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IN THE FIJI COURT OF APPEAL
CRIMINAL APPEAL NO. 1 OF 1988

Between:

MELI VAKAMOCEA — Appellant

- and -

THE STATE — Respondent

The Appellant In Person
Mr. I. Mataitoga for the Respondent

Date of Hearing: 24 August 1988
Delivery of Judgment: 6 September 1988

JUDGMENT OF THE COURT

This is an appeal against sentence of 3 years imprisonment imposed on the appellant by the learned Chief Justice on the 29th of February 1988 for the offence of rape contrary to sections 149 and 150 of the Penal Code. The appellant who was the 1st accused in the Court below was jointly indicted with 2 others (2nd and 3rd accused).

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The brief facts of the case are as follows:-

On 24th April, 1987 the complainant an 18 year old girl attended a dance at R.S.A. Hall and then ended up drinking beer with a friend at a clearing off High Street in Toorak a little after midnight. About an hour later the second accused arrived on the scene and suggested to the complainant that they go to 158 Rewa Street to have sex there. When she refused he punched her and she was injured over the eye. She ran away to a shop in Toorak where the 2nd accused eventually caught up with her in a taxi. He again punched her and with the assistance of some others managed to drag the complainant into the taxi. They then took her to 158 Rewa Street where the 1st accused lived. The 3rd accused was one of the persons in the taxi that took her to Rewa Street. There the 2nd accused again punched her and he and the 3rd accused then forced her to go into the bathroom. The 2nd accused then had sex with the complainant against her will. The 3rd accused then followed suit. Later the 1st accused also had sex with her without her consent. She then left the house through the back door in the early hours of the morning of 25th February, 1987. An Indian boy jogging along Rewa Street accompanied her to Samabula Police Station where she lodged her complaint. She was examined at the C.W.M. Hospital where the injury on her was treated and she was given some pills. The complainant was known to all the 3 accused. Indeed the 2nd accused was her former boyfriend with whom she had had sex on a previous occasion. The 2nd accused claimed that he was fired with jealousy when he saw her with an older person in Toorak on the night in question.

In view of the nature of this appeal we find it necessary to briefly outline the course that the trial took and the circumstances in which the sentences were passed.

When the 3 accused persons appeared in the High Court before the Chief Justice on 18/2/88 each one pleaded not guilty. The complainant then gave evidence detailing the ordeal she had gone through. She was cross-examined by each accused. The hearing was adjourned to the next morning but the appellant was absent when the case was called the next day. It had to be stood down till the afternoon when Mr. Q. Bale appeared for the 1st appellant and made certain submissions following which the case was adjourned to 21st February, 1988. On the adjourned date the accused again did not appear and Mr. Bale felt obliged to seek leave to withdraw which was granted. A bench warrant was ordered against the appellant. In the meantime the 2nd and the 3rd accused instructed Mr. Bale to appear for them and they then changed their plea to one of guilty. The Prosecution then adduced evidence of their antecedents. Mr. Bale made a strong plea in mitigation and asked that they be given a chance to rehabilitate. The 2nd accused was 23 years of age, married with one child. The 3rd accused was 17 years of age. For the purposes of sentencing the prior convictions of both the accused persons were ignored by the learned Chief Justice for the reasons given by him in Court. He sentenced the 2nd and the 3rd accused to 2 years imprisonment each but suspended the sentence for 2 years. In passing sentence on these 2 accused persons he stated inter-alia:-

> "I have decided in view of the particular circumstances of the case to give you both a suspended sentence of 2 years. I am doing this (most unusual for a charge of rape) because I believe you two can be helped to live a good life."

The appellant was brought before the Court on 29th February, 1988 when he changed his plea to guilty and gave what appears to us to be an unacceptable reason for his non-attendance on 22nd February.

Evidence of his antecedents was given and his list of previous convictions were put in. This showed that the appellant was 26 years of age, was married and had a young child at the time of the offence. He had a long list of convictions starting from 1978. He asked for leniency so that he could reform. He was sentenced to 3 years imprisonment. In passing sentence the learned Chief Justice made the following observations:-

> "I have listened carefully to all you have said to this court. I must say that looking at your antecedent history, that among the group of boys that raped that young girl, you were the oldest. But according to the record, you did nothing to discourage that behaviour nor did anything to stop the rape of that poor girl.
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> Your record of previous convictions show that your pattern of life has been one of indulging in criminal activities. It is probably also true to say that amongst you, you ought to have set a good example for the younger boys you were with on that morning. But I suppose that is asking too much. Moreover, I think this court cannot disregard the fact that twice last week you absented yourself without giving us any prior explanation and necessitated this court to issue bench warrants against you. You not only caused considerable inconvenience to this court but also to the gentlemen assessors who are busy people in their own rights. This is clearly reflected on your kind of attitude which, unless you change it, you will be spending many more times in gaol.
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> The only saving grace I can see in your case in this sordid affair is that this matter had been hanging over your head for a long time before it could be brought on for trial.
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> I accept the fact that you have pleaded guilty which in some sense has saved the Court from further sitting on this case, but it could have come earlier on in this trial and would have spared the girl from having to live through the ordeal of that night by having to give evidence here.

As I have said earlier, rape is considered to be one of the most heinous offences in the criminal calendar. Every society takes a very grave view of people who commit rape.

So, given all the circumstances which I have explained, the sentence that I feel proper to pass on you is three years' imprisonment."

The appellant has appealed against this sentence and his grounds of appeal may be summarised as follows:-

(1) That there was a marked disparity in sentencing in that each of his co-accused received a 2-year suspended sentence only whereas he was given a 3-year prison sentence for the same offence and thus the appellant has suffered injustice.

(2) That the sentence passed on the appellant was in any case harsh and excessive because:-

(a) the Court failed to take into account his plea of guilty as a mitigating factor.

(b) the sentencing court failed to take into account that he was the sole bread-winner in the family and was a married man with a small child.

(c) he had not used any violence on the complainant.

When the appellant appeared before this Court he appealed to us for mercy as he was very remorseful for what he had done. He asked that he also be given a suspended sentence like his co-defendants.

It would be convenient to dispose of the second ground of appeal first for reasons which would become obvious later.

Le us state at the outset that the appellant's contention that the learned Chief Justice failed to give any consideration to his plea of guilty is misconceived as the learned Chief Justice's observations quoted earlier would clearly reveal.

It is true that the appellant did not assault the complainant at any time before having sex with her but we cannot help but note that the victim was already in a helpless position both physically and in regard to the captive situation she found herself in at the appellant's house.

The appellant's family circumstances were not such as to warrant leniency on grounds of compassion.

The learned Acting Director of Public Prosecutions Mr. I. Mataitoga submitted that the sentence was infact a lenient one. He cited cases to support his submission that the proper sentence should have been between 6-7 years imprisonment. Guidelines for sentencing in rape cases were set by the Lord Chief Justice of England when giving judgment of the Court of Appeal in R. v. Billam & Ors. (1986) 82 Crim. App. R. 347. These guidelines have been adopted by our own Chief Justice in Circular Memorandum No. 1 of 1988 issued as recently as 26/7/88. For an adult a figure of 5 years is suggested in the guidelines as a starting point in a contested case without any aggravating or mitigating features but where the circumstances are similar to the case before us the starting point suggested is 8 years.

Mr. I. Mataitoga also agreed that the sentence passed on the 2nd and the 3rd accused was very light. He however submitted that there was some justification for imposing a comparatively heavier sentence on the appellant.

The Fiji Court of Appeal has on previous occasions observed that the crime of rape is all too prevalent in Fiji and prevalence is a factor that should be taken into account in assessing punishment. As was said by Lord Lane CJ in R. v. Roberts [1982] All E.R. 609 in cases of rape the sentence should be such as:-

> "First of all to mark the gravity of the offence.
> Second, to emphasise public disapproval.
> Third, to serve as a warning to others.
> Fourth, to punish the offender, and last, but by no means least, to protect women."

Bearing these considerations in mind and the fact that the offence of rape is prevalent in Fiji we are of the opinion that the learned Chief Justice was more than justified in imposing the sentence he did. It is by no means manifestly excessive. On the contrary it is on the lenient side if we have regard to the guidelines in the Billam Case and bear in mind the appellant's age, his criminal background and the circumstances of the offence. His appeal on the ground of severity therefore cannot succeed.

Turning now to the 1st ground of appeal relating to disparity of sentence we must say that this ground has caused us some concern because it is an important principle of sentencing that there should be justice between co-defendants which requires that any difference in the sentences imposed should be reflected in the different degrees of their culpability and in their character and background. (See R. v. Richards (1955) 39 Cr. App. R. 191.)

It is desirable that whenever possible co-defendants should be sentenced together. The complaint about disparity might not have arisen had the 3 accused been sentenced together but the appellant's own failure to attend court contributed to this situation arising.

Mr. Mataitoga agreed that this Court was faced with the difficult task of reconciling 2 competing principles namely the need to impose a proper sentence and the need to avoid marked disparity in sentences between co-defendants unless such disparity can be justified.

However, we must bear in mind that our prime concern is to decide whether the appellant's sentence was a proper one or not. Had the Director of Public Prosecutions appealed against the leniency shown to the 2nd and the 3rd accused this court would have been in a position to rectify any complaints about disparity. There is no such appeal before us although we had of necessity to compare the sentences because of the complaint about disparity. We are in no doubt that at least the 2nd accused who was the ring leader and who inflicted violence on the complainant, received a very lenient sentence compared with the one imposed on the appellant. The 2nd accused was a mature person and the degree of his culpability was substantially greater even after disregarding his criminal record. But would this disparity justify our reducing a sentence that we consider to be lenient in any case. We think not. Whilst we are aware that some appellate courts in the past have reduced particular sentences to bring about parity we do not think that we would be justified in doing so in this case. A reduction in sentence in the present circumstances could be seen as following one incorrect sentence with another. Furthermore, it would mean creating a greater disparity between defendants in this case and the general run of defendants in other cases where they have been given higher sentences.

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As was said by the English Court of Appeal in Weeks & Ors. [1982] Crim. App. R. 161 the test is not whether the appellant harbours a grievance but whether his grievance is justified. We think it is not justifiable in this case because the sentence passed on the appellant was proper in principle and very moderate in extent. To reduce the sentence to bring about reasonable parity would also be to ignore the considerations (outlined earlier) that courts ought to take into account in passing sentence in rape cases. Those considerations must in the present circumstances take precedence over any grievance that the appellant may harbour about the leniency shown to his co-accuseds.

This appeal must therefore fail and is dismissed accordingly.

R. Richmond
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Justice of Appeal

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Justice of Appeal

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Justice of Appeal