

IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

Criminal Case No: HAC 72 of 2017

BETWEEN : THE STATE

AND : APENAI KALOUSESE KINILOVO

Counsel: Ms D Kumar for the State
Mr J Korotini and Ms K Boseiwaqa for the Accused

Date of Hearing: 20 - 21 August 2018

Date of Summing Up: 22 August 2018

Date of Judgment: 23 August 2018

JUDGMENT

1. After a three-day trial, the assessors have expressed a unanimous opinion that the Accused is not guilty of defilement as charged.
2. To prove defilement, the prosecution must satisfy the following elements beyond a reasonable doubt:
 1. That the Accused had sexual intercourse with the complainant, that is, he penetrated her vagina with his penis.

2. That at the time of sexual intercourse, the complainant was between 13 and 16 years of age.
3. It is not in dispute that the Accused had sexual intercourse with the complainant on 17 October 2017. The complainant's birth certificate is in evidence. She was born on 12 October 2002. On 17 October 2017, she was 15 years old. He was 22 years old and from a neighbouring village. Both, the complainant and the Accused gave evidence.
4. The incident occurred at a boarding school in Bua. The Accused entered the school compound at midnight and after a conversation with the complainant had sexual intercourse with her inside a vacant dormitory. The defence case is that the Accused had a reasonable cause to believe and did in fact believe that the complainant was of or above the age of 16 years when he had sexual intercourse with her. For the Accused to succeed with this defence he must show that it is probable that he had a reasonable cause to believe and did in fact believe that the complainant was more than 16 years old when he had sexual intercourse with her.
5. In his evidence, the Accused said that the complainant led him to have sexual intercourse with her after she told him she was 18 years old and a Form 5 student. The complainant in her evidence said that in her conversation with the Accused they did not talk about her age and that she did not say to the Accused that she was 18 years old and in Form 5. She said that her meeting with the Accused was a coincidence. She came out of her dormitory thinking she was going to meet a boy she had known from the church. She had not met the Accused before. But when the Accused showed interest in her she went with the flow and had sexual intercourse with him.
6. The Accused, on the other hand, has given consistent evidence. He said in his caution statement that the complainant had told him she was 18 years old and that he did not know she was 15. He said in his evidence that he believed that the complainant was 18 by observing her demeanour and conduct during the conversation before sex. The prosecution did not lead any evidence of the complainant's physique when the incident occurred. However, when the complainant gave evidence 10 months after the incident she did not appear to be of a small physique. The Accused's evidence is

plausible. It is probable that the Accused had a reasonable cause to believe and did in fact believe that the complainant was of or above 16 years of age when he had sexual intercourse with her on 17 October 2017.

7. I feel unsure of the Accused's guilt and I acquit him of the charge.



A handwritten signature in blue ink, appearing to read "D. Goundar", is written over the seal.

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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State
Office of the Legal Aid Commission for the Accused