

LIVINAI NAMAMI

v

THE STATE

[HIGH COURT, 1995 (Fatiaki J), 17 July]

Appellate Jurisdiction

A

Crime-sentence-defilement-proper approach to sentencing where offence committed by adolescents in the course of a mutual display of affection.

The Resident Magistrate sentenced an 18 year old youth to 2½ years imprisonment for defiling a young woman who turned out to be 15½ years old. On appeal against sentence HELD: cases which do not involve sexual exploitation by an older man in a supervisory capacity are not generally suitably punished by imprisonment.

B

C

Cases cited:

Aisake Valo v. State (Labasa Cr. App. No. 8/90)
Derek Roy Taylor and Others v. R. (1977) 64 Cr. App. R. 182

D

Appeal against sentence imposed in the Magistrates Court.

A. Parshu Ram for Appellant
Ms. L. Laveti for Respondent

E

Fatiaki J:

On the 15th of May 1995 this Court ordered the immediate release of the appellant on his entering into a 12 months good behaviour bond. At the time the appellant had already served 3 1/2 months imprisonment. On that occasion the Court said it would give its detailed reasons later. This I now proceed to do.

F

On the 6th of February 1995 the appellant who was a few months short of his 19th birthday appeared before the Labasa Magistrate Court on a charge of Defilement in which he was alleged to have "... had unlawful carnal knowledge of Sulueti Ganake Rawaqa a girl aged 14 years 5 months 23 days".

G

The appellant pleaded guilty and admitted having sexual intercourse with the complainant. Upon his conviction the learned trial magistrate said :

"He is a youngster of 18 years and has pleaded guilty in the first instance. But the offence is serious and has to be dealt with deterrent punishment. Accused is sentenced to 2 1/2 years imprisonment."

HIGH COURT

- A The appellant now appeals against the sentence imposed on the ground that it was "both harsh and excessive putting into consideration the circumstantial facts of the case." In this latter regard learned counsel for the appellant laid emphasis upon the minimal age difference between the parties; their elopement to a nearby settlement and the rather drastic consequence of the sentence upon the appellant's present schooling and future prospects.
- B Further at the hearing of the appeal production of the complainant's birth certificate was sought and allowed without objection. This revealed that contrary to the age averred in the Particulars of Offence charged i.e. 14 years 5 months 23 days, the complainant was in fact 15 years 6 months and 22 days old on the date of the alleged offence i.e. 13 months older.
- C In this regard, accepting that the age of the complainant was still within the prohibited age limits prescribed in Section 156(1)(a) of the Penal Code (Cap. 17) and therefore the appellant's conviction was entirely proper, nevertheless, it has long been recognised by this Court that the relative age difference between the offender and the complainant in such an offence is an important consideration in sentencing.
- D The learned author in "Principles of Sentencing" by D.A. Thomas in discussing the approach of the English Courts to sentences for unlawful sexual intercourse with girls says at p.113 :
- E "... the Courts tends to make a clear distinction between cases which involve exploitation of an immature girl by an older man and cases of sexual experimentation or displays of mutual affection between adolescents. In cases of the latter kind the offence is normally considered not to be particularly serious, and the Court generally considers that a modest fine or discharge is appropriate."
- F Furthermore as was said by Lawton L.J. in Derek Roy Taylor and Others v. R. (1977) 64 Cr. App. R. 182 at p.185 :
- G "What does not seem to have been appreciated by the public is the wide spectrum of guilt which is covered by the offence known as having unlawful sexual intercourse with a girl under the age of sixteen. At one end of the spectrum is the youth who stands in the dock, maybe 16, 17 or 18, who has had what started off as a virtuous friendship with a girl under the age of 16. The virtuous friendship has ended with them having sexual intercourse with one another. At the other end of the spectrum is the man in a supervisory capacity, a school-master or social worker, who sets out deliberately to seduce a girl

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under the age of 16 who is in his charge. The penalties appropriate for the two types of case to which I have just referred to are very different indeed. Nowadays, most judges would take the view, and rightly take the view, that when there is a virtuous friendship which ends in unlawful sexual intercourse, it is inappropriate to pass sentences of a punitive nature. What is required is a warning to the youth to mend his ways.”

A

(approved and applied in Aisake Valo v. State Labasa Cr. App. No. 8 of 1990 in which this Court set aside a sentence of 18 months imprisonment and bound over the appellant for 2 years.)

B

On the facts of this case there can be little doubt that this was a case of “a virtuous friendship (between two young people) that ended with them having sexual intercourse with one another.” Certainly it falls within that category of offending where “... it is inappropriate to pass sentences of a punitive nature.”

C

In this case the learned trial magistrate sentenced the appellant on an incorrect factual basis in that the complainant was not then under 15 years of age at the time of the offence. Furthermore no consideration appears to have been given to the minimal age difference between the parties and finally, as conceded by learned State counsel, there is no record that the learned trial magistrate was aware that the appellant was a student at the time of sentencing him.

D

Insofar as it may be possible to give some guidance in the matter, on a charge of Defilement under Section 156(1)(a) of the Penal Code (Cap.17), this Court is firmly of the view that in the absence of aggravating factors and subject to a favourable Social Welfare Officer’s report, where the age difference between the accused and the complainant is less than 4 years, a non-custodial sentence is appropriate.

E

In the light of the above and for the foregoing reasons the appeal was allowed and the appellant and his father were ordered to enter into a recognizance of \$100 to keep the peace and be of good behaviour for a period of 12 months and further conditioned that the appellant was not to associate with the complainant.

F

(Appeal allowed; sentence varied.)

G