IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section 246(1) of the Criminal Procedure Act 2009.

[APPELLATE JURISDICTION]

ASERI RAIKALEVU

Appellant

CASE NO: HAA. 28 of 2019
[MC, Nausori Criminal Case No. 549 of 2018]

Vs.

STATE

Respondent

Counsel	**:**	Ms. S. Prakash for the Appellant Mr. R. Kumar for the Respondent
Hearing on	**:**	23 January, 2020
Judgment on	**:**	21 February, 2020

JUDGMENT

1. The appellant was convicted by the Learned Magistrate for one count of sexual assault contrary to section 210(1)(a) of the Crimes Act 2009 upon the appellant pleading guilty to the relevant charge.

2. The appellant was sentenced on 09/08/2019. I have found it difficult to make out the final sentence imposed by the Learned Magistrate and therefore will quote verbatim

from the impugned decision. In imposing the sentence, the Learned Magistrate had stated thus;

> *". . . an imprisonment of 5 years with a non-parole period of 6 months is imposed upon you. Accordingly, the actual period of imprisonment is 4 years and 6 months."*

3. The date of offence is 24/05/18. The appellant's date of birth is 24/04/2001 and therefore he was 17 years and 01 month old when he had committed the aforementioned offence. Hence, the appellant was a young person within the meaning provided under the Juveniles Act, at the time he had committed the offence. The conviction entered and the sentence imposed by the Learned Magistrate are mainly assailed based on the provisions of the Juveniles Act.

4. The grounds of appeal advanced in this case are as follows;

Against Conviction

(a) The Learned Magistrate erred in law by recording a conviction against me when he ought to have made a finding of guilt, pursuant of section 20 of the Juveniles Act.

Against Sentence

(a) The Learned Magistrate erred in law and in fact by not taking into consideration that I was under 18 years of age (juvenile) at the time of the offence.
(b) The Learned Magistrate erred in law and in fact in not applying the relevant provisions of Juveniles Act (sections 30 and 32) in giving a suitable punishment.
(c) The Learned Magistrate erred in law and in fact in imposing a term of imprisonment that is harsh and excessive.
(d) The Learned Magistrate erred in law and in fact in selecting a starting point at the higher end of the tariff applicable to adult offenders.
(e) The Learned Magistrate erred in law and in fact in not considering and giving sufficient weight to mitigating factors properly.
(f) The Learned Magistrate erred in law and in fact when he gave an actual period of imprisonment that is ambiguous.

5. The appellant was produced before the magistrate court on 31/07/18. At that time he was 17 years and 03 months old. The charge was read to him on the same day and he

had pleaded guilty. It is noted in the court record that the appellant was 'present and defending himself'. I also note that the appellant had not been explained of his right to counsel. Moreover, the appellant was convicted by the Learned Magistrate on the same date without considering the summary of facts as the summary of facts was not filed on this date.

6. The appellant's plea was again taken on 06/11/18. The Learned Magistrate had noted in the court record that the appellant pleaded guilty on his own free will and had convicted the appellant (again). It is pertinent to note that the summary of facts was filed and admitted by the appellant after the conviction was recorded.

7. Entering a guilty plea to a particular offence does not itself establish that the relevant accused had committed that offence. Before entering a conviction on a guilty plea the court should first be satisfied that the relevant accused had in fact committed the offence to which the plea of guilty was entered. [See ***Matoga v State*** [2019] FJHC 965; HAA05.2019 (4 October 2019)] A court can be satisfied that the accused had committed the offence which the guilty plea was entered, if the accused admits facts that would establish all the elements of the relevant offence. That is the main reason why the summary of facts are filed and why it is necessary to ascertain whether the accused admits those facts.

8. In this case the appellant had in fact admitted that he took the six-year-old victim to a vacant house and that he touched the victim's private parts after removing her underwear. These facts do constitute the offence of sexual assault. Moreover, the appellant has not taken up the position before this court that his plea was equivocal. Therefore, I do not find it necessary in this case to disturb the conviction based on the fact that the Learned Magistrate has not followed the proper procedure in finding the appellant guilty of the relevant offence on his guilty plea.

9. On the single ground of appeal against the conviction the appellant submits that the

Learned Magistrate had failed comply with section 20 of the Juveniles Act. The said section reads thus;

> *The words "conviction" and "sentence" shall not be used in relation to juveniles and any reference in any written law to a person convicted, a conviction or a sentence shall, in the case of juvenile persons, be construed as including a reference to a person found guilty of an offence, a finding of guilt or an order made upon such a finding, as the case may be.*

10. The Learned Magistrate had in fact used the word 'conviction' in relation to the appellant in this case. However, the appellant's counsel has informed this court that the ground of appeal against the conviction will not be pursued.

11. As I have stated before, the sentence imposed by the Learned Magistrate is challenged mainly based on the ground that the said sentence contravenes the provisions of the Juvenile Act, specifically, section 30(3).

12. Section 30 of the Juveniles Act states thus;

> *Restrictions on punishment of juveniles*
>
> **30.**-(1) No child shall be ordered to be imprisoned for any offence.
>
> (2) No young person shall be ordered to be imprisoned for an offence, or to be committed to prison in default of payment of a fine, damages or costs, unless the court certifies that he is of so unruly a character that he cannot be detained in an approved institution or that he is of so depraved a character that he is not a fit person to be so detained.
> *(Amended by 23 of 1975 s.3)*
>
> (3) A young person shall not be ordered to be imprisoned for more than two years for any offence.

13. According to the ordinary meaning of the language in section 30(3) above, 'a young person' shall not be ordered to be imprisoned for more than two years. Section 2 of the

Juveniles Act defines 'young person" to mean a person who has attained the age of 14 years, but who has not attained the age of 18 years. Therefore, a sentencing court cannot order a person below the age of 18 years to be imprisoned for more than two years.

14. It is pertinent to note that the appellant was 18 years and 03 months old when he was sentenced by the Learned Magistrate. Therefore, the Learned Magistrate in this case has not ordered a young person to be imprisoned.

15. However, from the decision in the case of ***Komaisavai v State*** [2017] FJCA 91; AAU154.2015 (20 July 2017), it could be construed that the court considered the age at the time of offending, in applying the provisions of section 30(3) above. This same approach was taken by the Court of Appeal in ***Matagasau v State*** [2018] FJCA 161; AAU0120.2017 (4 October 2018) and more recently in ***Ralulu v State*** [2019] FJCA 260; AAU19.2018 (28 November 2019).

16. Needless to say, the lower courts are bound by the said decisions. Accordingly, the age at the time of offending should be considered in deciding whether a particular offender is a young person in applying the provisions of section 30(3) of the Juveniles Act.

17. Therefore, the Learned Magistrate had clearly erred in law in sentencing the appellant by imposing a term of imprisonment over two years. The appeal against the sentence should be allowed on the second ground of appeal against the sentence alone. The sentence imposed by the Learned Magistrate should therefore be quashed and be substituted with an appropriate sentence (punishment).

18. Before I proceed to determine the appropriate sentence (punishment) to be passed against the appellant, I am compelled to make certain observations on the approach taken by the Learned Magistrate in sentencing the appellant.

19. The Learned Magistrate had selected 06 years as the starting point saying that the said staring point is selected considering the objective seriousness of the offence and the

aggravating factors. This is not in line with the generally accepted sentencing practice in Fiji which is the two-tier approach and also offends the 'best practice' advocated in the case of ***Koroivuki v State*** [2013] FJCA 15; AAU0018.2010 (5 March 2013) where the court held that the starting point should be selected without considering the aggravating factors of a case.

20. After selecting the above starting point, the Learned Magistrate had then deducted one year in view of the mitigating factors that were identified to arrive at 05 years' imprisonment. Then again the Learned Magistrate had deducted a further one year in view of the guilty plea and had arrived at 04 years. Having arrived at 04 years' imprisonment as explained above, the Learned Magistrate had pronounced that the appellant's sentence is 05 years imprisonment.

21. The Learned Magistrate had fixed the non-parole period at 06 months and had then stated that the actual period of imprisonment is 04 years and 06 months.

22. Accordingly, there are many infirmities noted on the impugned decision which reflects negatively on proficiency and diligence.

23. Now I would turn to the punishment that is warranted in law to be passed on the appellant. Since the appellant was above the age of 18 years at the time of sentencing, he cannot be ordered to be detained at the Fiji Juvenile Rehabilitation and Development Centre. Therefore, there is no other alternative but to order a term of imprisonment.

24. Given the ceiling of 02 years and considering the aggravating factors and the mitigating factors of the case, including the fact that the appellant had entered an early guilty plea, I would consider 08 months to be the appropriate term of imprisonment to be imposed on the appellant. Considering the nature and the circumstances of the offending, the age of the appellant at the time of committing the offence, the age at the time of sentencing and the fact that the appellant had entered an early guilty plea, I would not

consider it appropriate for the appellant to be sent to the corrections centre to serve the above term. Though the offence committed by the appellant against the 06 year old victim cannot be condoned, when the damage that could be caused to the appellant and his future by having him serve the above term at the corrections centre is considered, I would lean in favour of suspending the said sentence (punishment).

25. The appellant was sentenced by the Learned Magistrate on 09/08/2019 and he was granted bail pending appeal by this court on 01/11/19. Thus, he had served 2 months and 22 days in prison. I would suspend the remainder of his term of imprisonment for a period of 3 years.

Orders;

a) The appeal against the conviction is dismissed but the conviction to be construed as a finding of guilt;
b) The appeal against the sentence allowed;
c) The sentence imposed by the Learned Magistrate in the Magistrate's Court at Nausori Criminal Case No. 549 of 2018 is hereby quashed;
d) A term of 8 month's imprisonment is substituted as the punishment of the appellant and the said punishment is partially suspended with effect from 01/11/19 for a period of 3 years; and
e) The court clerk to explain the effects of a suspended sentence.

Vinsent S. Perera
JUDGE

Solicitors;

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