

IN THE HIGH COURT OF FIJI
AT LABASA
APPELLATE JURISDICTION
CRIMINAL APPEAL CASE NO.: HAA 001 OF 2022LAB

BETWEEN: **APIMELEKI TAMANOBUNOA**
APPELLANT

AND: **THE STATE**
RESPONDENT

Counsels : **Ms. M. Tuiloma for Appellant**
 Ms. L. Latu for Respondent

Hearing : **23 August, 2022**

Judgment : **26 August, 2022**

JUDGMENT

1. On 10 March 2020, in the presence of his counsel, the following charge was read and explained to the appellant (accused):

CHARGE
(COMPLAINT BY PUBLIC OFFICER)

Statement of Offence

DEFILEMENT OF A YOUNG PERSON BETWEEN 13 AND 16 YEARS OF AGE: Contrary to Section 215 (1) of the Crimes Act of 2009.

Particulars of Offence

APIMELEKI TAMANOBUNOA between the 1st day of August, 2019 to 31st day of August, 2019, at Labasa in the Northern Division, had carnal knowledge of **L. V.** a young person aged 14 years 11 months old.

2. He said, he understood the charge and pleaded not guilty to the same. On 14 December 2020, the court set the hearing of the matter from 13 January 2021. On 13 January 2021, the prosecution called three witnesses. The first witness was the complainant's mother (PW1), then the complainant (PW2) herself, and then Corporal 3360 Merewalesi (PW3), the police investigation officer. The prosecution tendered two exhibits; first, the complainant's birth certificate (Prosecution Exhibit No. 1) and the Accused's police caution interview statement (Prosecution Exhibit No. 2).
3. On 8 April, 2021, the court ruled that the accused had a case to answer and he was called upon to make his defence. The defence presented his case on 11 August 2021. The accused gave sworn evidence himself. At the end of the defence's case, the parties presented their closing submissions. Judgment was delivered on 28 September 2021. The court found the accused guilty as charged and convicted him accordingly. The judgment contained 10 pages. On 2 December 2021, the court sentenced the appellant to 18 months imprisonment. The learned Magistrate sentencing remarks were expressed in 8 pages.
4. The appellant was not happy with his conviction. On 30 December 2021, he filed his petition of appeal. He asked for his conviction to be set-aside on the following grounds:
 - “1. That the Learned Magistrate erred in law and in fact when he failed to recognise that the Petitioner has a statutory defence under Section 215 (2) of the Crimes Act.
 2. That the Learned Magistrate erred in law and in fact when he failed to consider at page 5 of his Judgment that the Petitioner had a reasonable cause to believe, and did in fact believe, that the person was of or above the age of 16 years.
 3. That the Learned Magistrate erred in law and in fact when he failed to consider at page 5 of his Judgment that the Victim had stated while giving evidence that “... she never mentioned her age to the accused...”
 4. That the Learned Magistrate erred in law and in fact when he failed to consider at page 5 of his Judgment that the Victim had stated that she was of similar built as she was at the day of the hearing and when she had sex in 2019 with the Petitioner.”

5. Although the appeal grounds were expressed in four paragraphs, in my view, the appellant appears to be dissatisfied with the way the learned Magistrate applied the statutory defence applicable under section 215 (2) of the Crimes Act 2009. It was therefore appropriate to examine the whole of section 215 of the Crimes Act 2009, which created the offence. Section 215 abovementioned reads 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 subsection (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 subsection (1) to prove that the person consented to the act.”

6. In order to find out whether or not the appellant’s complaint was justified, I had carefully read and considered the Magistrate Court’s record, including the learned Magistrate’s judgment.

Appeal Ground No. 7 (1) – That the Learned Magistrate erred in law and in fact when he failed to recognise that the Petitioner has a statutory defence under section 215 (2) of the Crimes Act.

7. Paragraph 30 to 38 of the Judgment showed that the learned Magistrate recognized the statutory defence under section 215 (2) of the Crimes Act 2009, wherein he considered the defence and applied the same to the facts of the case. This ground of appeal was therefore misconceived and I dismiss the same.

Appeal Grounds 7(2), 7(3) and 7(4), mentioned in paragraph 4(2), 4(3) and 4(4) hereof

8. The above appeal grounds must be considered together, because they appear to be dealing with the same issue, that is, the application of the statutory defence under section 215 (2) of the Crimes Act 2009 to the facts found in the case. Furthermore, it was inappropriate to criticize a judgment by considering matters mentioned in one page, in this case, page 5 of the judgment. A

judgment must be considered and evaluated having regard to the whole judgment, rather than merely a part of it. In this case, the learned Magistrate had clearly laid out the format of his judgment, beginning first with the allegation in general, the case history, the burden and standard of proof, the charge and its elements, the case for the prosecution, the case for the defence, the analysis of the case, his finding and conclusions.

9. In my view, the learned Magistrate had carefully considered the case, carefully considered the relevant authorities, carefully considered the offence as laid out in section 215 (1) of the Crimes Act 2009 and found that the accused had unlawfully had sexual intercourse with a girl under the age of 16 years, but above 13 years old, at the material time. The learned Magistrate then applied his mind to the statutory defence under section 215 (2) of the Crimes Act 2009 from paragraph 30 to 38 of his judgment. The learned Magistrate was the judge of fact and law in the case, and it appeared he rejected the accused's version of events on the statutory defence under section 215 (2) of the Crimes Act 2009. He was entitled to do so as the judge of fact. Furthermore, he personally observed the prosecution and defence's witnesses during the trial and can correctly assess the witnesses' demeanour. An appellate court cannot do the above. It can only rely on the court record.
10. Given the above, I find the defence's appeal grounds in 7(2), 7(3) and 7(4) are without merit and are dismissed.
11. I therefore dismiss the appellant's appeal against conviction, because the same are without merit. I order so accordingly.




Salesi Temo
JUDGE

Solicitor for Appellant : **Legal Aid Commission, Labasa**
Solicitor for Respondent : **Office of Director of Public Prosecution, Labasa**