

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**

**Crim. Case No: HAC 116 of 2022**

**STATE**

vs.

**GAUNA MOCIMOCI**

**Counsel:** Ms. P. Ram for the State  
Mr. J. Biaukula for the Juvenile

**Date of Hearing** : 14<sup>th</sup> to 15<sup>th</sup> February 2023

**Date of Closing Submission** : 15<sup>th</sup> February 2023

**Date of Judgment** : 16<sup>th</sup> February 2023

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**JUDGMENT**

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*(The name of the victim is suppressed she will be referred to as "I.D.M")*

**Introduction**

1. The Director of Public Prosecutions has charged the juvenile for the following offence on the Information dated 03<sup>rd</sup> May, 2022:

**COUNT ONE**

*Statement of Offence*

**RAPE:** Contrary to Section 207 (1) and (2) (a) of the Crimes Act, 2009.

*Particulars of Offence*

**GAUNA MOCIMOCI** on the 05<sup>th</sup> day of February, 2017 at Wainimakutu Secondary School Teacher's Compound, in Ra, in the Western Division, had carnal knowledge of **IDM**, without her consent.

2. Just before the trial when this was mentioned on 9<sup>th</sup> February 2023 it transpired that the person accused Gauna was 17 years and 10 months as at the date of the alleged date offending and he was a juvenile then. The trial proceeded on that basis. The trial commenced on 14<sup>th</sup> of February 2023 upon reading and explaining the charge to which the juvenile pleaded not guilty.
3. This is an allegation of rape of a 15-year-old girl. The prosecution led the evidence of the Complainant (IDM) and closed its case. As there was prima facie evidence, the defence was called for and the rights of the juvenile were explained. The juvenile opted to remain silent and neither did he call any witnesses. This court heard the closing submissions and I will now endeavor to pronounce my judgment.
4. For the juvenile to be found guilty of the count of rape based on sub sections 2(a) of section 207 of the Crimes Act 2009 in addition to the date and place stated in the count the prosecution must prove beyond reasonable doubt, the following elements:
  - (i) the juvenile is Gauna Mocimoci;
  - (ii) he had carnal knowledge with or of IDM., and
  - (iii) IDM the complainant, did not consent.

If I may further elaborate, under Section 207 (2) (a) of the Crimes Act 2009, the offence of Rape is defined as follows: a person rapes another person if the person has carnal knowledge with or of the other person, without the other person's consent. In the context of this case, 'carnal knowledge' is the penile penetration by the accused of the female genitalia that of the victim. The slightest penetration of the female genitalia is sufficient to prove the element of penetration [vide- Section 206(4) of the Crimes Act].

5. According to Section 206(1) of the Crimes Act, the term *consent* means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent. Submission without physical resistance by a person to an act of another person shall not alone constitute consent. Consent obtained by force or threat or intimidation etc., will not be considered as consent freely and voluntarily given.

#### Burden of proof

6. The Accused/Juvenile is presumed to be innocent until he is proven guilty. As a matter of law, the onus or burden of proof rests on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation or burden on the accused/juvenile to prove his innocence. The prosecution must prove the accused's guilt, beyond reasonable doubt. If there is a reasonable doubt so that the court was not sure of the accused/juvenile's guilt or if there be any hesitation in my mind on any of the ingredient or on the of evidence led by of the prosecution the Accused/ Juvenile must be found not guilty of the charge and accordingly acquitted. The accused has a right to remain silent and no adverse inference can be drawn if the Accused/ Juvenile remains silent.

#### Admitted Facts

7. The following facts are admitted and are not in dispute;
  1. *THAT* the Accused in this matter GAUNA MOCIMOCI, (hereinafter referred to as "Gauna") is the person charged with Rape in this case, and is born on the 25<sup>th</sup> of March 1999.
  2. *THAT* IDM, [hereinafter referred to as "IDM"] is the complainant in this matter, born on the 10<sup>th</sup> of September 2001 as per her birth certificate.
  3. *THAT* in the year 2017, IDM was attending Wainimakutu Secondary School and was living in the Teacher's Quarters with her oldest sister, Ms. Olimivia, who was a school teacher.
  4. *THAT* in February of 2017, Ms. Olimivia and her husband were in Suva due to her pregnancy and IDM was then sleeping over at Mrs. Venina's home.
  5. *THAT* a boy named Pita was also living in Wainimakutu and a class 8 student in that year in 2017.
  6. *THAT* on the 5<sup>th</sup> of February 2017, Gauna entered the Quarters of Ms. Olimivia and her husband, whilst the couple were still in Suva.
  7. *THAT* on that above date, Gauna had sex with IDM in Ms. Olimivia's school Quarters by penetrating his penis into IDM's vagina

8. This is an allegation of Rape of a young girl who was 15 years, 4 months and 7 days on 5<sup>th</sup> of February, 2017 the date of the alleged offending. Gauna himself was 17 years and 10 months old as such he was a juvenile. The act of sexual intercourse, the date and the place are admitted. The only issue for determination is consent. The prosecution called just one witness namely, IDM the complainant and closed its case. When the defence was called for the Accused opted to remain silent and called no witnesses on his behalf.
9. According to IDM as on the 5<sup>th</sup> February, 2017 she was residing with her sister and the sister's husband who were occupying a teacher's quarters of the Wainimakutu Secondary School as IDM was also attending the same school. On or around the 5<sup>th</sup> of February 2017, her sister had been admitted to hospital in relation to a complication of her pregnancy. As such IDM was temporally staying over with her mathematics teacher Ms. Venina. On the 5<sup>th</sup> morning IDM has gone to the beach and spent the morning with some friends and family of Ms. Venina. After returning she had gone to her sister's house to collect a mattress and also to close the windows as there was some sign of rain.
10. When IDM was at her sister's house she noticed a known friend called Pita was in the house smoking suki. She then asked him to leave and he appears to have gone out and then she had seen Pita with the Accused Gauna near the outer kitchen. Then she narrates that both of them were in the house and was seated on the settee. She herself had been in the house and then the Accused/juvenile had come to her, held her hand and has taken her into the bedroom. She says that he put her on the bed and wanted her to remove her clothes. She admits that she removed her skirt and says that the juvenile/accused removed her undergarments. Then the Juvenile himself had lowered his pants and had sexual intercourse. She says it was without her consent and that she did not consent.
11. She says that she did not consent and that it was due to fear that she removed her skirt. She also admitted that she knew that he will do something to her. The Accused appears to have not said anything other than asking her remove her clothes. At one point she did say that she removed the skirt because he forced her to do so. She also admits that removing her skirt was her own choice and she did so because he (the Accused/Juvenile) wanted to have

sexual intercourse. However, she said that she did not want to have sexual intercourse with the Accused/Juvenile. She also said that Pita was in the settee and she could see him.

12. After Gauna had sexual intercourse both Pita and Gauna have left and she herself has taken the mattress, locked up the house and gone back to her teacher Ms. Venina's house. She admits that she did not tell the teacher or anyone else of this incident. However, after the lapse of a year, in April 2018 police officers have come to her school and recorded her statement in respect of this matter. She says that there were rumours circulating of the fact of she having sexual intercourse with Gauna and she was shy about these rumours. However, she had not told her parents nor any other and admitted that she made the statement to the police because she felt shy about the rumours. However, she consistently took up the position that she did not consent and that it was fear that made her to remove her clothes and have sexual intercourse.
13. In cross-examination it was suggested that she was lying naked on the bed when Gauna came in to the room and she consented to having sexual intercourse with him. It was also suggested that she had intercourse with Pita prior to this. She denied all these suggestions. It is in cross-examination that she admitted it was possible for her to have left the room if she wanted. She also admitted that it was Pita who has told others of this incident in the village and other students also got to know of this. She also admitted that she was prompted to complain or make a report to the police because as she was shy as others got to know about this.

#### Evaluation

14. As stated above the fact of sexual intercourse is admitted and is not in dispute. The only matter left for the prosecution to prove is the lack of consent. IDM does consistently say that she did not consent. Thus considering her conduct of removing her skirt on her own and not leaving the room and the other circumstances it appears that IDM may have submitted due to a sense of helplessness at that moment and may not have resisted the Accused having sexual intercourse. That may be her reason for deny consent.

15. As opposed to this the defence position is that she did consent. According to IDM's evidence she had been held by her hand into the room and had been put onto the bed. Sexual intercourse had taken place whilst the door was open and being seen by Pita. In the normal course of event if she was having consensual sexual intercourse with a person, it is rather unusual for it to take place in the presence and the seeing of another. To that extent the fact of IDM merely surrendering and not consenting appears to be probable. Pita though he was present have not come to help her but appears to have been supporting the Gauna in this act. In these circumstances she could not expect to obtain the help of Pita. That being so IDM did not tell this to anybody. Immediately after the incident she went to her teacher's house but remained silent. The week thereafter, she had returned to her sister's house and claims to have told this to her sister and her husband. Both of them have found fault with her for having sexual intercourse in the house. They have not taken any action. Considering the above it does support her position of submitting without consenting.
16. However, thereafter she had not told this to her parents when she returned home in May. She admits that the rumours was one of the reasons for her to tell the police when they came. There is a long delay in making this complaint. This delay should be considered with her conduct at the time of the incident in determining the issue of consent. She admits that she had the opportunity to leave the room before the act took place. She was aware and she had realized that Gauna was intending to have sexual intercourse with her. Knowing that she herself has removed a part of her clothes. Gauna had not made any verbal threats or any other gestures of a threatening nature. He had merely held by her hand and taken her into the room. She also admits that whilst inserting his penis and having sexual intercourse he did not say anything and that she too appears to have not said anything.
17. The above sequence of events is consistent and gives rise to the inference that IDM may have agreed and consented to the act of sexual intercourse or at least this creates a doubt in this regard. Accused and Pita were known persons and were not strangers. The fact that they were known may be a reason for her to remain silent after the event without disclosing. Similarly this can also be a reason for her to have consent at that moment. If I

may elaborate they were 15 and 17 year school mates known to each other and in the said circumstances when Gauna persists and seeks her consent to have sexual intercourse either wholeheartedly or otherwise it is possible for IDM to have agreed and consented.

18. According to the evidence IDM has shown her reluctance when she was taken by her hand into the room. But after being put on the bed and realizing that Gauna was wanting to have sexual intercourse she removes her skirt on her own and willingly without protest. She admits that she had the choice of not doing so. When the Gauna removes his pants, she remains in the room despite being able to leave the room and finally offers no resistance to the vaginal penetration. Isn't this the conduct of a person who was willing and does not this indicate that he was giving some sort of tacit or unspoken consent? Certainly, a person acquiescing or going along with sexual penetration in the face of coercive circumstances or due to force or threats will not be true consent. However, in the absence of such circumstances, force or threat the inference that she may have consented does arise. It is important to remember that rape is not sexual intercourse by force. It is simply sexual intercourse without valid consent and without the belief on a part of the Accused that the victim is consenting and such belief should be on reasonable grounds. Rape is not sexual violation by force and that does not have to be proved to be so. What has to be proved is sexual violation without valid consent and without an honestly and reasonably held belief that the victim is consenting.
19. In these circumstances, there is a possibility that the victim may have consented to the act of penetration committed by Gauna. It is not that this court disbelieves IDM but it is just that the circumstances create a reasonable doubt on the issue of consent and the benefit of which the Accused is entitled to have. Accordingly, I hold that the prosecution has thus failed to prove that lack of consent beyond reasonable doubt.

#### Consideration of the lesser or alternative offence

20. On the evaluation of IDM's evidence, I observe that her demeanour was consistent with that of a truthful witness. She was certainly a truthful and a credible witness. Her evidence is also reliable. In her mind she may have not consented. The doubt in respect of consent

has arisen not due to the reason of she being disbelieved but due to the circumstances of this case. As stated above her evidence is consistent with submitting and succumbing due to the circumstances. Thus, when she says she did not consent she is being truthful. However, when considered in context and in the totality of the evidence it is just that there also arises a reasonable doubt of which the benefit was given to the Juvenile. It is for this reason that I have concluded that the prosecution has failed to prove the charge of Rape beyond reasonable doubt. As such I will now consider the alternate count of defilement.

21. As it is admitted and this court is satisfied that sexual intercourse (penile penetration) has been proved beyond reasonable doubt, I am of the view that this is a fit matter to act under Section 162 (1) (f) of the Criminal Procedure Act and consider the lesser or alternative offence of defilement punishable under Section 215 of the Crimes Act. At the commencement of the trial and during the course of the evidence, the defence was put on notice that the offence of defilement may be considered at the end of the trial. Accordingly, the defence was mindful of the defences available to an Accused under section 215 (2).
  
22. At this stage it is possible to consider the alternate charge of defilement in respect of the count of rape under section 162 of the Criminal Procedure Act as section 162 clearly states that “*the court may record a conviction*” (emphasis added) of a lesser offence. Defilement is an offences designed protect adolescent children and civilised societies must protect its adolescent children from the predatory activity of adults or even that of juveniles. This is a case where the circumstances show that an adolescent girl was manipulated and cunningly coerced into having penile intercourse with the Accused a juvenile of 17 years of age. In the circumstances of the present case to my mind it is necessary to act under section 162 and I am of the view that the ends of justice will be met by considering the alternate or lesser offence in respect of the rape count which act of penetration is also admitted by the accused. Now I will proceed to consider if the alternate offence of defilement has been proved beyond reasonable doubt.

### Defilement



23. It is admitted and proved beyond reasonable doubt that IDM was above 13 years but less than 16 years of age. There is a doubt as to consent. However as regards the act of penile-vaginal penetration between Gauna and the Complainant is admitted and is common ground and thus the same has been proved beyond reasonable doubt. 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.”*

24. 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.

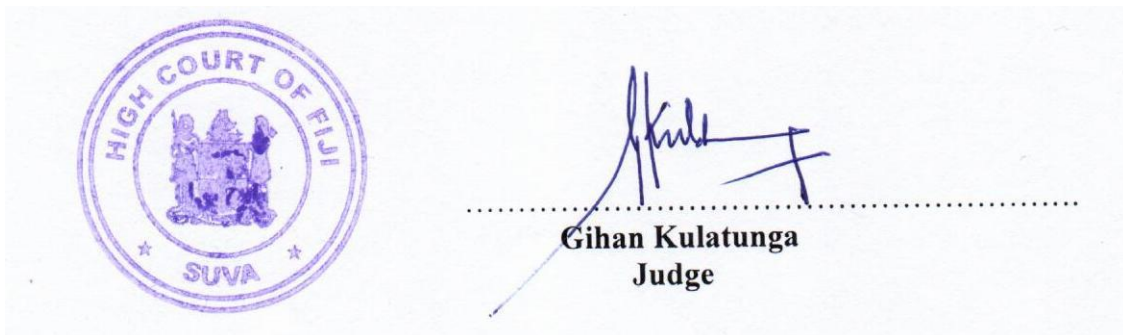
25. In the present case as determined above the ingredients to prove the offence of defilement are all satisfied. However, an accused has a defence under section 215 (2) of the Crimes Act. As for the defence under section 215(2) of alternate count of defilement it is neither the consent nor the behaviour of the victim that matters, but rather the reasonable belief

that the child is above the age of sixteen and evidence of steps taken by the accused to ascertain the age of the victim.

26. Considering the admissions along with the evidence of IDM the fact that Gauna inserting his penis into her vagina and having sexual intercourse on the 5<sup>th</sup> of February, 2017 as well as the fact that IDM was between 13 and 16 years of age is not in dispute and is proved. The Juvenile was known to the victim and they were in the same school. That being so there is no doubt that the Juvenile knew that IDM was less than 16 years on that day. These facts are all proved beyond reasonable doubt. There was even a suggestion to the contrary.

### Conclusion

27. In the above circumstances I hold that the prosecution failed to prove the charge of rape beyond reasonable doubt. However, I hold that the prosecution had proved beyond reasonable doubt the alternate offence of defilement punishable under section 215 of the Crimes Act. Accordingly, I hold that the Juvenile Gauna is not guilty of charge of rape but find him guilty of the alternate offence of defilement punishable under section 215 of the Crimes Act.
28. Accordingly, the Juvenile is hereby found guilty for the said alternate offence of defilement committed on the 5<sup>th</sup> of February 2017, punishable under section 215 of the Crimes Act and the Juvenile is acquitted of the charge of rape.



**At Suva**  
16<sup>th</sup> February 2023

### **Solicitors**

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