

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO: HAA 089 OF 2008**

**BETWEEN:**

**PITA DOMONI**

***Appellant***

**AND:**

**THE STATE**

***Respondent***

**Date of Hearing:** 26<sup>th</sup> June 2009

**Date of Judgment:** 10<sup>th</sup> July 2009

**Counsel:** Appellant in person  
Ms N. Tikoisuva for State

## **JUDGMENT**

[1] On 22 November 2007, the appellant appeared in the Magistrates' Court on a defilement charge. After waiving his right to counsel, he pleaded guilty to the charge. The prosecution tendered facts in support of the charge but the conviction was not entered. Instead the case was adjourned to allow the

appellant to seek advice from the Legal Aid Commission. The appellant was released on bail.

- [2] On 29 November 2007, the prosecution applied to substitute the charge, with the offence of rape. The appellant's objection to the amendment was overruled and leave was granted to amend the charge. Bail was extended to the appellant to seek legal advice.
- [3] On 31 December 2007, the appellant was arraigned on the new charge of rape. He entered a plea of not guilty and elected to be tried in the Magistrates' Court.
- [4] When he appeared for pre-trial conference on 15 April 2008, the appellant informed the Magistrate that he admitted sexual intercourse, but disputed lack of consent.
- [5] On 18 June 2008, the trial commenced.
- [6] The complainant gave evidence. She said on the day in question, the appellant invited her and her two younger sisters to his house for lunch. He told the sisters to play outside with his children. He pushed her into his house and raped her.
- [7] The complainant said the appellant threatened her not to tell anyone. She returned home and after a while she complained to her parents. In cross-examination the appellant suggested to the complainant that she had consented to the sexual intercourse. The complainant maintained that she had not consented and that she did not scream because she was frightened.

- [8] The complainant was medically examined after a month from the date of the incident at the appellant's house. According to the medical evidence, the complainant's hymen was not intact.
- [9] The appellant's caution interview was admitted in evidence. The caution statements of the appellant were both exculpatory and incriminatory in nature. The appellant admitted having sexual intercourse with the complainant, knowing she was fourteen years old, but claimed she had consented.
- [10] The appellant elected to remain silent but called evidence from his neighbour that on the day in question he did not hear any screams coming from the appellant's house.
- [11] In his closing submissions, the appellant said he was not guilty of rape.
- [12] The learned Magistrate convicted the appellant of rape and sentenced him to nine years imprisonment. The appeal is against conviction and sentence.
- [13] The appellant appeals against conviction and sentence saying his trial was unfair due to lack of legal representation and his sentence is harsh and excessive. He seeks a retrial or a substitution of conviction for defilement.
- [14] In his caution interview and at the trial, the appellant did not dispute sexual intercourse. He admitted having sex with the complainant but said it was

consensual. The learned Magistrate was correct in his finding that sexual intercourse had been proved.

[15] The only issue was consent or lack of it.

[16] The manner in which the issue of consent was dealt is contained in the following passages of the judgment:

“Did the complainant consent to having sex with the accused in May 2007? On this issue, the parties version of events differed. From the accused’s viewpoint, as gathered from his Police Caution Interview Statement, Prosecution Exhibit No. 2(b), he had sex with the complainant once in May 2007, and she was a willing partner. [Please, refer to Prosecution Exhibit No. 2(b), Questions 23, 24 and 25 and the answers thereto].

From the complainant’s viewpoint, she did not consent to sex with the accused, at all. She said, the accused lured her to his house, and then took her to his bed. He took off her clothes forcefully. He sucked her breast and licked her vagina. The complainant told him to stop, but he resisted. As a 14 year old, the complainant was frightened and confused. She said, she did not consent to the accused having sex with her, and she repeated the above during cross-examination.

Which version of events should the Court accept on the issue of consent? In my view, I accept the complainant’s version of events, for the following reasons. When the allegation of unlawful sexual intercourse with the complainant was put to the accused, by the Police, he admitted it. [Please refer to Prosecution Exhibit No. 2(b), Question 10 and the answer thereto]. So, in a sense, the accused’s above statement to the Police, confirmed the complainant’s version of events, on the issue of consent. She did not consent, and the accused admitted to Police, he had unlawful sex with the complainant, that is, without consent.”

[17] Later in the judgment:

“So in a sense, what the complainant said in Court on the issues of sexual intercourse and consent, were somewhat confirmed and verified by what the accused told the Police, in his Caution Interview Statement. This, in a sense, solidified her credibility as a witness, and thereby led this Court to accept her version of events, on the issue of consent. I accept that she did not consent to sex with the accused.”

[18] As can be seen from the judgment, the learned Magistrate based his finding of lack of consent on the caution statement of the appellant, in particular the appellant’s answer to question 10. Question 10 and the answer read:

“What can you say on the said allegation?”

Yes. I admit its true.”

[19] The allegation put to the appellant was:

“..... that you between months of May to August 2007 unlawfully had sexual intercourse with M.R.”

[20] Later in his interview, the appellant said:

Q: Do you know that M is just 14 years old?

A: Yes.

Q: Why did you do this act on her?

A: She was willing for it.

- [21] There is no doubt that the Magistrate relied on the caution statements of the appellant to bolster the credibility of the complainant and then to accept her version of the evidence of lack of consent. As it will be seen, the caution statements of the appellant did not support the evidence of the complainant on lack of consent. The caution statements in fact supported the defence of consent advanced by the appellant. The appellant admitted to the allegation of having unlawful sexual intercourse with the complainant. The word unlawful does not connote lack of consent, which is an essential element of rape and is distinct from the element of sexual intercourse. The word unlawful, as used in the definition of rape, refers to the *actus reus*, that is, sexual intercourse that is prohibited by law. The element of lack of consent refers to the *mens rea*, which must be proved in addition to the *actus reus*.
- [22] The law prohibits the act of sexual intercourse with girls under the age of sixteen years. It is an offence contrary to s.156 of the Penal Code to have sexual intercourse with a girl between thirteen and sixteen years of age. The offence is known as defilement. Consent of the girl will not constitute a defence to a charge of defilement but if the accused had reasonable cause to believe and did in fact believe that the girl was above the age of sixteen years, the accused cannot be convicted of defilement.
- [23] Thus, when the allegation of unlawful sexual intercourse was put to the appellant in his caution interview, the appellant admitted to the offence of defilement and not rape. The appellant said he knew the complainant was fourteen years old

when he had sexual intercourse with her and therefore the defence of reasonable belief about the age of the complainant was not available to him.

[24] It follows that the learned Magistrate erred in relying on the caution statements of the appellant to convict him for rape. There was no independent assessment of the complainant's credibility as far as her evidence of lack of consent was concerned and therefore the conviction for rape cannot stand.

[25] The relief sought by the appellant is a retrial or a conviction on a lesser offence of defilement. I am inclined to grant the latter. The appellant had maintained through out the proceedings that he was not guilty of rape but of defilement

[26] Section 176 of the Criminal Procedure Code provides:

“When a person is charged with rape and the court is of opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections 154(1), 155, 156, 158 and 178 of the Penal Code, he may be convicted of that offence although he was not charged with it.”

[27] Since the offence of defilement contrary to s. 156 is regarded a kindred offence for rape, it was open to the learned Magistrate to convict the appellant of that offence on his own admission.

[28] This Court pursuant to s.319 of the Criminal Procedure Code can exercise any power that the Magistrates' Court may have exercised, provided the appellant is not prejudiced.

- [29] I am satisfied that the appellant is not prejudiced if the rape conviction is substituted with defilement because it is a lesser offence and the appellant has freely and voluntarily admitted to that offence to the police. I bear in mind that if I order a re-trial, the complainant will have to relive her experience when she will have to give evidence for the second time. The offence is already two years old and any re-trial is unlikely to be heard without further delay given the current constraints in the Magistrates' Court.
- [30] For all these reasons, I set aside the conviction and sentence for rape and substitute defilement contrary to s.156 of the Penal Code.
- [31] The sentences for defilement range from a suspended sentence to four years imprisonment (***Etonia Rokowaqa v State*** Criminal Appeal No. HAA 37 of 2004). Suspended sentence is reserved for "virtuous friendship" offending while the higher side of the tariff is for offenders who are older and in position of trust with the victim (***Elia Donumainasuva v State*** Criminal Appeal No. HAA032 of 2001, ***State v Roqica & Others*** Criminal Appeal No. HAA037 of 2002S).
- [32] I take into account the early admission of guilt to the offence of defilement, the previous good character, the apology to the complainant's parents and the family circumstances of the appellant as mitigating factors. The aggravating factors are the huge age gap between the appellant and the complainant and the subsequent threat made to the complainant to keep quiet about the incident. The appellant was 51 years old while the complainant was 14 years old. They were neighbours. This was a case of sexual exploitation of a young girl by an

older man. A sentence of four years imprisonment is just and fair in the circumstances of this case.

[33] The appeal is allowed. The conviction and sentence for rape is substituted with defilement and a sentence of four years imprisonment effective from 17 July 2008.

Daniel Goundar  
**JUDGE**

At Suva  
10<sup>th</sup> July 2009

**Solicitors:**

Office of the Director of Public Prosecutions for State  
Appellant in person