

IN THE COURT OF APPEAL, FIJI ISLANDS

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. AAU0053 OF 2007

BETWEEN: ELIJAH MALUMU *Appellant*

AND : THE STATE *Respondent*

**BEFORE THE HONOURABLE JUDGE OF APPEAL MR JUSTICE
JOHN E. BYRNE**

Counsel for Appellant : In Person
Counsel for Respondent : Mr P. Bulamainaivalu
Date of Hearing & Judgment : 23rd August 2007

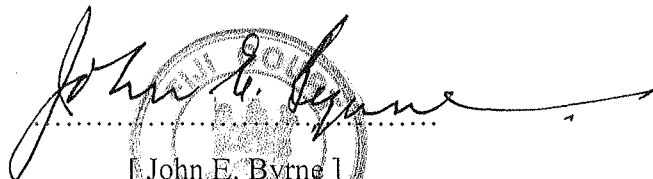
J U D G M E N T

- [1] The Appellant was convicted of Defilement of a girl between 13 and 16 years of age and sentenced to 3 years imprisonment in the Magistrate's Court at Suva. He appeals against sentence.
- [2] He was originally charged with Rape but on the 31st of August 2006 the charge was amended to one of Defilement.
- [3] The facts were that the Appellant and the Complainant, a girl 14 years old, belonged to the same church. On the 26th of April 2005, the Appellant had sexual intercourse with her. Her mother reported the matter to the Police. When

interviewed by the Police, the Appellant admitted the act of sexual intercourse and knowledge of her age. When he was charged, he said he wished to marry her. He had one previous conviction which he did not agree to and was therefore treated as a first offender.

- [4] He is 26 years old and is unemployed. Previously when he had employment he worked as a part-time taxi driver. He expressed remorse and apologised to the victim and her mother, neither of whom accepted the apology. He told this Court that he was very sorry for what he had done.
- [5] He appealed against sentence to Shameem J. on the 11th of May 2007 and she gave her judgment on the 18th of May 2007.
- [6] He told Shameem J. and me that he considered the sentence imposed by the Magistrate was harsh and excessive and that he will never rehabilitate himself in prison.
- [7] Shameem J. considered all the relevant factors and accepted a submission by State counsel that the sentence was not harsh or excessive considering the age difference was more than 10 years and the Appellant was a trusted member of the same church. Shameem J. said that a custodial sentence was inevitable but, that as a first offender, he was entitled to a considerable latitude. The maximum sentence for this offence is 10 years imprisonment but the tariff is between a suspended sentence and 5 years imprisonment.
- [8] I remarked in passing that in my judgment a suspended sentence could hardly if ever be justified for defilement but did not elaborate on my comment.
- [9] In the circumstances of this case, Shameem J. said that a starting point of 3 years was justified and taking into account the guilty plea, the good character, the betrayal of trust, the injury of the victim's vagina and the age of the victim, a term of

between two and three years was justified. She did not consider that the learned Magistrate erred in imposing the sentence he did. However, she said, because he was serving his sentence under the Bail Act at the same time and because sentences run as a matter of course consecutively unless ordered otherwise, the Appellant is in effect serving a term of 3 years and 9 months. The learned Judge considered this to be excessive and therefore ordered that the 3 year term run from the day on which it was imposed, 1st September 2006 and to run concurrently with the sentence under the Bail Act. To this extent the Judge granted the appeal. I can only add that in my judgment Shameem J. committed no error and the appeal against her judgment must therefore be dismissed.


[John E. Byrne]
JUDGE OF APPEAL

At Suva

23rd August 2007