

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 79 OF 2019

BETWEEN : **JAMES AVINESH CHAND**
APPELLANT

AND : **STATE**
RESPONDENT

Counsel : *Mr. K. Tunudau for the Appellant.*
: *Mr. A. Singh for the Respondent.*

Date of Hearing : *08th of July, 2020*
Date of Judgment : *23rd of July, 2020*

JUDGMENT

Background

- a). The Appellant (will be referred to as the accused sometimes) was charged with two counts of **“Abduction of young person under 18 years with the intent to have carnal knowledge”** contrary to section 211 (1) of the Crimes Act and **“Defilement of young person between 13 and 16 years of age”** contrary to section 215 (1) of the Crimes Act. The accused pleaded not guilty and after a full trial the learned

Magistrate found the accused guilty and having convicted him of the alleged two counts, sentenced him to 30 months of imprisonment with a non-parole period of two years.

b). Being aggrieved by the said conviction and the sentence, the accused appealed. At the hearing of the appeal the appellant, withdrawing the rest confined his grounds of appeal only to the following 3 grounds;

1. The trial Magistrate erred in law and in fact by failing to consider the appellant had a defence:

(a) Pursuant to section 212 (2) of the Crimes Act whereby the appellant had reasonable cause to believe and did in fact believe that the complainant was above the age of 18 years and the age bracket stipulated under the provision did not apply; and

(b) Pursuant to section 215 (2) of the Crimes Act whereby the appellant had reasonable cause to believe and did in fact believe that the complainant was of or above the age of 18 years.

2. The trial Magistrate erred in law and in fact by failing to establish the reasons or the grounds whereby the appellant has "reasonable cause to believe" that:

(a) The complainant was above the age of 18 years pursuant to section 211 (2) of the Crimes Act; and

(b) The complainant was above the age of 18 years pursuant to section 215 (2) of the Crimes Act.

3. The trial Magistrate erred in law and in fact by failing to consider, on the totality of the evidence, whether the appellant had reasonable cause to believe and had believed that the complainant was above the age of 18 years on both counts he was charged with.

c). The petition of appeal is filed within the allowed time, through a counsel and the said counsel has represented him throughout the hearing of this appeal. Since

withdrawn the rest of the grounds other than the above would not be considered by this court.

- d). When looked at all 3 grounds urged above, it all relates to one particular issue to wit; the defense of apparent age of the complainant.

Therefore, it would be necessary to reproduce the relevant sections in full.

211.- (1) *A person commits a summary offence if he or she, with intent that any unmarried person under the age of 18 years shall be unlawfully and carnally known by any person (whether such carnal knowledge is intended to be with any particular person or generally), takes or causes to be taken the person out of the possession and against the will of his or her father or mother, guardian or any other person having the lawful care or charge of the person under 18 years.*

Penalty— Imprisonment for 5 years.

- (2) *It shall be a sufficient defence to any charge under this section if it shall be made to appear to the court that the person so charged had reasonable cause to believe and did in fact believe that the other person was of or above the age of 18 years.*

215.- (1) *A person commits a summary offence if he or she unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any person being of or above the age of 13 years and under the age of 16 years.*

Penalty— Imprisonment for 10 years.

- (2) *It shall be a sufficient defence to any charge under sub-section (1) if it shall be made to appear to the court that the person charged had reasonable cause to believe, and did in fact believe, that the person was of or above the age of 16 years.*

- (3) *It is no defence to any charge under sub-section (1)(a) to prove that the person consented to the act.*

e). The vital words here would be "...if it shall be made to appear to the court". Therefore it is clear that the accused should take up that defense and made it appear to the court. In the present case the accused has neither taken such defense nor raised a single question in cross examination of such. Furthermore, the defence raised by the accused was a complete denial of the incident.

f). It would worth be mentioning the provisions of section 124 of the criminal Procedure Act.

124.- (1) Any exception, exemption, proviso, excuse or qualification—

(a) whether it does or does not appear in the same section as the description of the offence in the Act or Decree or Promulgation creating the offence; and

(b) whether or not it is specified or negatived in the charge or complaint— is to be proved by the accused person on a balance of probabilities.

(2) No proof in relation to any relevant exception, exemption, proviso, excuse or qualification applying under any Act or Decree or Promulgation to any offence shall be required from the prosecution.

g). It is established by the prosecution by production of the birth certificate that the complainant was below the age of 16 years at the time of the committal of the offence. The necessary elements of the offences were clearly established by the prosecution. The stance of the accused had been that he did not commit the alleged act. When the prosecution established that the accused did the alleged act, thereafter the defence is precluded from saying that 'Yes, I did it , but I was misled'.

h). Therefore it is clear that the defense had the duty to raise such defense if any and in absence, the court needs not consider such. Especially when the raised defense is one of complete denial, the court need not consider whether the complainant appears to be over the age limit and whether the accused was misled by such in abduction of her.

i). Accordingly, I make the following orders.

- (1) The appeal is dismissed as it lacks any merit.
- (2) The conviction and the sentence imposed by the learned magistrate are confirmed and affirmed.



Chamath S. Morais
Judge

At Lautoka
23rd of July, 2020

Solicitors: *Kevueli Tunidau Lawyers, Lautoka, for the appellant*
Office of the Director of Public Prosecutions, Lautoka, for the Respondent