a girl under sixteen. In the first type of case, custodial sentences were not needed; in the second, sentences of the maximum of two years, or near that scale, should be imposed.

- [14] The learned Chief Magistrate did not consider the offences to have arisen from a virtuous friendship between two young people of the same or similar age. He considered the victim was exploited by the Accused. He used a starting point of 2 years, added 1 year for the aggravating factors (exploiting a naïve and an inexperienced young girl) and deducted 1 year for the guilty plea, 3 months for previous good character, and 1 month for the remand period, before arriving at a sentence of 20 months’ imprisonment. The Chief Magistrate then directed his mind to the question of suspension. He said that while there must be consequences for wrongful behaviour, the Accused must be given an opportunity to rehabilitate due to his previous unblemished record. The majority term (18 months) of the sentence was suspended.
- [15] There is an error of principle in the exercise of discretion to suspend the sentence. *Donumainasava* guidelines are binding on the Magistrates’ Court. The facts of this case did not support a suspension of sentence. The victim and the Accused were neither in a relationship nor of the same age. This was a case where a 15-year old girl in a traditional rural community was sexually exploited by a young but an adult man. Suspension of sentence was inappropriate.
- [16] However, the Accused has already served his partial custodial sentence of 2 months in prison and was released early this year. There is a real possibility that he has been rehabilitated. In these circumstances it would be unjust to make him go back to prison to serve the remaining term that was suspended. Although the suspension of sentence was wrong in principle, the review is refused on the ground that it would lead to an unjust result if the suspension is set aside now when the Accused is out of prison after serving the custodial term of his sentence.

[17] For these reasons, review is not allowed.

[18] The Chief Registrar is to circulate a copy of this judgment on all the Magistrates for guidance in sentencing in future cases of defilement.



A handwritten signature in blue ink, appearing to be "D. Goundar".

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Hon. Mr Justice Daniel Goundar

Solicitors:

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