

SAT DEO SHIRI WASTO A

v.

REGINAM B

[SUPREME COURT, 1977 (Grant C. J.), 4th March]

## Appellate Jurisdiction

*Criminal law—sexual offences—unlawful carnal knowledge of girl under 16 years—indecent assault—reasonable cause to believe girl over 16—Penal Code (Cap. 11) ss. 148 (1)(2)(3), 150 (1)(a).* C

Under the wording of the statutory defence contained in Penal Code s.150(1) to a charge of unlawful carnal knowledge of a girl under the age of 16, an accused does not have to be satisfied beyond reasonable doubt that the girl is above that age; it is only necessary for him to believe it on reasonable grounds. For an accused to fall within the proviso, there need only be some evidence, adduced by either the prosecution or defence, sufficient to raise a doubt. D

*Per curiam:* Under the statutory defence in Penal Code s.148 (2) (3) to a charge of indecent assault, the burden on the accused is persuasive rather than evidential. It would be preferable for a similar evidential burden to be placed on an accused in relation to both offences, but such remedy would entail legislation. E

Appeal against conviction in the Magistrate's Court for attempting to have unlawful carnal knowledge of a girl under the age of 16 and indecent assault.

GRANT C. J.: [4th March 1977]

This is an appeal against the conviction of the appellant on the 6 January 1977 by Taveuni Magistrate's Court of attempting to have unlawful carnal knowledge of a girl under the age of sixteen years contrary to section 150(1)(a) of the Penal Code, and of indecent assault contrary to section 148(1) of the Penal Code, both charges arising from the same acts. F

As the Crown concedes that the conviction cannot be supported for the reasons herein contained, it is not necessary for the facts to be set out in detail. Suffice it to say that, on the facts found by the trial magistrate, the appellant attempted to have carnal knowledge of a girl in her fourteen year, who was sexually experienced and a willing and enthusiastic participant in the sexual activities. Sexual intercourse did not take place because, at the request of the girl, the appellant adapted his technique. G

The trial magistrate accepted that before making love to the girl the appellant asked her age, and she told him that she would be seventeen next birthday. The appellant testified that he believed the girl, but in his judgment the trial magistrate stated: H

A "I do not believe that the accused honestly believed her or had reasonable grounds for so believing. He knew she was at school and that she was frightened about what would happen if her mother missed her. There must have been a doubt in the accused's mind which no answer from the girl could reasonably have satisfied. Why did he not make enquiries of others to make sure? He could even have checked her class at school?"

B It is not possible to treat this part of what is a carefully considered judgment as other than a misdirection, in view of the fact that there was no onus on the appellant to be "sure" that the girl was of or above the age of sixteen.

So far as the first offence is concerned, the proviso to section 150(1) of the Penal Code reads:

C "Provided that it shall be a sufficient defence to any charge under paragraph (a) of this section if it shall be made to appear to the court before whom the charge shall be brought 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."

D It is quite clear from this wording that an accused does not have to be satisfied beyond reasonable doubt that the girl is of or above the age of sixteen; it is only necessary for him to believe it on reasonable grounds. Moreover, it is not incumbent upon an accused to satisfy the court beyond reasonable doubt that he had reasonable cause to believe and did in fact believe that the girl was of or above the age of sixteen; nor does he have to satisfy the court on the balance of probabilities. The use of the word "defence" in the proviso does not connote any shifting of the burden of proof. The proviso refers to no more than an evidential burden so that, for an accused to fall within the exception created by the proviso, there need only be some evidence, adduced either by the prosecution or by the defence, sufficient to raise a reasonable doubt.

E So far as the second and less serious offence is concerned, the position is strangely different. Subsections 2 and 3 of section 148 of the Penal Code provide that:

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- (2) It is no defence to a charge for an indecent assault on a girl under the age of sixteen years to prove that she consented to the act of indecency.
- (3) It shall be a sufficient defence to a charge for an indecent assault on a girl under the age of sixteen years to prove that she consented to the act of indecency and 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."
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H The use of the word "prove" in subsection 3 gives rise to a persuasive burden so that, for an accused to fall within the exception created by subsection 3, there must be sufficient evidence to satisfy the court on the balance of probabilities that it is more probable than not that the girl consented to the act of indecency, and that it is more probable than not that the accused had reasonable cause to believe and did in fact believe that the girl was of or above the age of sixteen.

It may be that what the legislature intended was to create a persuasive burden so far as consent is concerned, but only an evidential burden regarding belief of age as in the case of unlawful carnal knowledge; but in that case subsection 3 would have had to read "It shall be a sufficient defence to a charge for an indecent assault on a girl under the age of sixteen years to prove that she consented to the act of indecency and if it shall be made to appear to the court before whom the charge shall be brought 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." A B

As things stand the position is clearly anomalous, but if it is to be remedied only the legislature can do so. B

However, on the evidence accepted by the trial magistrate, there was more than a reasonable doubt that the appellant had reasonable cause to believe and did in fact believe the girl to be above the age of sixteen years; its probability was manifest, and the appellant therefore should have been acquitted on both counts. C

The convictions are accordingly quashed and the sentences set aside.

*Appeal allowed*