

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Criminal Appeal No: HAA 017 of 2009

BETWEEN:

THE STATE

Appellant

AND:

JOPE QALIA

Respondent

Date of Hearing: 10th July 2009

Date of Judgment: 24th July 2009

Counsel: Mr. S. Qica for State
Mr. T. Terere for Respondent

JUDGMENT

[1] This is an appeal by the Director of Public Prosecutions against an order discharging the respondent without conviction for an offence of indecent assault.

- [2] On 14 January 2008, the respondent pleaded guilty to one count of indecent assault in the Magistrates' Court. He was released on bail, to seek legal representation.
- [3] On 12 June 2008, the respondent appeared in person and maintained his guilty plea. Facts were tendered and admitted by the respondent. The respondent admitted inviting the victim into his house and touching her vagina using his fingers. The victim was eleven years old. She immediately complained to her mother and the matter was reported to the police and the respondent was arrested.
- [4] In mitigation, the respondent said he was eighteen years old and lived with his mother. The respondent's grandfather gave evidence. The grandfather told the court that the respondent's parents were separated and that he had supported him from birth. The court was informed that the respondent was attending a vocational school and his performance in school was good.
- [5] The Magistrate adjourned the sentencing to facilitate reconciliation between the parties.
- [6] On 26 June 2008, the respondent appeared in court with his grandfather and informed the Magistrate that they had presented the traditional apology of "bulubulu" to the victim. They said the victim's family had accepted the apology. The Magistrate did not seek any confirmation of the apology from the victim or her family.

- [7] The Magistrate discharged the respondent stating that he was a young boy and that he should be given another chance.
- [8] The principal complaint of the State is that the discharge order is wrong in principle.
- [9] I assume the respondent was discharged under s.44 of the Penal Code because the Magistrate did not make any reference to the law under which the order was made. The brief reasons given for the discharge of the respondent suggest that the order was hastily made and without any regard to the governing principles for such order.
- [10] Section 44 of the Penal Code provides:
- “(1) Where a court by or before which a person is found guilty of an offence, not being an offence for which a fixed sentence is prescribed by law, is of opinion, having regard to the circumstances including the nature of the offence the character of the offender, that it is inexpedient to inflict punishment and that a probation order under the Probation of Offenders Act is not appropriate, the court may, with or without proceeding to conviction, make an order discharging him absolutely, or, if the court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding twelve months from the date of the order, and subject to such other conditions, if any, including the payment of costs or compensation, or the restitution of goods or the payment of money in lieu of goods, as may be specified in such order.”
- [11] The principles governing the application of s.44 are well established.

- [12] An absolute discharge without conviction is granted in exceptional cases, for instance, where the offender is guilty of only a technical breach of the law, or where his conduct was not morally culpable. (**Roneel Kumar v. State** [2005] HAM0004/05S (1 April 2005).
- [13] The discretion to discharge should be exercised sparingly and after balancing considerations such as the nature of offence, the gravity of offence, the circumstances of the offender, the character of the offender, the consequences of the offence on the offender and as well as the victim, and the public interest considerations of recording conviction as a deterrent (**Carol Mitchell Tebbutt v. Commissioner of Inland Revenue** [1999] AAU005/99S (HAC108/98S); **State v. Nand Kumar** [2001] HAA014/00L Ruling 25 July 2001; **Commissioner of Inland Revenue v. Atunaisa Bani Druavesi** [1997] 43 FLR 150 HAA0012/97).
- [14] In the present case, the discharge order was made after reconciliation between the families of the respondent and the victim, which was promoted by the Magistrate. The apology to the victim was not instigated by the respondent.
- [15] The promotion of reconciliation is provided by s.163 of the Criminal Procedure Code. Section 163 reads:

“In the case of any charge or charges brought under any of the provisions of subsection (1) of section 197 or of section 244 or of section 245 or of subsection (1) of section 324 of the Penal Code, the court may, in such cases which are substantially of a person or private nature ... and which are not aggravated in degree, promote reconciliation and encourage and facilitate the settlement in an amicable way of the proceedings, on terms of payment of

compensation or on other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.”

[16] In ***Ratu Peni Baleidraiba Kevetibau v. State*** (1992) 38 FLR 110, Jesuratnam J observed that there are no reconcilable and non reconcilable offences as such when it comes to s.163 of the Criminal Procedure Code. Jesuratnam J held that what s.163 does is to indicate that the Court should endeavour to promote reconciliation in the case of offences listed in that section.

[17] The offence of indecent assault is not an offence where the court is obliged to promote reconciliation. The Magistrate was clearly wrong to exercise her discretion to promote the accused to reconcile with the victim given the sexual nature of the offence.

[18] The offence of indecent assault is a felony. The maximum sentence prescribed for this offence is five years imprisonment.

[19] In ***Rokota v. The State*** *Criminal Appeal No. HAA0068 of 2002*, after reviewing past cases on indecent assault, Shameem J formulated the following guidelines:

“Sentences for indecent assault range from 12 months imprisonment to 4 years. The gravity of the offence will determine the starting point for the sentence. The indecent assault of small children reflects on the gravity of the offence. The nature of the assault, whether it was penetrative, whether gratuitous violence was used, whether weapons or other implements were used and the length of time over which the assaults were perpetrated, all reflect on the gravity of the offence. Mitigating factors might be the previous good character of the accused, honest attempts to effect

apology and reparation to the victim, and a prompt plea of guilty which saves the victim the trauma of giving evidence.

These are the general principles which affect sentencing under section 154 of the Penal Code. Generally, the sentence will fall within the tariff, although in particularly serious cases, a five year sentence may be appropriate. A non-custodial sentence will only be appropriate in cases where the ages of the victim and the accused are similar, and the assault of a non-penetrative and fleeting type. Because of the vast differences in different types of indecent assault, it is difficult to refer to any more specific guidelines than these."

- [20] Counsel for the respondent concedes that the absolute discharge was wrong in principle, but submits that this was a case for suspended sentence.
- [21] The respondent committed a sexual offence albeit the nature of the assault was fleeting type. It was not just a technical breach of the law. The offence was deliberate and calculated. The victim was vulnerable due to her young age. She was a child. The respondent was a young and first time offender, but these factors alone could not justify a discharge without conviction. The respondent was eighteen years old and he had the mental capacity to release what he did was morally wrong.
- [22] I hold that the learned Magistrate erred in law by discharging the respondent without conviction.
- [23] I set aside the discharge order and convict the respondent for the offence of indecent assault.

[24] I bear in mind the principles in ***Rokota*** and take into account the mitigating and aggravating factors present in this case. The respondent is sentenced to twelve months imprisonment suspended for two years.

[25] The appeal is allowed.

Daniel Goundar
JUDGE

At Suva
24th July 2009

Solicitors:

Office of the DPP for State

Office of the Legal Aid Commission for Respondent