

RISHI RAM

v.

THE STATE

[HIGH COURT, 1998 (Pathik J), 30 April]

Appellate Jurisdiction

Crime-procedure- necessity of unrepresented accused to be aware of possibly available statutory defence- Penal Code (Cap 7) Section 156 (1) (a).

An unrepresented accused was convicted on his own plea of unlawful sexual intercourse but the Resident Magistrate did not bring to his attention the proviso to the penal provision which might have afforded the accused a statutory defence. In these circumstances the High Court HELD: the proceedings were a nullity and the conviction had to be set aside. A retrial was ordered.

Cases cited:

Akuila Kuboutawa and Reginam Labasa Crim. App. No. 2 of 1975

Mikaele Bari v. R. Labasa Cr. App. 11/75

The State v. Seremaia Amato & 5 Ors. Lab. Crim. App. No. 2 of 1995

Appeal against sentence imposed in the Magistrates' Court.

Appellant in person

Ms. L. Laveti for the State

Pathik J:

On 2 March 1998 the appellant was on his own plea convicted and sentenced to imprisonment for 3 years at the Magistrates' Court, Labasa by S M Shah Esq., Resident Magistrate for the offence of defilement of a girl between thirteen and sixteen years of age contrary to section 156(1)(a) of the Penal Code.

He has appealed against severity of sentence.

The appellant who came from Savusavu for the appeal, said that he is 24 years of age and is prepared to marry the complainant. The complainant and her mother were present in Court; she was born on 24 January 1983; she said "I am willing to marry him" and the mother was prepared to "consent to marry". The appellant said that he did not realize she was under age; she came to visit him in Prison. When asked by me he said that he thought she was over 16 years of age.

The learned counsel was asked to address me on the question whether proviso to s.156(1)(a) was put to the appellant. She said that although p.7 of the

A Record shows that the learned Magistrate did ask certain questions in regard to the age by stating that he "explain fully" it was not clear whether that refers to the proviso or not, particularly when the accused was unrepresented.

B Looking at the Record I have my doubts that when the charge was put to the appellant the proviso was also drawn to his attention for had the learned Magistrate done that he would not have asked the appellant the two questions regarding the age on page 9 of Record after the appellant had admitted the facts as outlined.

C The putting of the proviso to the accused is a strict requirement of the law. Failure to do so has led to convictions being set aside and quashed. [Grant CJ in Akuila Kuboutawa and Reginam Labasa Crim. App. No. 2 of 1975; The State v. Seremaia Amato & 5 Ors. Lab. Crim. App. No. 2 of 1995 - delivered 10.2.95; Mikaele Bari v. R. Labasa Cr. App. 11/75 - Grant CJ.].

C The section under which the appellant is charged and the proviso read as follows:-

"156. - (1) Any person who -

D (a) unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years;

E (b) ... is guilty of a misdemeanour, and is liable to imprisonment for five years, with or without corporal punishment:

F Provided that it shall be a sufficient defence to any charge under paragraph (a) if it shall be made to appear to the court before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of sixteen years.

(2) ...

G (3) ..."

In a case of this nature a trial Magistrate ought to bear in mind the following passage from the judgment of Grant CJ in Kuboutawa (supra - unreported):

"... that in the case of an unrepresented accused any statutory defence should be brought to his attention. For instance, in a charge of this nature (viz Defilement), the accused should be

informed that he is charged with unlawful carnal knowledge of a particular girl of a specific age and that he had no reasonable cause to believe that she was of or above the age of sixteen years; and the record should disclose that the charge was explained accordingly."

A

Not having brought to the attention of the appellant the proviso it is fatal to his conviction which is quashed and sentence set aside. The appellant is set free forthwith. There will be an order for retrial after a fresh plea is taken. The appellant is released on bail in own recognizance of \$200 with one surety of like amount to appear at the Savusavu Magistrates' Court on 1 June 1998 at 9.15 a.m.

B

(Appeal allowed; conviction quashed; retrial ordered.)