IN THE FIJI COURT OF APPEAL

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CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. 21 OF 1993
(High Court Criminal Case No. 14 of 1993)

BETWEEN

MOHAMMED KASIM — APPELLANT

-and-

THE STATE — RESPONDENT

Mr T Savu for the Appellant
Mr I F Wikramanayake for the Respondent

Date of hearing : 24th May, 1994
Date of delivery of judgment : 27th May, 1994

JUDGMENT OF THE COURT

On 18 August 1993 the Appellant was convicted in the Magistrate's Court after a trial on a charge of rape. The Appellant had not exercised his right to elect trial in the High Court but had submitted to the jurisdiction of the Magistrate.

Following conviction the Magistrate considered that the proper sentence to be imposed was likely to be one in excess of his jurisdiction and accordingly, in terms of s. 222 of the Criminal Procedure Code, he committed the Appellant to the High Court for sentence.

On 26 August 1993 Ashton-Lewis J. sentenced the Appellant to 10 years' imprisonment. He has now given notice of appeal against his conviction and sentence. Initially we had some doubt as to whether this Court had the jurisdiction to entertain an appeal against conviction (as distinct from an appeal against sentence) in the circumstances which occurred here. Having received written submissions from counsel and considered the matter further we are now satisfied that there is a right of appeal against conviction. Section 222 (2) provides:

"(2) where the offender is so committed for sentence .... the following provisions shall have effect, that is to say :-

....(e) If dealt with by the High Court the offender shall have the same right of appeal to the High Court of Appeal as if he had been convicted and sentenced by the High Court."

The provision is a somewhat unusual one but we think it must be interpreted on the basis that there is deemed to have been a conviction in the High Court. We accordingly proceed to consider the appeal against conviction.

At his trial the Appellant was unrepresented, and his Notice of Appeal was also apparently prepared without legal help. He is now represented, however, and his counsel has endeavoured to reduce the grounds to some form of order. In summary those grounds are:

1. **Contradictory material statements of prosecution witnesses.**
2. **Identification of clothing and a knife.**
3. **The identification parade.**
4. **The search of the appellant's house.**

We deal with these in turn.

1. Contradictory statements:

With considerable diligence counsel has examined the transcript of evidence and discovered a number of discrepancies in the evidence of witnesses and as between different witnesses.

It must be said at once that minor discrepancies and contradictions frequently occur in evidence given in a criminal trial and it is the function of the tribunal of fact to determine whether those matters are such as to throw a real doubt upon the credibility of the witnesses. Where, of course, discrepancies and contradictions can be seen of such significance as to lead to

the clear inference that the evidence of the particular witness could not properly have been accepted then an appellate Court will be obliged to interfere.

We have to say at once that none of the contradictions detected in this case come into the latter category. They are no more than minor errors which the Magistrate is likely to have regarded as if no relevance, or, if he failed to notice them, should not in any event be regarded as of any significance.

2. Identification of clothing and knife

The Police, a few days after the complaint was made to them, carried out a search of the house at which the Appellant was sleeping. They found, among other things, a blue coat and a knife. Although the complainant and other witnesses had said that the Appellant was wearing a blue coat it was argued that some at least of them could not have been clear about the colour, and also that there was some doubt as to the identification of the knife.

We think this falls into the same category as the previous ground, but for present purposes we are prepared to accept that some doubt could exist about the identification of these items.

3. Identification parade

Evidence was given by the two prosecution witnesses who were present immediately following the alleged offence that they recognised the Appellant as someone they had seen previously, and each picked him out on an identification parade. The complainant had not seen him previously, and was not present at an identification parade.

Whether or not the complainant ought to have been present at an identification parade, this did not affect the identification

by the two other witnesses, and we can see no basis upon which it could be said that the matter of identification was unsatisfactory. This is particularly so in view of the evidence of clothing found by the Police with which we deal next.

4. Search of the house

The prosecution evidence was that, on 2 July 1993, after the complainant had had intercourse with her boyfriend, Saleem, and for that purpose had removed some of her clothing, the Appellant took her a little distance away, removed the rest of her clothing and then raped her. When he was interrupted by Saleem he gathered up all her clothing and her shoes and took them away. A few days later, namely on 6 July 1993, the Police executed a search warrant on what was stated to be the Appellant's house and found there the shoes and articles of clothing which the complainant then identified as being those taken from her by the Appellant. The Police evidence was that the Appellant was present at the house at the time of the search.

It was argued for the Appellant that he had not been at the house at the time of the search, and that, although four police officers carried out the search, only one of them gave evidence. In these circumstances, and in view of the Appellant's denial that he was present at the search, it was submitted that the search may have been at a house other than the Appellant's.

This was a matter considered by the Magistrate and he found as a fact that it was the Appellant's house which was searched and in which the clothing was found. Although the Appellant denied this in evidence it appears that, in his statement to the Police (which the Magistrate held was voluntarily given) he had admitted taking the clothing to his home.

We are satisfied that there was evidence which the Magistrate was entitled to accept that the complainant's clothing was taken by the Appellant to his home and was found there by the

Police. This is very cogent evidence from which in inference of guilt could properly be drawn.

The appeal against conviction must therefore be dismissed.

Appeal against sentence

Before Ashton-Lewis J. the Appellant was sentenced to ten years' imprisonment.

He had two previous convictions for rape. The first was in 1976 and resulted in a term of imprisonment for 3 years and also 10 strokes of the birch. Shortly after he was convicted of a second offence and was sentenced to imprisonment for 5 1/2 years.

For a third offence of rape, and particularly one involving the use of a knife to threaten the victim, it is very difficult to say that a sentence of 10 years imprisonment is manifestly excessive. In this case, however, there are some circumstances which require us to look at the matter in a different light.

The Appellant was unrepresented both before the Magistrate and on sentencing. The record indicates that when he appeared in the High Court for sentencing he was not given an opportunity to address the Court in mitigation. The Judge, who would already have read the record of the trial, appears to have commenced his remarks on sentencing at once and without any reference to the Appellant. We think we should make it clear that this was a serious oversight. The Appellant may not in the end have been able to advance a great deal in the way of mitigation, but he should certainly have been given the opportunity to say what he wished.

We also wish to add a general comment as to the level of sentencing in cases of rape.

What the Judge said on this occasion was that in his opinion

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"the starting point in sentencing for a violent rape of this nature upon a finding of guilt after a contested hearing is eight years' imprisonment." Enquiries we have made indicate that whilst there has been no generally consistent starting point for sentencing for rape the Courts in Fiji have endeavoured to follow the guidelines laid down by Lord Lane in **Keith Billam & Others** (1986) 8 Cr. App. R. (S) 48. In this case he said, inter alia, that **"For rape committed by an adult without aggravating or mitigating features a figure of 5 years should be taken as a starting point."** Mr Wikramanayake the Assistant Director of Public Prosecutions who appeared for the Respondent informed us that the starting point for sentencing in such a case as is before us and as applied by the High Court generally has been 6 years.

While it is undoubted that the gravity of rape cases will differ widely depending on all the circumstances, we think the time has come for this Court to give a clear guidance to the Courts in Fiji generally on this matter. We consider that in any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years. It must be recognized by the Courts that the crime of rape has become altogether too frequent and that the sentences imposed by the Courts for that crime must more nearly reflect the understandable public outrage. We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than that starting point.

We should add a brief comment in respect of rape sentences imposed in the Magistrate's Court. The maximum sentence in such cases for a single count is 5 years. It follows that ordinarily a Magistrate should commit a rape offender to the High Court for sentence unless there are clearly mitigating circumstances.

As we have said, but for the matters to which we have referred it would not have been possible to say that the sentence

of 10 years was excessive. In the circumstances, however, and particularly because of the failure to give the Appellant an opportunity to be heard, we consider some small adjustment should be made.

Accordingly, the appeal against sentence is allowed and the sentence of 10 years' imprisonment is reduced to of 9 years.

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Sir Moti Tikaram
President Fiji Court of Appeal

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Sir Peter Quilliam
Judge of Appeal

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Mr Justice Savage
Judge of Appeal