

IN THE HIGH COURT OF FIJI
AT LABASA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL CASE NO. HAA 30 OF 2019

(Magistrates' Court Case No. 531 of 2019)

BETWEEN: **THE STATE**

APPELLANT

AND: **LIVAI PENISENI**

RESPONDENT

Counsel: **Ms A Vavadakua for the Appellant**
 Ms K Boseiwaqa for the Respondent

Date of Hearing: **20 May 2020**

Date of Judgment: **22 May 2020**

JUDGMENT

[1] This is an appeal by the State against sentence imposed on the respondent for an offence of defilement in the Magistrates' Court.

[2] The offence was committed in January 2019 in Soasoa, Labasa.

[3] The victim is the stepdaughter of the respondent. She was 14 ½ years old and a Form 4 student at the time. The respondent was a carpenter at the Water Authority of Fiji and 61 years of age.

- [4] On the day of the incident the victim and her two siblings were left alone at home with the respondent while the victim's mother went out to the market to sell food parcels. The victim was asleep on her bed when she suddenly woke up and found the respondent on top of her. He removed her underwear and had sexual intercourse with her. She tried to push him away but he was too heavy for her. He ejaculated inside her. The victim did not report the incident to anyone because she was sacred.
- [5] A few months later the victim's mother came to know about the incident. The victim was medically examined and the medical report revealed that the victim was 35 weeks pregnant.
- [6] The respondent was arrested and interviewed under caution. He admitted having sexual intercourse with the victim but denied the child that she was carrying was his. The police charged the respondent with defilement and produced him in court.
- [7] The respondent pleaded guilty to the charge after waiving his right to counsel. He was a first time offender and sought leniency from the court. On 8 November 2019, the learned magistrate sentenced the respondent to 1 year and 11 months imprisonment.
- [8] The State alleges that the learned magistrate made a number of errors in the exercise of his sentencing discretion. The first alleged error is that the learned magistrate failed to consider all the relevant aggravating factors pertaining to the use of force on the victim.
- [9] The facts tendered by the prosecution and admitted by the respondent revealed that the victim had not consented to sexual intercourse. She was asleep and he got on top of her and when she woke up she tried to push him away but he was too heavy. Although the facts revealed that the victim may have been raped by the respondent, the prosecution charged him with defilement, which is a lesser offence.
- [10] It is trite law that an offender can only be punished for the offence that he was charged or convicted. In *Vakalalabure v State* [2006] FJSC8; CAV0003U.20045 (15 June 2006), the offender was convicted of taking engagements in the nature of an oath purporting to

bind himself to commit treason. The offence did not require proof that the offender committed an act of treason. The trial judge imputed a higher culpability on the offender for setting of the new government after the lawful government was taken hostage by George Speight in 2000. The Supreme Court held that the trial judge had made an error in the exercise of her sentencing discretion by sentencing the offender for treasonable conduct for which he was not charged or convicted.

[11] The High Court of Australia in *The Queen v De Simoni* (1981)147 CLR 383 said at 389:

....the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence or which he has not been convicted... a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence. (per Gibbs CJ)

[12] In the present case, the use of force which is an element of rape cannot be used as an aggravating factor to enhance the respondent's sentence because he was not charged or convicted of rape.

[13] In his sentencing remarks, the learned magistrate identified the following as aggravating factors:

- a. Breach of trust as you are the stepfather of the victim,
- b. You take advantage of your position as a father to exploit the victim, when she is under your care,
- c. You take advantage of your age difference and your family relationship to exploit and abuse the victim,
- d. You have no respect on the victim and her rights as a child and human being.

- [14] While the facts revealed that the victim got impregnated after the alleged incident, the State did not rely on impregnation as an aggravating factor because the respondent in his caution interview denied that she was carrying his child. However, there was no dispute that the respondent ejaculated inside her and exposed her to diseases and pregnancy. This factor should have been considered as an aggravating factor. Another aggravating factor was that the offence constituted domestic violence as it was committed by one family member against another family member under one roof. Overall, the learned magistrate increased the sentence only by 2 years to reflect the aggravating factors. The aggravating factors were quite serious and the sentence should have been enhanced by at least three years using a middle range starting point.
- [15] The second complaint of the State is that the learned magistrate made an error in his sentencing discretion when he considered irrelevant factors such as family circumstances as mitigating factors.
- [16] The learned magistrate considered the following as mitigating factors:
- a. First offender, of 61 years old and shows your previous good character,
 - b. Seek the court forgiveness,
 - c. Learnt your lesson,
 - d. Married with 2 children and sole breadwinner,
 - e. You wanted to go for a contract in PNG.
- [17] For all the above factors, the learned magistrate gave a discount of 1 year, in addition to 1 year for the guilty plea. The only mitigating factors were the appellant's early guilty plea and previous good character. Family or personal circumstances of the offender cannot mitigate a sexual offence committed against a family member.
- [18] The respondent entered an early guilty plea in the hope to get a suspended sentence so that he could explore job opportunities abroad. He did not plead guilty because he was genuinely remorseful for his conduct.

[19] The errors in the exercise of the sentencing discretion by the learned magistrate leads me to allow the State's appeal and set aside the sentence imposed on the respondent in the Magistrates' Court.

[20] The respondent is sentenced as follows.

[21] In *Donumainasava v The State* [2001] FJHC 25; HAA0032J.2001S (18 May 2001) Shameem J recommended the following tariff for defilement 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.

[22] I use 3 years as a starting point and add 3 years to reflect the aggravating factors. I deduct 2 years for the respondent's early guilty plea, previous good character and one month remand period.

[23] The respondent is sentenced to 4 years' imprisonment with a non-parole period of 3 years effective from 8 November 2019.

[24] The State's appeal is allowed.



Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the Appellant
Office of the Legal Aid Commission for the Respondent



