

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 116 of 2022

STATE

vs.

GAUNA MOCIMOCI [JUVENILE]

Counsel: Ms. P. Ram for the State
Mr. J. Biaukula for the Juvenile

Date of Hearing : 14th to 15th February 2023

Date of Closing Submission : 15th February 2023

Date of Judgment : 16th February 2023

Date of Sentence/Mitigation Submission: 16th February, 2023

Date of Sentence: 20th February, 2023

PUNISHMENT

(The name of the victim is suppressed she will be referred to as "I.D.M.")

Introduction

1. Mr. Gauna Mocimoci was 17 years and a Juvenile as at the time of the offending. You were found guilty on 16th February 2023 for the alternate offence of defilement of IDM committed on the 5th of February 2017, punishable under section 215 of the Crimes Act and was acquitted of the charge of rape.

Circumstances of the Offending

2. On the 5th February 2017, the victim IDM was alone at her sister's house when you came with another friend to that house uninvited. You and other were known to the victim as all of you were attending the same school. She was 15 years and you were 17 years of age. You taking advantage of the familiarity took her into a room and engaged in sexual intercourse may be with her tacit consent. This happened in the presence and seeing of the other friend who was in the house. You knew she was less than 16 years and that sexual intercourse with such person is not lawful. You have no doubt taken advantage and led a young adolescent girl to engage in sexual intercourse.

Sentencing Regime

3. For the offence of defilement section 215 of the Crimes Act prescribes a maximum penalty of 10 years imprisonment. The tariff as laid down by State v Lal [2019] FJHC 565; HIR001.2019 [Labasa] 10th June 2019 is as follows. Sentences passed range from suspended sentence (usually where the accused and victim are both of same or similar age and are in relationship) to 3 or 4 years imprisonment where the accused is in a position of trust in relation to the victim and is much older. In that case the accused was imprisoned for 3½ years. Then in the case of State v Chand [2019] Sentence FJHC549; HAC 98.2018 the accused was convicted of defilement of a 13 year old male child and was sentenced for a period of 2 years and 14 days but it was not suspended. Justice Prematilaka in his ruling dated 13th August 2021, in Criminal Appeal No. AAU 75.2019 observed that there is a disparity in sentencing accused in defilement offences. His Lordship also observed that there is no uniformity as to the tariff and sentencing guidelines and opined that until such time as guidelines may be determined Judges follow the well-established tariff of suspended sentence to 4 years for defilement being mindful that a sentence even above the upper limit of 4 years can be meted out with reasons.
4. The sentences for defilement range from a suspended sentence to four years imprisonment (*Etonia Rokowaqa v State Criminal Appeal No. HAA 37 of 2004*). It appears that suspended sentence is reserved for offending is between persons of similar age engaging in consensual intercourse in relationship or friendship of a virtuous relationship whilst the

higher end of the tariff is for offenders who are older and in position of trust with the victim (vide - *Elia Donumainasuva v State Criminal Appeal No. HAA032 of 2001*, *State v Roqica & Others Criminal Appeal No. HAA037 of 2002S*).

5. The sentence prescribed for defilement was 5 years imprisonment under the Penal Code but in 2009 with the implementation of the Crimes Act the maximum penalty was increased to 10 years imprisonment. This is a clear indication that the Legislature has treated this offence as serious.

Objective Seriousness, Culpability and Harm of the Offending

6. Defilement committed by the juvenile is an instance sexual intercourse between two young persons and as to the objective seriousness the manner in which the juvenile had approached a known young girl when she was alone in a manner to win the confidence may be her consent. He has induced an adolescent child to engage in unlawful sexual intercourse.
7. Defilement of young adolescent children is a serious offence indeed and it seems to be prevalent in Fiji. The juvenile had very artfully approached a vulnerable victim and had sexual intercourse is not acceptable by any standard of decency. The conduct of the Juvenile in total disregard of the protection afforded to young children and the prohibition of sexual intercourse with adolescent makes his offending necessarily serious. Psychologists certainly have shown that the effect of sexual abuse on young children is profound and long lasting.
8. Defilement is a physical invasion committed on the victim taking advantage of the immaturity especially when the offender is older to the victim even by a few years. Therefore, the degree of invasion of the victim's bodily integrity and sexual autonomy is an indispensable factor in determining the gravity and impact of the crime on the victim. The degree of invasion should be ascertained based on the level of harm and culpability.
9. The aggravating factors are as follows:

- (1) The victim was vulnerable as she was 15 years and was alone at home;
- (2) As you were a senior student of the same school there was a breach of trust;
- (3) You were two years her senior and had unprotected sexual intercourse.

10. Mitigating Factors are as follows

- (1) You are a young juvenile;
- (2) You have no previous adverse record and is a person of good character;
- (3) You are now 23 years of age and is a farmer;
- (4) You are remorseful and regret what you did.

11. It is also relevant to note that from the beginning the juvenile did admit sexual intercourse. He has thus shown remorse for his actions from so admitting. He promises not to re-offend. He committed the act without full appreciation of its gravity as a crime. The learned defence counsel submitted that the said admission of the act of intercourse be considered as an admission and a plea of guilt to defilement for which he took responsibility.

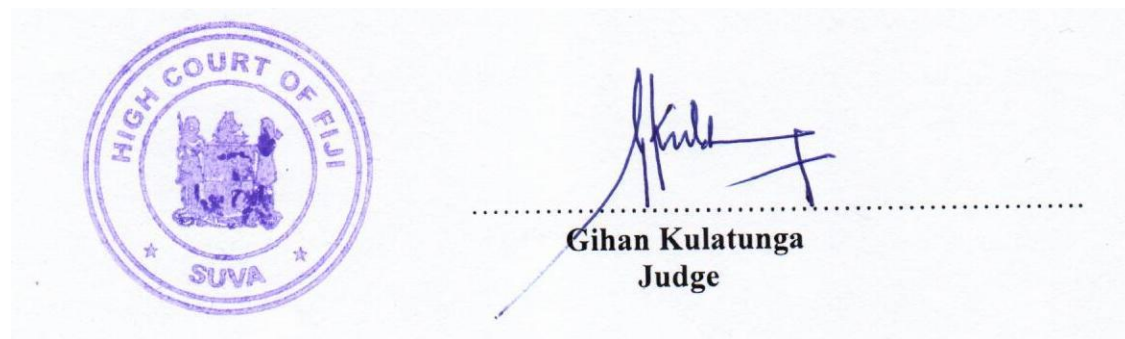
12. Section 30 (2) and (3) of the **Juvenile Act** restricts and places an upper cap of a maximum term of two years imprisonment for a juvenile offender. Therefore, the court in **sentencing juvenile** offender for crimes of this nature, is required to consider the seriousness of the offences of this nature as well be mindful as to the intention and object of the legislature in limiting a term of imprisoned to two years when the offender is a juvenile.

Punishment

13. The sentence I can impose for your offending, having regard to the aggravating and mitigating factors, will be as follows: I pick and start with a punishment of 3 years imprisonment. I add 1 year for the aggravating factors, making the total punishment 4 years imprisonment. As for the mitigating factors I will I deduct 2 year, leaving a balance of 2 years imprisonment. This brings the punishment within the limitation prescribed by section 30 (2) and (3) of the **Juvenile Act**.

14. Having considered all the facts before this court, I would impose a punishment of 2 years imprisonment.

15. The Defence Counsel has submitted that this is a fit act under section 26(2) of the Sentencing and Penalties. Act. The prosecution had no objection to this application.
16. As per Section 26(2) of the Sentencing and Penalties Act, the discretion to suspend a sentence should only be exercised by a High Court where the custodial sentence does not exceed 3 years and as opined in the Sentence Ruling in State v Aiding Zhang [2017] HAC 061 if there be circumstance which are exceptional.
17. In the circumstances of his case, I am of the considered view that this is a fit case to suspend the punishment as the final punishment has not exceeded 3 years and you are a first offender and a Juvenile.
18. Thus, upon duly considering the material before me, I impose a punishment of 2 years imprisonment and suspend the same for a period of 5 years.
19. The consequences of any violation of a suspended term is explained to the juvenile.
20. You have 30 days to appeal to the Court of Appeal if you so desire.



At Suva
20th February, 2023

Solicitors
Office of the Director of Public Prosecutions for the State.
Legal Aid Commission for both the Accused