

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 2 of 2021

STATE

vs.

JALE SUVADI

Counsel: Ms. K. Semisi for the State
Ms. N. Ali for the Accused

Date of Hearing: 16th – 18th August 2022

Date of Closing Submission: 19th August 2022

Date of Judgment: 23rd August 2022

JUDGMENT

(The name of the victim is suppressed he will be referred to as "R.I.S.")

Introduction

1. The Director of Public Prosecutions has charged the accused for the following offences as per the Information dated 10th February 2021:

COUNT ONE

Statement of Offence

RAPE: contrary to Section 207 (1) and 2 (a) of the Crimes Act, 2009.

Particulars of Offence

JALE SUVADI on 26 September 2020 at Suva in the Central Division had carnal knowledge of **R.I.S.** without his consent.

COUNT TWO

Statement of Offence

RAPE: contrary to Section 207 (1) and 2 (a) of the Crimes Act, 2009.

Particulars of Offence

JALE SUVADI on 27 September 2020 at Suva in the Central Division had carnal knowledge of **R.I.S.** without his consent.

2. The trial commenced on 16th of August 2022 upon reading and explaining the charges the accused pleaded not guilty to both the counts of Rape.
3. This is a fairly straightforward case of an alleged rape of a 15-year-old boy. The prosecution led the evidence of R.I.S. and his mother Bulou Elenoa Lealea and closed its case. The Medical Examination report was admitted and produced with consent of the parties. As there was prima facie evidence, the defence was called for and the rights of the accused were explained. The accused opted to give evidence but did not call any witnesses. This court heard the closing submissions and I will now endeavor to pronounce my judgment.
4. For the accused to be found guilty of the rape counts based on sub sections 2(a) of Section 207 of the Crimes Act 2009 in addition to the date and place stated in the respective counts the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) the accused Jale Suvadi
 - (ii) has carnal knowledge with or of R.I.S., and
 - (iii) complainant did not consent.

If I may further elaborate, under Section 207 (2) (a) of the Crimes Act 2009, the offence of Rape is defined as follows: a person rapes another person if the person has carnal knowledge with or of the other person, without the other person's consent. In the context of this case, 'carnal knowledge' is an act of penetration of the female genitalia or the anus of a victim

with the penis of the accused as carnal knowledge includes sodomy [vide-Section 206(5) of the Crimes Act]. The slightest penetration of the female genitalia or the anus is sufficient to prove the element of penetration [vide- Section 206(4) of the Crimes Act].

5. According to Section 206(1) of the Crimes Act, the term consent means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent. Consent obtained by force or threat or intimidation etc. will not be considered as consent freely and voluntarily given.
6. The accused is presumed to be innocent until he is proven guilty. As a matter of law, the onus or burden of proof rests on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation or burden on the accused to prove his innocence. The prosecution must prove the accused's guilt, beyond reasonable doubt. If there is a reasonable doubt so that the court was not sure of the accused's guilt or if there be any hesitation in my mind on any of the ingredient or on the of evidence led by of the prosecution the Accused must be found not guilty of the charge and accordingly acquitted. The accused has a right to remain silent and no adverse inference can be drawn if the Accused remains silent.

Admitted Facts

7. The following facts are admitted;
 1. *The complainant is one R.I.S.*
 2. *At the time, Jale Suvadi was 57 years old and a grass cutter from Kalekana Settlement, Lami.*
 3. *On the 26th September 2020, the complainant met Jale Suvadi at Flagstaff beside the Extra Supermarket.*
 4. *Jale Suvadi took the complainant to his residence, at the time, in Domain.*
 5. *The complainant and Jale Suvadi drank grog.*
 6. *The complainant slept on the bed in the bedroom.*
 7. *Jale Suvadi penetrated the complainant's anus with his penis on the morning of the 27th September 2020.*
 8. *The complainant returned home on the morning of the 27th September 2020.*
 9. *The complainant was medically examined on the 27th September 2020 at the CWMH by Dr. Josese Nakuita.*

The Prosecution Case

8. The victim R.I.S, in his evidence said that he met the accused when he was walking past the Extra Supermarket at Flagstaff when the accused accosted him and followed him. As they were walking the accused had asked what his name is, where he come from, where he lives, and if he is living by himself. Complainant has responded and then the accused has asked “*are you hungry?*” which he had answered in the affirmative when the accused has told him “*I can feed you but you have to come to my house*”.
9. The victim has believed and trusted the accused and has walked along with him may be for about 30 minutes and reached his house Imthurn Road, Domain. This had been a maid’s quarters close to another house. There was no other but the accused and the victim in the house. Accused has prepared dinner and both had their dinner. Victim has been only in his underwear and he says that the accused wanted him to be that way. Soon after dinner was over the accused has started touching the boy’s penis whilst he was wearing the underwear. The victim had resisted and tried to move away. The accused persisted and then pushed R.I.S. onto the bed, inserted the accused’s penis into the anus and had sexual intercourse with him.
10. He says that no one had done this to him before and he did not consent or agree however had submitted due to fear as he thought that the accused was bigger and could cause harm anytime. The accused had also been aggressive and forceful at this time. As such apart from just saying *not to*, he had not resisted but just kept still as the accused was holding his hand and shaking.
11. After this was done both of them have gone out to a nearby shop and bought grog then returned and both of them having drunk and fallen asleep. The victim says that he drank because the accused was asking him to drink it. The following morning the 27th of September 2020, when he woke up he found the accused penetrating his anus with the anus and he was angry and told him that it was enough and he had to go home now. However, the accused had continued penetrating for a few minutes more and then stopped.

12. Thereafter, he had got dressed and walked up to the Suva bus stand with the accused. On the way both have taken a photo (*selfie*) from the Accused's phone and whilst walking the accused had asked him if R.I.S. enjoyed himself and if he will come again. At the bus stand the victim had wanted the *bucket hat* worn by the accused which the accused had refused to give. R.I.S. had then paid \$6 to the Accused and got the hat. He admits that the accused did tell that "*I loves you*" and asking R.I.S., "*do you love me*" The R.I.S. had said "yes" and he says that he said so because he was afraid.
13. He had reached his grandmother's house at Kinoya where his mother had been. Mother had asked where he was and then she had noticed some kiss marks which he referred to as '*hickies*' on his neck has asked who and how he got those marks. When she was so questioning him at first he had not disclosed but as his mum got mad he says that he told the truth. The following day they have gone to Totogo Police station and lodged a complaint. At that time he had only known that the accused was Jale and not known anything more. He identified the accused in open court. The sketch plan and the photographs of the house was identified and produced as exhibits PE2 (a) and (b).
14. Under cross examination the R.I.S. admitted that he walked with the accused because he promised to give him food and as he trusted him he did not appear intimidating. It was suggested that on the way the R.I.S. had told that "*I know you will suck me at home*" and that they were talking about how 'both of them like boys' and that R.I.S. told the Accused that, "*I know that you like boys*"; all of which were denied. He admits that he had a shower and was wearing his underwear only. He admitted that he did not try to escape or get help from anyone though he had an opportunity to escape. He had not done so because he did not know where to go and thought others may not believe him and he was shy. He says he was also afraid of the accused. He denied being sucking by the accused. It was suggested that on Saturday morning both penetrated each other, which R.I.S. denied and said it was only the Accused who penetrated. He admitted buying the bucket hat for \$6. The reason for buying this, he said was because his brother had a similar hat and he too wanted one. It was suggested that he had given his age as 18 years which too was denied. Finally it was suggested that R.I.S. consent and he now says it is rape because his mum says so. His respond

was that it was his mum who said it was rape because it was someone older. It was suggested that no penetration took place on the 26th night and that it was only a 'blow job' by the accused, that too was denied. In re-examination he said that that he told the accused that he was 14 years old. However, when asked as to why he said so when he was 15 years, the victim did not answer and remained silent.

PW 2 – Bulou Elenoa Lealea

15. She is the mother of the victim. She has 5 children and lives in Lautoka. On this day her son has come to Suva to attend classes and was living at Kinoya with his paternal grandmother. On Saturday 25th September, 2020 she herself has been in Suva and after mid-day she met the victim at the Suva market and the boy has told her that he was going to an Internet Shop and left. However, since the victim did not return until 6.00 p.m, she had panicked and come to the Suva town with her other son and walked around and looking for him. Her effort to locate him had not been successful. Around 8.00 p.m they have gone to the police and complained of a missing boy and returned home as it was curfew at 11.00 p.m.
16. The following day when she was preparing lunch the R.I.S. had returned home. She had asked as to where he was when he had told he was with a friend. She had seen some love bits (*hickies*) on his neck and suspected something and continued to question him as to where he was and with whom he spent that night. When she was questioning him he had started to cry and then revealed that he was with a stranger, a man and that he had kissed and hugged him and had anal intercourse. The boy had then told the act of penetration was committed without his consent. The witness had explained to the R.I.S. that if it was without his consent it will be Rape and if he wants to report to the police. As R.I.S. agreed and they have proceeded to the police and had complained.
17. Then she had got into a taxi with S.I and proceeded to look for this house. R.I.S. had directed them and shown a small house to which they have walked in. On a bed was a man lying down and who the boy pointed out as being the person. She had then asked him in I-Taukei if he has brought her son showing R.I.S. He had said yes, then quickly got into a shirt and then run away and disappeared in to the bush. She described the person and then identified

him as the Accused in court. She described the boy to be a loner and not very good in communicating and skinny and small at that time. In cross examination it was suggested that it was she who got the boy to complain of Rape, she had denied this.

Defence Evidence

18. Accused gave evidence and admitted that he is 59 years old was a grass cutter living in a maid's quarters in Domain. He had been living in this area for over 10 years. He admits meeting the victim on the 26th of September and talking to him around 4.30pm. According to him the boy has also smiled with him, there was an exchange of smiles and they have spoken to each other in fact he had greeted him saying 'bula' and then he had asked about the boy as to where he was and what he was doing. The victim has told him that he was from Lautoka and was staying in Kinoya and was schooling in a senior class in Lautoka. The Accused also say that when he asked for his age he had said that he was 18 years old and he talked about boys and girls and was '*telling of sexual stories*'. As he mentioned that he was hungry he has told him there is food at home if he wants he can go home with him. The boy agreed and both of them has walked to his house which was about a 30 minute walk. He says on the way they did talk and the boy told him that he wanted to go with him because he knew that he will suck him. As soon as they reached home they have hugged and kissed each other and he said that he sucked the boy and he made the live bites during this time.

19. Then he had fixed the dinner and the boy had gone for a wash and had returned only in his underwear. After dinner both of them have gone to a nearby shop and brought grog and after drinking gone to sleep. Following morning both have woken up, greeted each other and soon after that they have penetrated each other and he says that the victim did not refuse when he asked and that he turned his back to him and gave the indication that he agreed. However, he says that he penetrated '*only a little bit*' and says that it was not a full penetration as it was tight so he had stopped, but admits penetrating the boy's anus. After that the boy also had done the same to him and then upon having a shower both of them have walked to the Suva bus stand. He admits taking a photo and at the bus stop says that the boy did buy his bucket hat after paying \$6 and the boy left in the bus.

20. After returning home that day the boy, his mother and sister had arrived at his house. He says that she was asking angrily “did you bring my son here” he had wanted to explain but as she was telling her daughter to take pictures the accused got frighten and had run away. He admitted leaving that house and going back to the village and that he was arrested by the police 2 months thereafter and said that a neighbor at Domain has given his address to the police.
21. In cross examination he said that he did not try to meet the mother or contact the police within that 2 months. He admitted that the boy told him he was in High School. He did admit that the boy indicated that he wants to go home and he has told him he can go if he wanted to. He admitted that there was a curfew on that day but the boy opted to remain. It was suggested to him the boy was penetrated on the 26th night, which the accused denied. He also admitted that he sought forgiveness from the victim and the family because he knew what he had done was wrong. He denies of luring the boy to his house and says that he came on his own to have food, he denied touching the penis and penetrating on the 26th. He admits penetrating on the 27th morning.

Evaluation of the Accused’s evidence.

22. The accused admits taking the boy to his house but tries to show that he invited him and offered food then he came voluntarily. The accused did tell that he did not have any ulterior motive or expectation of anything of a sexual nature when they set off. The accused was a grass cutter earning around \$70 a week. The boy was a total stranger according to the accused he was 18 years and quite mature and appeared to be confident and being able to look after himself. If the boy appeared so mature one cannot expect the Accused to go up to him and enquire into various personal details and offer food. This may happen and is probable if he appeared to be helpless and hungry. The accused himself was a daily wage earner not of great wealth and earning. These circumstances make the Accused’s evidence highly improbable on this matter and so improbable that it is false.
23. Further, accused says that the boy was telling about girls and boys and things of a sexual nature. The accused admits that the boy has told him that he was expecting him to suck him.

This certainly is consistent with the accused acting with the knowledge that the boy was expecting something of a sexual nature. Therefore, the accused was trying to make out that he is taking the boy was purely benevolent is highly improbable.

24. The accused states that after reaching home that he hugged and kissed and sucked the boy. He denies any other act of a sexual nature in the night. The accused whilst telling that he did not have any kind of sexual thought or expectation when he brought the boy home but merely to except to feed him then admits that as soon as they stepped in to the house they started hugging and kissing and ends up with him sucking the boy. This sudden change of circumstances immediately upon stepping into the house is unrealistic and cannot be so if the accused had no expectation of sexual nature from the outset as claimed. Therefore, the accused's assertion of the innocent reason for bringing a boy is certainly false. This clearly leads to the inference that he is concealing the true reason and is uttering a falsehood.
25. The accused then goes on to say that nothing else of a sexual nature happened that night. In the normal course of events is it probable that the accused would bring a strange boy kiss, hug and suck him and then feed him and just go to sleep? I think not and it is highly improbable and unrealistic in the least. This is further buttressed by the fact that the following morning he having anal penetration with the boy as soon as he got up. Thus the denial of penetration on the 26th night is false.

Age of the boy as the accused believed.

26. The accused says that the boy told him that he was 18 years old and that he himself believed so to that end he says that the boy was well built, he spoke confidently and looked quite independent and his voice was rough. It was suggested to him the boy was timid and skinny and small made and he was 15 years. I observe the boy in court myself it was 2 years after the incident he is now around 17 years. However, he is small in build rather skinny in nature and looking at his face and appearance he looks much younger to his actual age, he looks something like 15 to 16 years even now. As of a manner that he gave evidence he was extremely timid required the help of a female interpreter for him to come out with sensitive events and he was visible shy and embarrassed to openly tell and speak up. In these

circumstances to my mind there is no way in which anyone could have believed the victim was 18 years of age if he was seen 2 years ago. Further, the accused admitted being told that the boy was in the senior class and attending high school. This too will give a clear indication of the age of being not 18 years. Therefore, the accused is untruthful and lying when he says that he perceived and believed the age of the boy to be 18 years.

27. According to the above analysis I am of the view that, whilst the accused is telling the truth on certain parts of his narration he is also lying in respect of important aspects such as the actual reason for taking the boy to his house and the age of the boy and this is clearly with a view to develop and put forward a defence to these charges.

Overall Evaluation

Acts of Penetration by the Accused

28. On a consideration of the totality of the evidence the fact that the accused met the victim and both of them went to his house at Domain and spent the night are admitted and common ground. Penetration of the boy's anus by the accused on the 27th of September 2020 is admitted and is common ground. Penetration on the night of the 26th is denied by the accused. The victim takes up the position that he was induced to go with the accused because by the promise of food and that the acts of sexual penetration was a surprise to him and that he was shocked. I would now consider this aspect. It is true that the boy was 15 years and 7 months on this day. He was in his adolescence an age prone to explore sexual desires and fantasies and even to experiment.
29. His biological state being so he possibly may have had an expectation of something of a sexual nature when he was walking to the house, at least when the accused asked him if he was circumcised, he would have realised that it was something more than food that the accused was taking him for. The victim admits having a wash and being only in his underwear. In the normal course of events if you are at a stranger's house for the first time expecting only to have some food it is extremely unusual and strange to be in your underwear until the food was ready. This conduct shows that the victim also was mentally ready and expecting something more than dinner. In these circumstances it is highly probable that the

touching of the penis and the penetration of his anus did in fact take place. It is also highly probable that the accused did hug the boy and perform oral sex by sucking him as well as penetrating in the night. Therefore, the evidence in this case clearly proves and establishes that the accused did have intercourse by anal penetration on the 26th night as stated by R.I.S. As for the anal penetration by the Accused on the 27th morning it is admitted and is common ground. Accordingly I hold that the prosecution has proved beyond reasonable doubt that the accused did have intercourse by anal penetration on the 26th night as well as the 27th morning as alleged in counts 1 and 2. However the critical issue is, whether these acts took place with the consent of the victim and if the accused knew that he was consenting.

Did R.I.S. consent?

30. According to the evidence R.I.S. has shown his reluctance and even said that it was enough. Even if R.I.S. did not protest or offer physical resistance to anal penetration that by itself will not indicate that he was giving some sort of tacit or unspoken consent. Neither will the fact that a person acquiesces or goes along with sexual penetration if he does so in the face of coercive circumstances, force or threat of force be true consent either. It is important to remember that rape is not sexual intercourse by force. It is simply sexual intercourse without valid consent and without the belief on a part of the Accused that the victim is consenting and such belief should be on reasonable grounds. Rape is not sexual violation by force and that does not have to be proved to be so. What has to be proved is sexual violation without valid consent and without an honestly and reasonably held belief that the victim is consenting.

31. As I narrated above the conduct of R.I.S. as well as the accused clearly leads to the inference that both of them were looking forward to something of a sexual nature when they reached home. As to whether the boy expected to be anally penetrated and consented should be considered now. If you accept the R.I.S.'s evidence he seems to have shown some reluctance on the night of the 26th when the accused approached by touching his penis. The boy says that when he was put to the bed and was anally penetrated he did not resist in that sense and even says that he agreed. There was submission.

32. The following morning the boy says when he woke up he was been penetrated anally by the accused. He had told him that it was enough and to stop. On both these occasions he seems to have submitted or acquiesced. The accused says otherwise. However the accused has only to create a reasonable doubt. In order to ascertain the truth it is necessary to consider the circumstances and the previous and subsequent conduct of the victim in this instance. Before coming to the house the Accused asking him if he was circumcised and the fact of R.I.S. being only in his underwear becomes relevant. The fact that he had not made any attempt to tell or alert or get the help of the neighbor or at least from a by-stand when they went to buy grog too is relevant. He admits that the accused went into the shop and he was out on the road. R.I.S. had sufficient opportunity and space to escape if he so desired. He was 15 years. He had not done so. Following day when he returned he did not tell his mother on his own when he was questioned he uttered a falsehood and tried to say he was with a friend. It was the love bites that alerted the mother and led to these questioning if he was forcibly penetrated then one would expect him to tell the mother at least when she asked him. Further, I observe that the victim shortly before the departure at the bus stand has bought the accused's bucket hat paying \$6. If he was in fact trying to get away from a person who has subjected him to forcible penetration against his will and without his consent will he ask for the accused's hat? Further when the accused refused to give will he pay \$6 and buy it from him? To my mind this conduct is inconsistent with that of a person who has been forcibly subjected to penetration and was in in fear.
33. In these circumstances, it is possibility that the victim may have consented to the acts of penetration committed by the accused. It is not that this court disbelieves R.I.S., but it is just that the circumstances create a reasonable doubt on the issue of consent and the benefit of which the Accused is entitled to have. Accordingly I hold that the prosecution has failed to prove that lack of consent in respect of both counts beyond reasonable doubt.

Proof of Charges

34. However, as far as the two acts of anal penetration are concerned this court is of the view that the prosecution has proved to the satisfaction of this court that the accused did commit those acts. As evaluated and discussed above in paragraphs 28 and 29 the R.I.S. clearly states

that on the 26th night the accused did penetrate his anus. When one considers the sequence of events the accused penetrating the anus of the victim is highly probable. Accused had been living alone, he had no spouse or partner. The manner in which he approached the boy and identified him clearly shows that the accused was acting with the intention of finding a sexual partner to satisfy himself. The conversation that appears to have taken place between the accused and the boy as it transpired from the evidence of both parties and the accused's conduct clearly indicate that the accused was interested in young adolescent boys. He being a daily wage earner and earning not more than \$70 a week that is also is somewhat of an irregular basis cannot be expected to just spend and feed total strangers for nothing. Accused admits that he performed oral sex by sucking the boy before dinner. He also admits that the boy was in his underwear during dinner. Considering the circumstances mentioned above in all probabilities it is extremely probable that the accused would have certainly taken advantage of the boy to satisfy his sexual desires. R.I.S. in his evidence clearly states that the accused did penetrate his anus that night. This evidence was unshaken. No omissions or contradiction were raised. In these circumstances I accept R.I.S.'s evidence as true in respect of the act of penetration committed on 26th of September 2020.

35. As regards the act of anal penetration committed on the 27th of September 2020, it is admitted by the accused and proved by the evidence of the victim R.I.S. The medical evidence corroborates the fact of penetration by the laceration observed in the anus of the boy. In the aforesaid circumstances further to the evaluation made at paragraphs 28 and 29, this court is satisfied that the prosecution has proved beyond reasonable doubt that the accused did penetrate the anus of R.I.S. on the 26th night as well as on the 27th morning. However, as discussed above there is a reasonable doubt on the issue of consent. Accordingly I hold that the prosecution is unable to prove beyond reasonable doubt the two charges of Rape as alleged.

Consideration of the lesser or alternative offence

36. In these circumstances as the court is satisfied that sexual intercourse (anal penetrations) have been proved beyond reasonable doubt, this Court is of the view that this is a fit matter

to act under Section 162 (1) (f) of the Criminal Procedure Act and to consider a lesser or alternative offence of defilement punishable under Section 215 of the Crimes Act. During the course of the evidence of R.I.S. before the cross examination, the defence was put on notice that the offence of defilement may be considered at the end of the trial. Accordingly, the defence in cross-examination as well as accused's evidence was mindful of the defence available to the Accused under section 215 (2).

37. At this stage it is possible to consider the alternate charge of defilement in respect of both counts 1 and 2 under section 162 of the Criminal Procedure Act. The court is vested with a discretion to act, as section 162 clearly states that “*the court may record a conviction*” (emphasis added) of a lesser offence. Defilement is an offences designed protect adolescent children and civilised societies must protect its adolescent children from the predatory activity of some adults. This is a case where the circumstances show that an adolescent boy was manipulated and cunningly coerced into having anal intercourse with the Accused a mature adult of almost 57 years of age. In the circumstances of the present case to my mind it is necessary to act under section 162 and I am of the view that the ends of justice will be met by considering the alternate or lesser offence in respect of count number 2 which act of penetration is also admitted by the accused. Now I will proceed to consider if the alternate defilement offence to that of count number 2 has been proved beyond reasonable doubt.

Defilement

38. It is proved beyond reasonable doubt that S.I was above 13 years but less than 16 years of age. There is a doubt as to consent. However as regards the act of anal penetration the 27th it is admitted and is common ground and has been proved beyond reasonable doubt. Section 215 of the Crimes Act defines the offence of defilement as follows.

215.— (1) 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*

39. To prove the offence of unlawful carnal knowledge, the prosecution must prove beyond reasonable doubt that:

1. The Accused had or attempted to have carnal knowledge of or with the complainant. This means the defendant must have, or attempted to insert his penis into the complainant's genitalia or anus. Penetration of the genitalia or anus to any extent will be sufficient.
2. The carnal knowledge must have been unlawful. This means it must not have been authorised, justified, or excused by the law.
3. The complainant was of or above the age of 13 years and under 16 years of age.

40. In the present case as determined above the ingredients to prove the offence of defilement are all satisfied. However, the accused has a defence under section 215 (2) of the Crimes Act. As for the defence under section 215(2) of alternate count of defilement it is neither the consent nor the behaviour of the victim that matters, but rather the reasonable belief that the child is above the age of sixteen and evidence of the steps taken by the accused to ascertain the age of the accused. In the case of *Reddy v State* [2018] FJCA 10; AAU06.2014 (8 March 2018), His Lordship Prematilaka J.A., expounded the import, nature and the burden of proof of this defence as follows:

“[28] It is clear from section 215 (2) that if and when an accused takes up the defence stated therein two requirements must be satisfied; the first is objective and the second subjective. It must be made to appear to the court firstly, that the accused ‘had reasonable cause to believe’ and secondly, that he ‘did in fact believe’ that the victim was of or above the age 16 years. This evidential burden should be

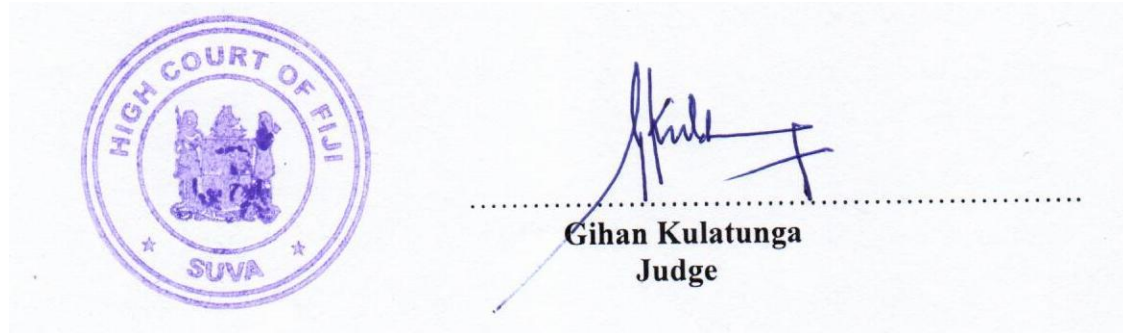
discharged by adducing or pointing to evidence that suggests a reasonable possibility that both of the said requirements exist (vide section 59)''.

41. The accused takes up the position that he was told by the victim that he was 18 years. According to the victim he was 15 years but has told that he was 14 years to the accused. In evaluating the evidence of the accused above at paragraph 26 I have extensively considered this aspect. According to which the utterance of the accused that he was told the age to be 18 years was held to be untruthful and false. I have considered further and come to the finding that there is no way in which any reasonable person could have believed or formulated the view that the victim was 16 years or over as at 27th of September 2020. Accordingly, I hold that the accused did not have reasonable cause to believe that IS was over 16 years and he certainly he did not believe so either. Accordingly, the evidence of the accused in this regard is false and I reject it in its totality. In this circumstances I hold that the accused fail to create any doubt on that he believed the age of the victim to be 16 years or over.

Conclusion

42. In the above circumstances I hold that the prosecution failed to prove count No. 1 beyond reasonable doubt. However, as regards count No. 2, I hold that the prosecution has proved beyond reasonable doubt that the accused had penetrated the anus of R.I.S. as alleged, however failed to prove that it was without his consent. However, I hold that the prosecution had proved beyond reasonable doubt the alternate count of defilement punishable under section 215 of the Crimes Act. Accordingly, I hold that the Accused is not guilty of count No. 2 but find him guilty of the alternate count of defilement punishable under section 215 of the Crimes Act.

43. Accordingly, I acquit the Accused of count No. 1; and I convict the Accused for the said alternate offence of defilement committed on the 27th of September 2020, under section 215 of the Crimes Act.



At Suva
23rd August, 2022.

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