

IN THE HIGH COURT OF FIJI
AT LABASA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL CASE NO. HAA01 OF 2018

(Magistrates' Court Case No. 252 of 2013)

BETWEEN: SEMI NAIWAU

APPELLANT

AND: THE STATE

RESPONDENT

Counsel: Appellant in person
Ms A Vavadakua for the Respondent

Date of Hearing: 02 March 2018

Date of Judgment: 16 March 2018

JUDGMENT

- [1] This is an untimely appeal against sentence only.
- [2] On 9 May 2013, the appellant was charged with an offence of defilement contrary to section 215 (1) of the Crimes Act 2009. The charge alleged that in January 2013, the appellant had sexual intercourse with a girl under the age of 16 years. The trial commenced in the Magistrates' Court on 22 October 2015. The appellant was represented by counsel. On 10 June 2016, the appellant was convicted of the charge. On 4 October 2016, he was sentenced to 2 years, 11 months and 2 weeks imprisonment with a non-parole of 18 months. The appellant gave his Notice of

Appeal to the Department of Corrections on 28 November 2017. The appeal was filed on 10 January 2018. The appeal is late by one year.

- [3] At the trial, the appellant did not dispute sexual intercourse. His defence was that he did not know the victim was under the age of 16 years. At the time of the alleged incident, the victim was 15 years and 11 months old. She was in Form 4. The appellant was twice her age. He was a relative and her church youth leader. He was a frequent visitor to her home. The offence was discovered after the victim became pregnant. Later she gave birth to a still born child. There was evidence that when the alleged incident occurred, the victim was of small built. The trial magistrate rejected the appellant's defence that he had reasonable cause to believe and did in fact believe that the victim was of or above the age of 16 years.
- [4] In sentencing the appellant, the learned magistrate referred to the maximum penalty and the tariff for defilement. The maximum is 10 years imprisonment and the tariff range from a suspended sentence to 4 years imprisonment. The learned magistrate took into account the appellant's previous good character and family circumstances as the mitigating factors. The breach of trust and the age gap were considered as the aggravating factors. The learned magistrate took a starting point of 2 years and then adjusted the sentence to reflect the mitigating and aggravating factors. A further downward adjustment was made to reflect the remand period of 2 weeks. The final sentence arrived at was 2 years, 11 months and 2 weeks imprisonment.
- [5] A number of complaints are now being made against the sentence. The appellant submits that his counsel wrongly advised him not to plead guilty because he had a statutory defence available to him. At the trial, the appellant relied upon the statutory defence. There is no error made by his counsel in advising him on the statutory defence.
- [6] The appellant's second complaint is that there was double counting of the aggravating factors in the starting point. There is no merit in this complaint. The learned magistrate did not make any reference to the aggravating factors when selecting a starting point of 2 years.

[7] The final complaint is that in other similar cases the offenders received lesser terms of imprisonment than the appellant. There is no substance in this argument. Other cases are only relevant to identify the range or tariff. The appellant's sentence is within the tariff for defilement. A custodial sentence was warranted to reflect the principles of deterrence and denunciation. The appellant was a matured man. He was 35 years old when he defiled the juvenile victim. She became pregnant. The breach of trust was gross because the appellant was the victim's church youth leader and her parents trusted him. The sentence imposed on the appellant reflected the seriousness of his conduct. There was hardly any genuine remorse by him. There is no error in the exercise of the sentencing discretion. I would grant an enlargement of time but dismiss the appeal.

[8] Appeal dismissed.



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Hon. Mr Justice Daniel Goundar

Solicitors:

Appellant in person
Office of the Director of Public Prosecutions for the Respondent