

IN THE SUPREME COURT }  
OF PAPUA NEW GUINEA }

CORAM: Prentice, SPJ.  
Friday,  
28th February, 1975.

THE QUEEN v. TAGUM WAGIS of Liskene

1975  
26, 27,  
28 Feb.

LAE  
Prentice, SPJ.

The charge which the accused defends, is one under s.215 of the Code viz. having carnal knowledge of a girl under the age of sixteen. The evidence establishes beyond question that the accused had sexual intercourse with a young girl Lode Lagabaka on some five occasions about the end of July 1974. The girl is now at the end of a term of pregnancy, which she says has resulted from the intercourse had by the accused. The defence contended for, rests on two submissions. Firstly it is said the age of the girl has not been established to the necessary degree (beyond reasonable doubt) to have been below sixteen years in July 1974. Secondly it is said that the accused can rely on the exculpatory provision in the Section (the second paragraph), not because he held the belief that she was over sixteen years of age at the time; but because he believed she was of a marriageable age (in village custom) and able to consent and she did consent.

The Crown does not seek to rely on the evidence of the girl's father and mother, in the upshot, to establish the girl's age as below sixteen. Her parents are sturdy, unlettered village folk now living in the ex-servicemen's village at Situm. They evince little knowledge of ages, years and the passage of time. But they both averred that the child concerned was born after Ajai Lomba her father, had left the police force after many years of service, and before the family took up a block in Situm.

Dr. Gibson Nad, a Papua New Guinean doctor of some seven years experience, gave evidence that during that period he had examined a number of girls to estimate their age and that he examined the girl Lode in October 1974. She was then pregnant some four to five months. On her general appearance the scant nature of her pubic hair, and her breast development;

he estimated her age then at between thirteen and fourteen. He agreed that he was not then examining her specifically to estimate her age. But his qualifications for doing so - that is estimating her age, were scarcely challenged, and his veracity not at all. I accept this witness's evidence.

It is also supported by the girl's uncle Lambi Kanon who stated he left the police force in 1954, later in time than Lombo was discharged. I accept that this witness left his village to go to Situm in the year 1962, and that at that time Lode had been born but was very small, not walking and being breast fed.

I have myself observed the girl clothed in Court. She is now at the end of her term obviously. Her breast development is visible. From her head and face, the stature and general appearance of her body; were it necessary for me to rely on s.20B of the Evidence Act (New Guinea) I would readily do so; as I formed the clear impression that she is probably thirteen or fourteen and certainly not sixteen even now.

I therefore find established beyond reasonable doubt that in July 1974 Lode was under the age of sixteen.

Mr Kaputin urges upon me Clarkson, J's interesting judgment in The Queen v. Philip Boike Ulel (1) in support of his second submission. I do not wish to add to what I have said in Reg. v. Paul Wanigu (2) as to that aspect of His Honour's reasoning which is relevant here.

But even were I disposed to seek to apply the exculpatory provision in the Section, in the way Clarkson, J. did, I can find no basis for doing so herein. It is for the defence to establish such an exculpatory belief on a balance of probabilities. In his statement from the dock the accused did not speak of any belief of his as to the complainant's particular age, or her readiness

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(1) Unreported Judgment No. 533

(2) Unreported Judgment No. 752

in village custom for marriage. In a Record of Interview in response to the question "Do you know how old is the girl"; he replied "I don't know how old she is". And to a further - "Is she your own size or not", he replied "No she is too young". In his statement to the District Court - evidence being given on oath by him; he stated "It is true that I had done wrong thing by having sexual intercourse with a girl whose age is well below the consent age".

It thus appears that an argument in this regard is being urged by his counsel, rather than by the accused himself in his statements or evidence. I am satisfied in any event from the girl's appearance now that he could not have entertained a reasonable belief in July 1974 that she was of marriageable age even on Clarkson, J's interpretation of the Section.

I find the case established. I convict the accused.

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Solicitor for the Crown: P.J. Clay, Crown Solicitor.

Solicitor for the Accused: N.H. Pratt, Acting Public  
Solicitor.