HAZRAT ALI

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v.

THE STATE

[HIGH COURT, 1989 (Jesuratnam J) 13 October]

Appellate Jurisdiction

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Crime: procedure- unlawful sexual intercourse- plea of guilty- whether prosecution absolved from need to prove age of victim- Penal Code (Cap 17) Section 155 (1)- Criminal Procedure Code (Cap. 21) Section 206.

Sentence- unlawful sexual intercourse- mitigatory factors- Penal Code (Cap 17) Section 155 (1).

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The Appellant pleaded guilty in the Magistrates Court to a charge of unlawful sexual intercourse with a girl under the age of 13. On appeal it was argued that the age of the complainant had not been proved. Dismissing the appeal against conviction the High Court HELD: that where an accused pleaded guilty and the circumstances of the offence were adequately explained to and accepted by him there was no further requirement for the ingredients of the offence to be proved. (*Editor's Note*: but as to acceptance of facts which are not within the accused's knowledge see: Barry Jennions v. Reginam 18 FLR 61, 63). The Court however HELD: that the Magistrate had paid insufficient regard to mitigatory factors and reduced the sentence.

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Cases cited:

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Derek Roy Taylor and others (1977) 64 Cr. App. 182
Mataiasi Curusese v State (F.C.A. Reps. 88/156)
Police v Shiu Prasad
R v. Chandrika Prasad (Cr. Appeal No. 8 of 1982)
R v. Courtie [1984] AC 463
R v. Golathan 11 Cr. App. R.79
R v. Griffiths 23 Cr. App. R. 153
Sherras v. De Rutzen (1895) 1 QB 918

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S.M. Koya for the Appellant
I. Wikramnayake for the Respondent

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Appeal against conviction entered and sentence imposed by the Magistrates' Court.

Jesuratnam J:

The appellant in this case was charged in the Magistrates' Court of Suva on 7th February 1989 as follows:

Statement of Offence

> Defilement of girl under 13 years of age: Contrary to Section 155(1) of the Penal Code, Cap. 17

Particulars of Offence

> Hazrat Ali s/o Intaz Ali, on the 30th day of January 1989 at Suva in the Central Division had unlawful carnal knowledge of a girl namely Mohini Lata Raj d/o Dharam Raj aged 10 years and 11 months.

The appellant was unrepresented. It is recorded "charge read and explained to accused. Accused asked to elect and elects trial by Magistrate's Court." Thereafter his plea is entered as "Guilty". After the outline of facts by the prosecution which he admitted he was convicted as charged and sentenced to 5 years imprisonment.
The appellant appealed against the sentence on 20.2.89.

Subsequently, Mr. S. M. Koya, counsel for the appellant filed on 13th March 1989 three additional grounds, the third being on sentence. Yet again on 27th July 1989 he filed three further grounds. Leave was granted and at the argument therefore there were six grounds of appeal.

I find that there is a lot of overlapping in the several grounds of appeal. In my view all the grounds form a composite whole and are really various aspects of the central issue whether the appellant had knowledge that the girl was under 13 years of age particularly in view of the fact that he was unrepresented. I propose to deal with all the grounds together drawing attention to specific grounds as I go along when it is necessary.

It is true that mens rea is *involved* in every common law crime. But that does not mean that in every case mens rea has to be *proved* by the prosecution. In England some common law crimes have been statutorily defined anew. In Fiji most offences have been codified. In such cases the ingredients of the offences including mens rea, have to be gathered from the definitions. In cases such as the instant one the mens rea - if it is necessary to isolate it - is the intention to do the prohibited act - and such intention may be inferred from the doing of the act itself. It was said in the early case of Sherras v De Rutzen (1895) 1 QB 918 at p. 921

> "There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

There is no question that in the instant offence it has to be objectively established by the prosecution that the girl was under 13 years of age on the day in question.

In this case the necessity to adduce such proof was obviated by the plea of guilty tendered by the accused, to which I shall come back again in a moment. But was A it open to the accused to thereafter subjectively establish, as argued by Mr. Koya in paras 7(c) and (d) of his summary of submissions, that absence of knowledge as to the complainant's age i.e. that she was under the age of 13 years was a good and valid defence under section 10 of the Penal Code? I think not.

B For instance, in the case of an offence under section 156(1)(a) it is a valid defence under the proviso to that subsection if it can be established "that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of sixteen years." Now there is no such proviso to Section 155(1). By necessary implication such is not a defence. In fact section 10 which provides a defence of mistake of fact goes on to limit and C qualify it by the last paragraph which reads:- "The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject." In my view the omission in S.155 (1) of any proviso akin to the one found in S.156(1) is significant and must be deemed to be deliberate. It therefore invalidates any such defence. Indeed the last paragraph of Section 10 just quoted necessarily points in that direction and reinforces my view.

D It is therefore clear that when the prosecution establishes that the girl was under 13 years of age the offence is complete. In this case the statement of offence stated that the girl was under 13 years of age and the particulars of the offence averred that in point of fact the girl was aged 10 years and 11 months. And the prosecution contends that when the appellant pleaded guilty with knowledge of the particulars of the offence it was relieved of the necessity to adduce formal E proof of age.

Mr. Koya complains in ground 1 that the prosecution did not produce the girl's birth certificate or tender any proof of her age. He says that her age was not even stated orally in terms. Mr. Ian Wikramnayake, who appeared for the D.P.P., submitted that once the appellant had admitted the charge which set out the age F the prosecution was relieved of the necessity to go further and prove her age. He says such proof was redundant. I find that in outlining the facts the prosecution had stated that the "complainant is student of Dilkusha Girls School attending class 6......"

It is common knowledge that on the average a student in Class 6 would be of the G age of 10 or 11 unless she is underdeveloped or overage. Is it a matter of such common knowledge so as to permit judicial notice to be taken of such fact? I do not think it can amount to such. But the fact remains that that aspect was brought to the attention of the accused when facts were outlined.

It seems to me that the crucial question is whether proof of age was necessary in the circumstances of the plea of guilyt. There is also an error when Mr. Koya says in ground l(b) that the accused said in mitigation that he "was tempted

when she said she is 17 years." I find from the record that the accused did not say that at that stage but much later in his petition of appeal dated 20th February 1989. The averment on ground 2 that the appellant had placed sufficient material to put the court on inqury as to the girl's age is therefore not correct in fact.

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In my view the question as to whether the prosecution was absolved from the duty to furnish proof of the girl's age when it outlined the facts is inextricably involved with the question whether the accused understood the charge when he pleaded guilty. Mr. Koya states on ground 4 that the Magistrate did not comply with section 206 of the Criminal Procedure Code. He says that the learned Magistrate failed to ask the appellant whether he admitted or denied the truth of the charge.

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In particular he says the Magistrate "ought to have inquired whether the appellant accepted the allegation that the complainant was under the age of 13 years at the time of the offence". Section 206(1) states "The substance of the charge or complaint shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge". The sub-sections which follow set out the subsequent procedure. These are the detailed provisions. But what happens in actual practice is not to ensure literal and verbatim compliance with the provisions but substantial compliance.

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Learned State counsel, Mr. Wikramnayake pointed out to some subsections and sections which follow S.206 where a plea of "guilty" and "not guilty" are referred to in terms: For instance 206(5) refers to "a plea of guilty or not guilty" S.208 refers again to plea of "not guilty" and "guilty". He says that a recording of a plea of "guilty" is sufficient compliance provided the charge was read and explained to the accused which, on the record, was done in this case. Mr. Koya also complained that the charge was not explained to the accused in Hindustani. There is nothing to suggest that the regular course of conduct was not followed in this case. The plea in mitigation on which the defence relies has been recorded in this case and it would have been stated in the language which the accused knew. There is nothing to suggest that it was different when his plea of guilty was recorded. I do not therefore think there is any merit in the complaint of the appellant that prejudice was caused to him by non-compliance with the literal provision of Section 206.

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The cases cited by Mr. Koya cover quite different situations. In the case of R v. Chandrika Prasad Cr. Appeal No. 8 of 1982 (High Court of Lautoka) the charge was under S.105 "throwing an object at Veebha" whereas the accused stated before he was convicted that "he did not aim at anyone"

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Again in Police v Shiu Prasad the offence was cutting forest produce on Crown Land but the charge did not set out that the cutting was done on Crown Land.

In Mataiasi Curusèse v State F.C.A. Reps 88/156) the main ground on which the appeal was allowed was the prejudice caused to the appellant by the trial

Judge's~ reference to a possible defilement charge. It was no doubt held that the statement of her age unsupported by firm evidence was hearsay.

A In R v. Golathan 11 Cr. App. R.79 the depositions clearly revealed a valid defence and the statement he made was ambiguous.

In R v. Griffiths 23 Cr. App. R. 153 the accused charged with bigamy said in cross-examination of the officer who gave his record "I do not know I had committed bigamy until I told him (the officer) about it". There was also a B defence on the depositions.

What can be gathered from all the authorities is that if there is revealed something in the outline of facts which militates against or destroys an essential ingredient of the offence it is the clear duty of the court to seek further clarification from the accused or enter a plea of not guilty. But that duty does not arise where the C outline of facts could have been fuller or more complete but was in fact substantially sufficient as it was in this case. There is nothing to suggest that the plea of guilty by the appellant was ambiguous, equivocal or uninformed. I can do no better than cite a passage from Lord Diplock in the recent case of R v. Courtie [1984] AC 463 at 467

> D "One way in which the prosecution may establish that all the factual ingredients of the specific offence with which the accused person is charged did exist, is by the accused, on his arraignment, entering an informed and unequivocal plea of guilty to the charge set out in an indictment which complies with section 3 of the Indictments Act 1915, in that it contains a statement of the specific offence E with which the accused is charged together with such particulars as may be necessary *for giving reasonable information as to the nature of the* charge". (the emphasis is mine.)

It applies equally to charges in Magistrates' Courts.

In any event the proviso is available in a case like this. It is my view that in all F the circumstances of this case the procedure followed by the Magistrate has not occasioned any failure of justice. All the grounds of appeal therefore fail.

The appeal against conviction is therefore dismissed.

On the question of sentence a remarkable feature in this case is the absence of any sort of violence or use of force or threats which usually accompany or G precede the act of sexual intercourse in cases of this type. The medical report does not disclose any injuries. It was the suspicions of the motel authorities that led to the detection in this case. There was no trickery employed on the girl by the appellant.

The complainant appears to be a precocious girl. There is no evidence of any calculated attempt, plan or prelude or conduct on the part of the accused to

corrupt the girl over any period of time before seducing her. The meeting at the hospital appears to have been jointly planned spontaneously and voluntarily. She appears at this stage to have been already converted.

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In this type of cases it is well to recall the words of Lawton L.J in Derek Roy Taylor and others (1977) Cr. App. Reports Vol. 64 182 at 185.

> "What does not seem to have been appreciated by the public is the wide spectrum of guilt which is covered by the offence known as having unlawful sexual intercourse with a girl under the age of sixteen. At one end of the spectrum is the youth who stands in the dock, maybe 16, 17 or 18, who has had what started off as a virtuous friendship with a girl under the age of 16. That virtuous friendship has ended with them having sexual intercourse with one another. At the other end of the spectrum is the man in a supervisory capacity, a schoolmaster or social worker, who sets out deliberately to seduce a girl under the age of 16 who is in his charge. The penalties appropriate for the two types of case to which I have just referred to are very different indeed. Nowadays, most judges would take the view, and rightly take the view, that when there is a virtuous friendship which ends in unlawful sexual intercourse, it is inappropriate to pass sentences of a punitive nature".

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The same considerations will generally apply to girls under 13 but with severer penalties.

From his order the learned Chief Magistrate does not appear to have taken into consideration the total absence of any violence or force or threat or trickery on the part of the appellant in this case. It is no doubt true that consent is no defence in offences of this type. But that does not mean that cases should not be differentiated on the basis of fear and terror induced in the victim or their absence so far as sentence is concerned.

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I therefore set aside the sentence of 5 years imprisonment and substitute therefor a sentence of imprisonment for 3½ years.

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The appeal against sentence is allowed to that extent.

(Appeal against conviction dismissed; appeal against sentence allowed; sentence varied.)

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