IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Labasa Criminal Appeal No. 14 of 1978

Between:

THE DIRECTOR OF PUBLIC PROSECUTIONS

and

PENI RAITEVUI

JUDGMENT

On the 1st May 1978 at Savusavu Magistrates Court the respondent was charged under count 1 with the attempted defilement of a girl under the age of thirteen contrary to section 149(2) of the Penal Code and under count 2 with indecently assaulting the girl contrary to section 148(1) of the Penal Code.

The second count was quite properly stated to be in the alternative to the first count, as the respondent was not being charged with two separate acts constituting two separate offences, but with one act which constituted either attempted defilement or indecent assault.

The trial Magistrate recorded that the respondent pleaded guilty to both offences, a situation which should not have arisen as once the respondent pleaded guilty to the first count the second count, being in the alternative, should not have been put to him. It is only if an accused pleads not guilty to the first count that an alternative count is put to him. If he then pleads guilty to the alternative count the prosecution should be asked whether they accept that plea. If so, the accused should be convicted on the second count, and the first count to which he has

pleaded not guilty should be withdrawn and the accused discharged in respect thereof. If the prosecution are not prepared to accept a plea to the alternative count then, despite the accused's plea of guilty thereto, the Magistrate should enter a plea of not guilty on his behalf, proceed to a hearing and then decide on the evidence which of the offences, if either, has been proved beyond reasonable doubt and convict him of that offence accordingly, making no finding in respect of the alternative offence.

Magistrates are referred to the Chief Magistrate's Circular Memorandum No. 7 of 1976 which correctly sets out the position.

After hearing the facts of this case, the trial Magistrate purported to convict the respondent on the first count and sentenced him to five months' imprisonment. stating that the second count would be left on the record. However I am satisfied that, and the Crown concedes that the circumstances of the offence do not constitute attempted defilement as charged under count 1, but indecent assault as charged under count 2.

On the day in question the respondent was in the house where the girl resided with her parents, while the parents were out working, and on finding himself alone with the girl he removed her panties, asked her to lie down, and rubbed his penis against her legs. The girl was aged only three years four months at the time.

The Crown has appealed against the sentence of five months' imprisonment as being manifestly inadequate, and I am in no doubt that behaviour of this sort warrants a heavier penalty.

The conviction of the respondent is quashed and the sentence set aside. In substitution therefor the respondent is convicted of indecent assault contrary to section 148(1) of the Penal Code and is sentenced to twelve months' imprisonment with effect from the 1st May 1978.

(Sgd.) Clifford H. Grant
Chief Justice

Suva,
31st July 1978.