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IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Criminal Appeal No. 42 of 1979

THOMAS KABOA

Appellant

v.

REGINAM

Respondent

Mr. E. Vula for the Appellant
Mr. D. Williams for the Respondent

Date of Hearing: 5 June 1980

Delivery of Judgment: 27/6/80

JUDGMENT

Speight J.A.

Appellant pleaded guilty in the High Court of Solomon Islands to a total of five charges and was sentenced by the Hon. Mr. Justice Cooke in respect of these. Details are:

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| 1. | Burglary of the dwelling house of Mrs. Jarvis with intent to rape | 5 years' imprisonment |
| 2. | Assault causing actual bodily harm on Mrs Jarvis. | 5 years' imprisonment |
| 3. | Burglary of the dwelling house of Mr. & Mrs Henshall with intent to rape | 5 years' imprisonment |
| 4. | Rape of Sharon Henshall | 10 years' imprisonment |
| 5. | Larceny from the dwelling house of Mr & Mrs Henshall | 6 months' imprisonment |

All offences were committed on 2nd/3rd July 1979. All sentences were concurrent. Fourteen other offences committed in the months of April-July 1979 were taken into account; five of burglary, six of larceny and three of receiving.

He has three previous convictions - one of burglary, one rogue and vagabond and one of attempted rape. For this last he had been sentenced to one year imprisonment on 12th July 1978.

He appeals to this Court against "my sentence" of ten years. On its face this would relate only to charge No. 4 above, but in his notice the appellant refers to "three separate counts on Burglary, Rape and Assault" so his appeal should really be understood as being against all the major penalties.

The facts can be summarised briefly. On the night in question he forced an entry into the dwelling of Mrs. Jarvis - premises which he had previously unlawfully entered a fortnight before. The lady lives alone. His purpose was to look for a European lady to have sexual intercourse. When Mrs. Jarvis returned home she entered her bedroom and found him lying in wait. He had a knife in his hand. She fought with him, was able to pick up a golf club to help herself and she also called her dog to attack appellant. During the struggle she was grasped around the throat and she also suffered cuts to the wrist. Appellant desisted and ran off. Later the same evening he broke into the house of Mr. & Mrs. Henshall. He went to the bedroom of their daughter aged thirteen - she was asleep in bed. He removed her clothing, lay on top of her and had intercourse with her while she slept.

During this she woke and commenced to struggle and call out but he silenced her cries. He then made off taking some items of property from the house with him. He remained lurking in the vicinity and was later apprehended by the police who had been called.

In sentencing the learned Chief Justice outlined the more serious aspects of the case, including the fact that there had been complete intercourse with the girl Henshall. He gave credit for the fact that the accused had been frank and straightforward with the police when apprehended, and had saved the girl's embarrassment by pleading guilty. He described the offences as the most determined and callous he had encountered in his experience and he said that he could not overlook the criminal history of three previous convictions.

In submissions to this Court Mr. Vula on behalf of appellant has again put forward a matter advanced by Mr. O'Regan at original sentencing viz. that ten years is far in excess of any other sentence for rape imposed in the Solomon Islands in recent history. In the last fifteen cases dealt with it is apparently the case that the maximum sentence for this offence has been four years, the least has been six months (with one only bound over) and the average has been two years. Now sentencing is not a mathematical exercise and not a great deal of assistance can be gained by referring to other cases unless the facts are also known, but it is somewhat disturbing to find that the sentence under appeal exceeds the previous average by fivefold and is two and a half times greater than the highest previous sentence. It would have been very helpful

in considering this apparently disparate sentence had we been able to assess its appropriateness against the facts of these other cases. It is true that there is an onus on appellants to put relevant matters before the Court, but here the matter was clearly put in issue in submissions made at the time of sentence and the Chief Justice pointed out that the details of these fifteen other cases were not available to him. Additionally it is to be noticed that the appeal is filed by Mr. O'Regan whose position as a Solicitor assisting the Social Welfare Service must give him limited resources whereas the office of the Director of Public Prosecutions would have this material readily to hand. It is no fault of Mr. Williams who of course appeared on brief, but it is a pity that his instructions did not include some material relevant to this crucial question of disparity which had so clearly been put in issue in the Court at Honiara. We accept that the present case is a very serious one. The record shows that appellant must have deep sexual maladjustment and is a menace to the community. The shock to Mrs. Jarvis, and more particularly the damage to the young Henshall girl will be long lasting, and we can perhaps assume that none of the other cases approached this one in gravity and a condign sentence was called for. However, we cannot accept that none of the other cases were of a serious nature. Disproportionate sentences have always attracted criticism and rightly so - reference was made by counsel to two decisions of the New Zealand Court of Appeal in rape cases where this principle was discussed at length - see R. v. Pawa 1978 2 N.Z.L.R. 190 and R. v. Pui 1978 2 N.Z.L.R. 193.

Some mention need also be made of the reliance placed on the appellant's previous convictions. The proper scope for such consideration was discussed by this Court in Peter Rima v. Reginam, Criminal Appeal No. 62 of 1974, Judgment of the Court delivered by Gould V.P. on 17th March 1975. Reference was made to Betteridge 1942 28 Criminal Appeal R. 171 and to Casey 1931 N.Z. G.L.R. 286 - the Court should be careful to see that a sentence of a prisoner previously convicted is not increased beyond what would be appropriate to the facts merely because of previous convictions. Previous convictions are relevant to establish a prisoner's character - but here we think his character is adequately established by the circumstances of the case, including the material found in his possession and his conduct that night. The references made give rise to the implication that part of this very heavy sentence was attributable to his previous record - which in effect is ~~sentencing~~ sentencing twice over.

In our opinion counsel have succeeded in showing this sentence was manifestly excessive. The appeal is allowed, the sentence is quashed and a sentence of seven years is substituted to run from the original date of sentencing. We did not receive any substantial submissions on the other sentences and no point would be served in adjusting them.

(sgd.) C.C. Marsack
JUDGE OF APPEAL

(sgd.) G.D. Speight
JUDGE OF APPEAL

(sgd.) B.C. Spring
JUDGE OF APPEAL