IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Crim. Appeal Case No: HAA 18 of 2022

SAIMONE TUNAQASE

vs.

STATE

Counsel: Mr. A. Singh Applicant
Ms. L. Latu for Respondent

Date of Hearing: 26th October 2022

Date of Judgment: 05th December 2022

JUDGMENT

---

*(The name of the victim is suppressed she will be referred to as "***AS.N***")*

Introduction

1. The Appellant was charged as follows in the Magistrate's Court:

[COUNT 1]

Statement of Offence

DEFILEMENT OF A YOUNG PERSON BETWEEN 13 AND 16 YEARS OF AGE:

Contrary to section 215 of the Crimes Decree no. 44 of 2009.

Particulars of Offence

SAIMONE TUNAQASE, on the 28th day of July, 2012, at Labasa in the Northern Division, had unlawful carnal knowledge of **A.S.N**, a young person being the age of 15 years 5 months 21 days.

[COUNT 2]

Statement of Offence

DEFILEMENT OF A YOUNG PERSON BETWEEN 13 AND 16 YEARS OF AGE:

Contrary to section 215 of the Crimes Decree no. 44 of 2009.

Particulars of Offence

SAIMONE TUNAQASE, on the 04th day of August, 2012, at Labasa in the Northern Division, had unlawful carnal knowledge of **A.S.N**, a young person being the age of 15 years 6 months 21 days.

2. The Appellant has preferred this appeal against the conviction dated 15th October 2021 of the learned Magistrate of Labasa. The Appellant was charged with two counts of defilement of a young person between 13 and 16 years of age alleged to have been committed on 28th July 2012 and 4th August 2012 contrary to section 215 of the Crimes Act 2009.

3. Due to the change of the Magistrate the first trial was aborted and on the 11th January, 2021 a *de novo* trial commenced. Upon the conclusion of the said trial on the 15th October, 2021 judgment was delivered convicting the Accused on both the charges and on the 18th July, 2022 the Appellant was sentenced to 18 months imprisonment with the non-parole period of 15 months. The Appellant has preferred this timely appeal with six grounds of Appeal against the said conviction.

4. The said grounds of Appeal are:

    1. **THAT** the Learned Trial Magistrate erred in law and in fact in coming to a finding that the complainant's evidence was credible when her evidence was full of inconsistencies and contradictions.
    2. **THAT** the learned Trial Magistrate erred in law and in fact in failing to take into consideration that the alleged incidents happened in broad daylight and she was supposed to have been pulled from the market, in front of market police post and across the railway bridge in the presence of the public without raising any alarm.
    3. **THAT** the Learned Trial Magistrate erred in law and in fact in failing to take into account that the complainant had agreed that in her statement to police she had told that on the day of the incident she was with Sakiusa also called Baba.
    4. **THAT** the learned Trial magistrate erred in law/ and in fact in failing to take into consideration that the Appellant had been falsely accused as he had challenged the position of Turaga ni Mataqali from the complainant's grandmother.

    Additional Grounds

    Further grounds of appeal were added by Motion dated 23/09/2022 which they are referred to as grounds of appeal 5 and 6 as follows.

    5. **THAT** the Learned Trial Magistrate erred in law and in fact when she failed to take into consideration that the Prosecution had failed to tender medical report of the complainant.
    6. **THAT** the Learned Trial Magistrate erred in law and in fact when she came to a finding that the Accused's evidence as to the age of the complainant was not credible.

Facts of the case

5. The only witness for the prosecution was the victim ASB. According to her evidence the facts of the case may be summarized as follows. ABS was born on 14/03/97 and was around 14 years at the time of the incident. On 28/7/2012 and 4th August 2012 she came to

Labasa and met the Accused Simone who happens to be her mother's cousin and her uncle. Then both of them have gone to a shrub jungle opposite the Labasa courthouse at which place they have engaged in sexual intercourse on both occasions. On the first occasion the Accused has given her $10 and told her not to tell anybody. Her birth certificated had was tendered as prosecution exhibit 1.

6. The Accused totally denies the allegation and having sexual intercourse with the victim. According to him this is a fabrication to bring disgrace to his family and to remove him from the mataqali. He also says that she looks 17 or 18 years and that he did not know she was 16 years.

7. The grounds of appeal number 1 and 2 are based on alleged inconsistencies, improbabilities failure to take into account of relevant evidence to that extent these grounds could be considered together as being the failure to consider relevant evidence.

GROUNDS 1 and 2

8. It was submitted on behalf of the Appellant that in evidence it is stated that she was taken to the sugarcane field opposite the court house but in her statement to police dated 11/08/2012 she had stated that it was a bush with Vaivai trees opposite the court house. In her evidence though she said that she was frightened in her statement to police she did not mention this. In her evidence in court, she said that she had tried to stop him from having sex. However according to her statement to the police she said she had sex with him willingly. (contradiction). Further in her evidence she said that the Accused had pulled her from the market to the bridge holding her hand but it is not in her police statement dated 11/08/2012 (omission).

9. In her evidence in court, she said that the accused had taken her from the market, past the police and through the taxi stand and across the bridge by pulling her hand and it is not possible to drag a girl in broad day light without drawing the attention of the public and walk across the railway bridge as the wooden planks are about one foot apart and the Magistrate has accepted this improbable.

10. Certainly, the prosecution case depends solely on the evidence of the victim. The victim and the Accused are related as uncle and niece. They are not strangers. The Accused is a known adult from the same village. On the days of the incidents the Accused had come to the Labasa market and called the victim and taken her. Considering the age of the victim and the seniority of the Accused together with his status as uncle it is possible that the victim will be persuaded to accompany him across the bridge to the scrub jungle where the incident is alleged to have taken place. It was submitted that dragging a girl along this narrow bridge in the middle of the town unnoticed by others is almost impossible and it is improbable. If the Accused was a stranger the victim will certainly resist and protest if she was being taken in that manner.

11. However, when a known uncle calls her in this manner a girl of tender age can be persuaded to accompany him with very little resistance even reluctantly. Therefore, the evidence of the victim is not improbable. She does not say that she was dragged or that she resisted but that she was held by her hand and taken. This when done by a known elder will not mean and be the same thing as a total stranger dragging a victim.

12. The victim does say that she was held by the hand and taken. But does not state at any point that she resisted, shouted or tried to run away. It is apparent that the victim has, when called gone with the accused. This clearly and very strongly indicates that a girl of about 14 years who was known to the accused introduced to sexual pleasure even reluctantly may subsequently be easily induced to participate without resisting. She may be subconsciously desiring the pleasure of sexual activity with the known uncle. This is further buttressed by the fact of the accused giving money on such occasions. It is highly probable that a girl of 14 years will fall pray and become a willing victim in these circumstances. Considering the tender age and being in a vulnerable stage of a moral and sexual development a girl reluctantly proceeding with the Accused in this manner is not unusual nor is it improbable. The Accused has taken advantage of the girl's vulnerability.

13. As for that contradictions and the omissions it is relevant to note that the victim has given evidence almost 9 years after the incident and such contradictions are expected and not significant.

GROUND 3 and 4

14. It is submitted that the Learned Magistrate erred in law and in fact in failing to take into account that the complainant had agreed that in her statement to police she told on the day of the incident she was with Sakiusa. In the statement of Jotivini Tabua recorded by police on the 10th of August, 2022 it is recorded that the victim had informed Jotivini that she went out with her boyfriend Sakuisa who was from Naodamu. However, in the victim's statement (defence exhibit No. 1) there is no mention of Sakiusa. Jotivini Tabua is not a witness at this trial and a different statement in such a statement is not in evidence and cannot be considered in this matter.

15. It was argued that the Magistrate has not considered the defence evidence or the defence case in its judgment. On a perusal of the judgment at page 62 of the copy record I observe that from paragraph 5, 5.4 7.5 and 7.6 onwards the Magistrate has considered and summarized the evidence of the Accused. Apart from so summarizing the evidence the defence position suggested in cross examination has also been considered.

16. It is submitted that the victim implicated her boyfriend Sakuisa for the incident by informing Jotivini. In evidence what the victim had admitted appears in cross-examination as follows:

> *Question: Put to you that this matter reported to police by your mom?*
> *Answer: Yes.*
> *Question: Put to you all this described as happening with boyfriend not with accused?*
> *Answer: 2 dates happen with accused.*

17. Thus, the victim does not deny having sexual intercourse with her boyfriend. Her evidence is that '*two of the dates it happened with the accused*'. Accordingly, there is no contradiction or omission except that she has consistently been of the position that she did have sexual intercourse with the accused. Therefore, ground number 3 is misconceived.

GROUND 5

18. This will lead us to Ground number 5 where it is argued that the Learned Magistrate failed to consider the non-production of the medical examination report. The argument is that if the report proved the victim to be a virgin then it would contradict the evidence of the victim. Firstly, the victim does not deny sexual intercourse with any other and in cross-examination she has by implication admitted having sexual intercourse with her boyfriend apart with the Accused. In view of this evidence the medical report would serve no purpose. In any event if such a report was available it certainly would have been disclosed to the defence. That being so in the normal course of event one would expect the defence counsel to suggest the same to the victim in cross examination. Nothing of that sort was suggested. As such the failure to produce the medical examination report does not affect the validity or the correctness of the Learned Magistrate's findings.

GROUND 6

19. In support of ground number 6 it was submitted that the Accused has established on a balance of probability that he believed that the complainant was over 16 years of age and the Learned Magistrate failed to appreciate and merely rejected the same on the basis that it was not raised- during the cross-examination. In order to consider this ground of appeal it is necessary to have an understanding of the offence of Defilement and section 215 of the Crimes Act. Section 215 of the Crimes Act defines the offence of defilement as follows.

> *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

20. To prove the offence of unlawful carnal knowledge, the prosecution must prove beyond reasonable doubt that:

    1. The Accused had or attempted to have carnal knowledge of or with the complainant. This means the defendant must have, or attempted to insert his penis into the complainant's genitalia or anus. Penetration of the genitalia or anus to any extent will be sufficient.
    2. The carnal knowledge must have been unlawful. This means it must not have been authorised, justified, or excused by the law.
    3. The complainant was of or above the age of 13 years and under 16 years of age.

21. In the present case on the evidence of the Victim the ingredients to establish and prove the offence of defilement are all satisfied. However, the Appellant has a defence under section 215 (2) of the Crimes Act. As for the defence under section 215(2) count of defilement it is neither the consent nor the behaviour of the victim that matters, but rather the reasonable belief that the child is above the age of sixteen and evidence of the steps taken by the accused to ascertain the age of the accused. In the case of Reddy v State [2018] FJCA 10; AAU06.2014 (8 March 2018), His Lordship Prematilaka J.A., expounded the import, nature and the burden of proof of this defence as follows:

"[28] It is clear from section 215 (2) that if and when an accused takes up the defense stated therein two requirements must be satisfied; the first is objective and the second subjective. It must be made to appear to the court firstly, that the accused 'had reasonable cause to believe' and secondly, that he 'did in fact believe' that the victim was of or above the age 16 years. This evidential burden should be discharged by adducing or pointing to evidence that suggests a reasonable possibility that both of the said requirements exist (vide section 59)".

22. Appellant's defence is one of denial. As such he would not in the normal course have the benefit of defence under section 215 (2). However, since the Accused in his evidence has stated that he did not know that she was under 16 years and that she looked 17 to 18 years let us consider if he may have any benefit arising therefrom. In the first instance the prosecution is required to prove that the girl is less than 16 years of age and that the Accused had sexual intercourse with her. Then, there is an evidential burden on the Appellant to prove that he believed the girl was over 16 years.

23. The Appellant is proved to be an uncle of the victim (mother's cousin). This is the girl's evidence that was not challenged in cross-examination. They are living in the same neighborhood or village and have known each other. In these circumstances it is highly improbable that the Accused would have any reason to believe the girl to be a high school student of 17 to 18 years in 2012. In his evidence he admits that they are from the same mataqali but claims to have no relationship with her. When the victim in evidence repeatedly gave the details of her relationship with the Appellant it was not assailed in cross-examination or challenged. Then the Appellant denying any relationship at the end of the trial appears to be more of an afterthought to distance himself from the victim as a prelude to his change of defence.

24. In an allegation of defilement an accused has a right to invoke the defence provided by section 215 (2) of the Crimes Act. In the present case the Accused's defence is a total denial thus invoking the defence does not arise. An Accused cannot blow hot and cold so to speak. This defence is available only if the Accused admits sexual intercourse in the first instance. In Reddy v State [2018] FJCA 10; AAU06.2014 (8 March 2018), His Lordship Prematilaka J.A.,

> [25] However, in my view when one reads section 215(2) in the light of sections 59, 60 and 61 it appears that the burden on an accused under section 215(2) of the Crimes Act is an evidential burden of proof as contemplated in section 59 and not a legal burden of proof under section 60 and 61 and I agree with the following pronouncement of Grant CJ in ***Sami v State*** *Criminal Appeal 0046 of 2002S: 26 November 2004 [2004 FJCA 54] on*

the proviso to section 156 (1) of the Penal Code which is similar to section 215(2) of the Crimes Act.

> *'It is quite clear from this wording that an accused does not have to be satisfied beyond reasonable doubt that the girl is of or above the age of sixteen; it is only necessary for him to believe it on reasonable grounds. Moreover, it is not incumbent upon an accused to satisfy the court beyond reasonable doubt that he had reasonable cause to believe and did in fact believe that the girl was of or above the age of sixteen; nor does he have to satisfy the court on the balance of probabilities. The use of the word "defence" in the proviso does not connote any shifting of the burden of proof. The proviso refers to no more than an evidential burden so that, for, an accused to fall within the exception created by the proviso, there need only be some evidence, adduced either by the prosecution or by the defence, sufficient to raise a reasonable doubt.'*

25. Then it was opined that in that case that neither consent (in respect of the rape charge) nor age (in respect of the defilement charge) had been raised by the appellant and that once the appellant had indicated that his defence was that no act of sexual intercourse took place, then the issue of age which is the basis of the statutory defence, is irrelevant under section 215(2).

26. The Appellant at the trial had not directly taken up the defense available to him under section 215(2) of the Crimes Act. If an accused is to rely on or advance this defence he has to first admit the act of sexual intercourse or an attempt to have sexual intercourse as both acts are included in section 215(1). His defense is one of a total denial of sexual intercourse with the Victim. Further, upon a perusal of the totality of the evidence adduced for the prosecution as well as the defense, I am satisfied that the evidential burden on both aspects of section 215(2) had not been discharged by the Appellant nor has he made it appear to court that in his evidence that he had reasonable cause to believe and he did in fact believe that the victim was of or above the age of 16 years. Trial Judge had considered this aspect and come to a correct finding accordingly this ground of appeal is thus reject.

27. Therefore, on a consideration of the totality of the evidence it is extremely probable that the Accused knew that the girl was not 16 years of age and certainly he could not have reasonably believed that she was over 16 years. This is nothing but a last-ditch desperate attempt take up some defence. To that extent the Accused is untruthful and the Learned Magistrate hace come to that finding and its correct.

28. In the above circumstances, I am of the view the Learned Magistrate's findings of fact are correct and in accordance with the evidence. Thus I see no merit in this appeal against the conviction and accordingly the appeal is dismissed and the Learned Magistrate's Judgment and conviction dated 15th October 2021 are affirmed.

29. The appeal against conviction is refused and dismissed.

30. 30 days to appeal to the Court of Appeal.

At Labasa via skype
05th December 2022

Solicitors
Messrs Kohli & Singh Lawyers for the Appellant
Office of the Director of Public Prosecutions for the Respondent.