

IN THE RESIDENT MAGISTRATE'S COURT AT SUVACriminal Case No. 441 of 2010

DPP

v.

YASIN ALI s/o Ashik Ali

For Prosecution: Ms. Segrán J. (DPP Office)

Accused: In Person

SENTENCE

1. You YASIN ALI, are here today to be sentenced on your guilty plea for two counts of "Defilement of Child Under the 13 Years of Age" an offence punishable under sec. 214 (1) of the Crimes Decree No 44 of 2009.
2. You appeared before the Court first time on 07th April 2010, considering the surrounding facts which prevented me from enlarging you on bail; I decided to grant an early hearing date for you which was a Saturday the 07th August 2010.
3. In between the first calling date and the date fixed for the hearing, this case was called four times in Court for several reasons and each and every occasion, I advised you to find a counsel to represent yourself in the trial. Each occasion, you adamantly refused to listen to the Court's advice and you informed the Court that you are representing yourself in the case.

4. On 07th August 2010, Saturday, this case was taken up for hearing and three witnesses including the victim testified for the prosecution. At the end of the victim's testimony, you informed the Court that you did not force the victim to have sex with you and both of you had sex with consent.
5. Since the consent is immaterial for the present charge, I explained that fact to you. Thereafter you informed that you are pleading guilty to the charges.
6. This case was then adjourned for the prosecutor to prepare the summary of facts. On 09th August 2010, you admitted the summary of facts which had been read to you and you filed your mitigation submission in writing. You further requested to add some mitigatory facts orally and you informed the Court that you are challenging the photocopies of documents filed in the Court by the prosecution.
7. The only photo copy marked by the prosecution is the birth certificate of the victim and before marking that document, prosecutor duly followed the proper procedure to identify the birth certificate through the victim's mother. However, by the time of the marking of the document, you never objected for the marking and moreover you never opted to challenge the date of birth of the victim.
8. Since, you brought up that point, I again questioned you whether you wish to change your plea but you informed the court that you are pleading guilty.
9. After following above-mentioned tedious procedure, I am satisfied that your guilty plea is unequivocal and you have pleaded guilty on your own free will.
10. The offence you have been charged carries a maximum sentence of "Life Imprisonment" under the Crimes Decree 2009 and under the repealed Penal Code this offence had the same imprisonment period, which is "life imprisonment".
11. State counsel assisted the Court by filing very helpful sentencing submission.

12. In John Peter Vunilagi v. State [Criminal appeal Case No ; 075 of 2004 and HAA076 of 2004] appellant was sentenced in the Magistrate's Court for 06 years imprisonment for defilement of a girl under 13 years of age and sitting in appeal Shameem J had made following comments whilst upholding a sentence of 06 years imprisonment.

"In respect of defilement of girls under the age of 13, the statutory maximum is life imprisonment. There can be only exceptional circumstances which could justify a term of imprisonment less than 03 years".

13. In the above-mentioned case Shameem J had referred to Attorney General Reference (No. 1 of 1989) [90 Cr. App. R. 149] which laid down the guidelines for sentencing the offenders who had sexual intercourse with girls under 13 years. Like in Fiji, in England maximum sentence for such offence is life imprisonment and considering the guidelines Shameem J held;

"The court said that a wide range of sentences could be expected, but where the victim was not far short of her thirteenth birthday and there were no particularly adverse or favourable features, a term of 06 years would be appropriate. The younger the girl when the sexual approach was first made, the more likely it would be that her will was overborne, and the more serious the crime".

14. In Tevita Dakai v. State [Criminal Appeal no. 0036 of 2001], appellant was sentenced for 05 years imprisonment and the victim was little over 12 years of age. While dismissing the appeal Justice Byrne had made following comments.

"I am satisfied that the Appellant fully understood the nature of the charge against him before pleading guilty and that there is no substance in his claim that his victim consented to having intercourse with him".

His Lordship went on to say that;

"Section 155(3) of the Penal Code states that it is no defence to a charge of unlawful carnal knowledge of a girl under the age of thirteen years to prove that she consented to the act. I consider the Learned Magistrate committed no error in imposing the maximum sentence allowed in the Magistrate's Court for the offence and I therefore dismiss the appeal".

15. Considering the above-mentioned decided cases, I set my starting point of sentencing for 07 years imprisonment. You have 10 previous convictions against your name. Therefore you are not eligible for any discount for your previous good character. To reflect your late guilty plea I reduce 06 months from your sentence.

Aggravating facts

16. Following facts are considered as aggravating factors in this case.

1. Age gap between you and the victim. (You are 28 years old and victim is just 12 years).
2. Before you take advantage of the victim, you have carefully made your friend to leave the place.
3. You have committed the offence whilst the victim was under the influence of liquor.

17. Considering these facts I add another 02 years to your sentence to reflect the aggravating nature of the offending.

Mitigating facts

18. You have filed your mitigation in writing. In your written mitigation you informed that you have to look after your elderly sick mother and you were brought up from a broken family. You repeatedly sought forgiveness from the Court and asked for a lenient sentence.

19. I would like to quote the last paragraph of your written mitigation which states.

"Your worship, I know it was my duty to protect this girl but I failed to do my job. I hope this Court will forgive me in regards to what I have done. I promise before this court that I will marry this girl and I won't show myself in this court again. I hope fully this Court will acquit discharge or a lenient sentence".

20. Considering the above-paragraph I am satisfied that you were fully aware of the nature of your offending. However, to reflect your mitigating facts I reduce 03 years from your sentence.

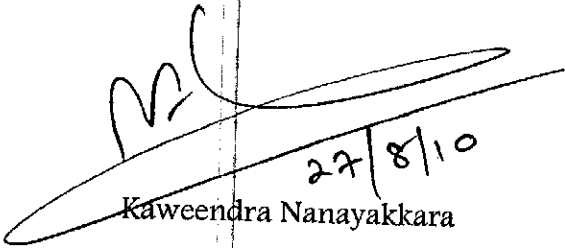
21. Your sentence now stands for five years and six months imprisonment.

22. As per the requirements in sec. 18 (1) of the Sentencing and Penalties Decree 2009, I order that you serve minimum of 03 years imprisonment period without being eligible for a pardon.

23. You have 28 days to appeal against the sentence.

On this Friday the 27th day of August 2010.




27/8/10
Kaweendra Nanayakkara
Resident Magistrate