

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

Review Case No. HAR 001 of 2019
[LABASA]

BETWEEN : STATE

AND : ASHNEEL AMIT LAL

Counsel : Ms L Bogitini for the State
Ms R Raj for the Accused

Dates of Hearing : 20 May 2019

Date of Judgment : 10 June 2019

JUDGMENT

- [1] On 26 April 2016, the Accused was charged with defilement of an underage girl. The alleged incident occurred between November 2015 and March 2016 in Labasa. At the material time, the complainant was 13 years old. Her date of birth is 20 April 2002.
- [2] The Accused pleaded not guilty to the charge in the Magistrates' Court at Labasa. After numerous adjournments, the trial was held over a period of days in 2018. On 10 July 2018, the Accused was convicted of the charge. He was represented by legal aid counsel at the trial. On 18 March 2019, the learned trial magistrate sentenced the Accused to 11 months' imprisonment – 2 months to serve in prison and 9 months suspended for two years.
- [3] Being aggrieved by the leniency shown to the Accused, the grandfather of the complainant wrote a letter of complaint to the Department of Justice. The complaint

was referred to the Chief Justice. The Chief Justice referred the complaint to the High Court. The High Court called for the record of proceedings in the Magistrates' Court to examine the correctness of the sentence imposed on the Accused. The power to call for and examine the record of any proceedings in the Magistrates' Court is governed by section 260(1) of the Criminal Procedure Act. The power on revision is governed by section 262(1) of the Criminal Procedure Act.

- [4] Both the Accused and the State were served with a notice of hearing. The Accused elected to be represented by counsel of his choice. Both parties have filed helpful written submissions.
- [5] I now proceed to examine the correctness of the sentence.
- [6] The facts of the case were that the complainant at the material time was a Year-8 student in a primary school. She lived with her grandparents after her parents separated.
- [7] At the material time, the Accused was 23 years old. He worked for the complainant's grandfather as a labourer. He met the complainant at her home and befriended her. He gave her a mobile phone as a gift. They had sexual intercourse on few occasions. She consented to sexual intercourse. The matter came to light after the complainant's grandmother discovered her granddaughter had a mobile phone. The complainant was moved to her father's home in Seaqaqa.
- [8] : On 13 April 2016, the complainant was medically examined. It was discovered that the complainant was 5 months pregnant. The Department of Social Welfare intervened. The child complainant was removed from her home. She went ahead with her pregnancy and gave birth to a child.
- [9] Defilement is an offence that prohibits sexual intercourse with girls below the age of 16 years. Consent is not a defence for defiling underage girls.

- [10] The maximum penalty prescribed for defilement is '10 years' imprisonment. Previously, under the Penal Code the maximum penalty was 5 years' imprisonment. The penalty was increased under the Crimes Act 2009. The increased penalty indicates the legislature's intention to treat the offence seriously. The applicable guidelines for sentencing were set out in the case of *Donumainasava v The State* [2001] FJHC 25; Haa0032j.2001s (18 May 2001) at p 3:

Reported cases in Fiji and abroad show that sentences passed range from suspended sentences (usually where the accused and victim are both of the same or similar age, and are in a relationship) to 3/4 years imprisonment where the accused is in a position of trust in relation to the victim, and much older than her.

- [11] In sentencing the Accused, the learned magistrate adopted the two-tiered methodology. She picked 20 months as a starting point and added 4 months to reflect the breach of trust and the age gap between the Accused and the complainant as aggravating factors. She considered the age, previous good character and family circumstances of the Accused as mitigating factors and reduced the sentence by 12 months. A further 1 month was reduced to reflect the Accused's remand period.
- [12] After arriving at a term of 11 months' imprisonment, the learned magistrate directed her mind to suspension of sentence. She decided to partially suspend the sentence to allow the Accused to rehabilitate.
- [13] In *Donumainasava*, a 22-year old first time offender pleaded guilty at the first opportunity to defilement of a 15-year old girl and impregnating her. On appeal this Court said a term of 3 years' imprisonment was an appropriate starting point and upheld a sentence of 2 years' imprisonment imposed on the offender after adjusting for aggravating and mitigating factors.
- [14] Although the facts of the present case are similar to the case of *Donumainasava*, the gravity of the offence in present case is more serious. The complainant was very vulnerable. She was only 13 years old and a primary school student. She came from a

broken home and was being raised by her grandparents. The Accused was a mature adult. He knew that the complainant was a primary school student. He admitted that fact in his caution interview. He exploited the complainant's vulnerability and had a sexual relationship with her. He impregnated her and she had to drop out of school. She gave birth to a child when she herself was a child. She was removed from her home and family to be under the State's care.

- [15] The Accused took very little responsibility for his conduct. He contested the charge. His defence that he thought the complainant was over the age of 18 years was based on thin ground. Earlier he admitted in his police statement that he knew the complainant was a primary school student. This was not a case of "virtuous friendship" between young people of the same age which ended in sexual intercourse. This was a case of sexual exploitation of a very young girl by a mature adult. The only compelling mitigating factor was the Accused's previous good character. His age and family circumstances did not mitigate the offence.
- [16] Based on all these factors, the primary purpose of sentence should have been deterrence and not rehabilitation. The offence of defilement is prevalent in our community and the courts duty is to send a clear message that prison sentence is inevitable for sexual exploitation of underage girls.
- [17] The harm that was done to the child complainant is significant. As a child she lost an opportunity to study due to pregnancy. She was removed from her family environment due to the offence. These were some serious aggravating factors that the learned magistrate did not direct her mind to before suspending the sentence. In any event, the term of 11 months imprisonment is manifestly lenient in all circumstances of this case.
- [18] The sentence imposed on the Accused in the Magistrates' Court is reviewed and set aside. An appropriate starting point is 3 years' imprisonment. I add 2 years to reflect the aggravating factors. I deduct 1 year for the Accused's previous good character and 6 months to reflect the time he spent in prison and in custody while on remand.

[19] The Accused is sentenced to 3 ½ years' imprisonment with a non-parole period of 2 years to serve effective from today.



A handwritten signature in black ink, appearing to be "Daniel Goundar".

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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State
Messrs Kohli & Singh Solicitors for the Accused