

**IN THE RESIDENT MAGISTRATES COURT AT LABASA
CRIMINAL JURISDICTION**

Criminal Case No. 552/12

STATE -v- NARESH PRASAD

For Prosecution : WPC Musuqawa
Accused : Mr Tuicolo (LAC)
Date of Hearing : 16 February 2018
Date of Judgment : 3rd July 2018

JUDGMENT

- 1.0 **NARESH PRASAD** is charged with Defilement of person between 13 and 16 years of age contrary to section 215 the Crimes Decree 2009.
- 2.0 The victim's name has been suppressed for public interest purposes.
- 3.0 The particulars of the offence read as follows:

'Statement of Offence

DEFILEMENT OF A YOUNG PERSON BETWEEN 13 AND 16 YEARS OF AGE: contrary to section 215 (1) of the Crimes Decree No 44 of 2009.

Particulars of Offence

Court 1

NARESH PRASAD sometimes in January 2011 at Korotolutolu, Seaqaqa in the Northern Division, had unlawful carnal knowledge of S.S.P, a young person aged 15 years.

4.0 **Section 215** of the **Crimes Decree** defines the offence as-

Defilement of young person between 13 and 16 years of age

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 sub-section (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 sub-section (1)(a) to prove that the person consented to the act.

5.0 The Accused pleaded not guilty and trial commenced on 16 February 2018 and concluded on the same date.

6.0 The burden of proof in this case is on the Prosecution, the State. The Prosecution is required to prove all the elements of the charge the accused is charged with beyond reasonable doubt. If the defence establishes to the Court's satisfaction that there is reasonable doubt, then the prosecution fails.

7.0 Lord Denning in *Miller v. Minister of Pensions*, in commenting on the proof beyond reasonable doubt stated: "*it need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of*

doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable,' the case is proved beyond reasonable doubt, but nothing short of that will suffice."

- 8.0 The Elements of the charge of **Defilement of person between 13 and 16 years of age** are:
- (i) The accused on the dates as per the charge (identification and date),
 - (ii) unlawfully and carnally knows or;
 - (iii) attempts to have unlawful and carnal knowledge;
 - (v) of a person (S.S.P) above 13 years of age and below 16 years of age.
- 9.0 Prosecution called 5 witnesses to prove the charges against the accused. Prosecution applied for a sign language interpreter and the court granted the application to assist the witness.
- 10.0 The Material evidence of **PW-1 Sitla Devi** was residing Naividamu in Seaqaqa 2 years ago. Before that she was living with parents in Valelawa, Dreketi. In 2011 in May one Nalesh Prasad had raped her daughter. She stated Accuse admitted to her he was with her daughter at the pawpaw patch. She knows Accused since 1986 as he was also their neighbour. She only knew about her child being pregnant when she stopped her menstruation and her stomach grew large. She was taken for medical examination which confirmed that her daughter S.S.P was expecting and was 3 months pregnant.
- 11.0 PW-2 was Doctor Katarina Ralagi who confirmed she had conducted a medical examination whilst she was serving at the Seaqaqa hospital and she prepared a medical report which she could identify as her handwriting and signature was on the medical report. The history of the report was allegations of defilement. In D14 of the report there was injury on forceful penetration of vagina and bruised developed into a haemotoma. Her impression of the victim was that victim was withdrawn and was not able to

communicate. Victim kept saying she did not want to wear the same shorts otherwise she will get it. The victim is mentally slow in intellect but Doctor was able to understand what she says. Medical Report was tendered as **Exhibit 1**.

- 12.0 Under cross examination PW-1 she admitted that she would communicate with the victim and can use signs to assist. Her mother had given the history of the incident to her. The victim was crying and stating the words 'she could not wear the same skirt or she would get there'. She admitted she had difficulty getting the victim to communicate and so mother assisted. The victim previously was a patient for normal coughs and flu and communicated to her with hand signals. By the time examined she was 4-5months pregnant.
- 13.0 PW-3 was DC Kamlesh the police officer who conducted the caution interview in Hindi. The Accuse was given all his rights and the caution interview was later translated. Caution interview and translation tendered as **Exhibit 2**.
- 14.0 In cross-examination he admitted the Accused had admitted in the caution interview that he had sex with the victim because the victim had forced him to have sex.
- 15.0 PW-4 was the victim. A sign interpreter assisted the court in interpreting her answers. She confirmed that she had a birth certificate. She is now 21 years of age. She was 15 years of age in 2011. Naresh, had come to ask for pawpaw from the pawpaw patch near the river. Her mom was at home and she did not know where her father was. Accuse use to come home to drink water and smoke suki. He grabbed her and took off her skirt and lay on top of her. He then had sexual intercourse with her once. Birth Certificate tendered as **Exhibit 3**.
- 16.0 In cross-examination she admitted Naresh came home and she called Naresh to go with him to the pawpaw patch to get pawpaw. She had sex with the Accused. She stated the accuse signalled to her to have sex. The Accuse then touched her. She did not tell him of her age.

- 17.0 The prosecution closed its case and the Accused gave his evidence.
- 18.0 The Accused stated he resided in Navidamu in Seaqaqa and was residing in Korotolu in Seaqaqa in 2011. He stated he was residing on mataqali land. He admitted to having sex with the Accused once under the pawpaw patch. She had waved to him whilst he was walking on the road. She was with her mother. Her mother asked for him to pick pawpaw from her farm. She went to the pawpaw patch with S.S.P. S.S.P then grabbed him from the back and held his penis. When he scolded her and pushed her away with his shoulder. She stood beside him and signalled in sign language to have sex with him. He was scared and he said no. In 2011 he thought the victim was 18 years of age as she was fit and big built and tall up to his shoulder.
- 19.0 In cross-examination he admitted he had sex with the victim whilst the victim was 15 years of age.
- 20.0 In re-examination he denied victim was 15 years of age in 2011 and he had heard rumours she was 15 years when she was expecting. He heard the rumours were from her mother. He thought she was 18 years of age.
- 21.0 The Court carefully considered the evidence of the prosecution.
- 22.0 The Accused has admitted to having sex with the victim in 2011 in the pawpaw patch and this was the evidence of prosecution as well. This proves the elements of carnal knowledge of the victim.
- 23.0 The Accuse challenges the evidence of prosecution by admitting that the victim had wanted to and consented to having sex and that he thought the victim was 18 years of age at the time of the offence because of her built.

- 24.0 The prosecution relies upon the evidences and the tendered birth certificates to prove the elements of the offence.
- 25.0 I find the evidences of prosecution reliable, relevant and consistent. I also find the evidences of prosecution credible and truthful. Her demeanour, despite her requiring assistance to interpret, was forthright and confident. She admitted that she was forced to have sex with Accuse and as a result became pregnant. The Accuse was a frequent visitor to the home as he was a neighbour and hence there is a high probability he knew that she was attending school and that it was a primary school. PW-1 her mother gave consistent reliable evidence as well that her child was raped by Naresh who admitted having sex with the victim. The medical doctor's evidence showed that the victim suffered from injuries in the vagina as a result of the penetration. This is clearly an indication that there was force used in having sex with an unwilling person, more particularly a child. The birth certificate tendered confirmed the age of the victim as a school student who was 15 years of age at the time of the offence.
- 26.0 The Accuse has raised his defence. However the Accuse initially had given his sworn testimony that the victim had consented to having sex with Accuse after forcing him to do so. And then later admitting that he thought that the victim was 18 years of age when the offence was committed. The court finds that the Accuse evidence is not truthful and is not credible. Section 215 (3) of the Crimes Decree provides that consent is not a defence for a person below 16 years of age and hence his argument that he was forced into sex does not hold true and cannot be used as a defence. The court finds that this is also not credible as the medical opinion has also confirmed that the victim suffered from intellectual disabilities and partially deaf and hence communication was limited. Therefore such a vulnerable victim would have not in any way possible had conducted herself in such a manner towards the Accuse. It is the Accuse who had carnal knowledge and committed the act himself. The Accuse also was residing in the same neighbourhood and as a frequent visitor to the home would have knowledge of the victim's age given that he knew she was a school student.

27.0 As the arbiter of facts, the Court finds that the Accused is not compelling in his evidence.

28.0 The court finds that Prosecution has proven beyond reasonable doubt the elements of the offence.

Conclusion

29.0 **NARESH PRASAD** I find that you are convicted of the offence of Defilement of a young person between 13 to 16 years of age.

30.0 Prosecution will submit your previous convictions and I will give you time to make a submission of mitigation prior to sentencing you.

31.0 28 days to appeal.


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Senileba Levaci
Resident Magistrate

