

IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEALS NOS. AAU0017 OF 1994  
AND AAU0003 OF 1995  
 (Miscellaneous Case No. 9 of 1994)

BETWEEN

JONATI CAMA  
ISOA RATUVA

APPELLANTS

and

THE STATERESPONDENT

Appellants appeared in Persons  
 Mr. Wilkinson for the Respondent

Date of Hearing : 12th May 1995, Suva  
Date of Delivery of Judgment : 22nd May 1995

JUDGMENT OF THE COURT

On 27 June 1994 the appellants were convicted by a Resident Magistrate in the Suva Magistrates' Court of rape committed on 16 June 1991. They were then committed to the High Court for sentence on 5 October 1994. They were both sentenced in the High Court to serve 7 years' imprisonment. They have each appealed against both the conviction and the sentence.

The petition of appeal of the first appellant was filed in person and was accompanied by a letter signed by him in which he set out the grounds of his appeal. At the hearing of the appeal he presented the Court with a written document containing what were in effect four further grounds of appeal against conviction and one ground of appeal against sentence. The petition of appeal of the second appellant was also filed in person. It contained four grounds.

Offences of rape are triable in a Magistrates' Court. In most cases where a resident magistrate convicts a person of an offence tried by him, he proceeds to sentence that person for the offence. However, section 222 of the Criminal Procedure Code (Cap 21) provides for committal to the High Court for sentence in the circumstances specified in that section. That section reads as follows:

"222.-(1) Where a person, being not less than seventeen years of age, is tried by a resident magistrate for any offence, and such person is convicted by such magistrate of that offence, or of any other offence of which he is liable to conviction under the provisions of this Code then, if, on obtaining information as to his character and antecedents, the magistrate is of opinion that they are such that greater punishment should be inflicted in respect of the offence than the magistrate has power to inflict, the magistrate may, in lieu of dealing with him in any manner in which the magistrate has power to deal with him, commit him in custody or on bail to the High Court for sentence in accordance with the following provisions of this section.

(2) Where the offender is so committed for sentence as aforesaid the following provisions shall have effect, that is to say:-

- (a) the High Court shall enquire into the circumstances of the case, and shall have power to deal with the offender in any manner in which he could be dealt with if he had been convicted by the High Court; and
- (b) if dealt with by the High Court the offender shall have the same right of appeal to the Fiji Court of Appeal as if he had been convicted and sentenced by the High Court;
- (c) the High Court, after hearing counsel for the Crown if he desires to be heard, may remit the accused for sentence, in custody or on bail, to the magistrate which originally committed the accused for sentence, and thereafter the accused shall be dealt with by such court and shall have the same

*right of appeal as if no such committal to the High Court had been made."*

The circumstances in which a person convicted in a Magistrates' Court can be committed to the High Court for sentence are, thereafter, that he must be not less than 17 years of age, that the trial has been conducted by a resident magistrate, that after conviction the resident magistrate has obtained information as to the person's character and antecedents and that he is of the opinion that the person's character and antecedents are such that a more severe punishment should be inflicted in respect of the offence than he has power to inflict. Where a person is committed to the High Court under the provisions of that section, the judge in the High Court does not try the offence; that has already been done by the resident magistrate. The judge only passes sentence. However, by virtue of section 222(2)(b) of the Criminal Procedure Code, an appeal against the conviction, as well as the sentence, lies to this Court.

The record made by the learned trial resident magistrate of his committal of the appellants to the High Court discloses an irregularity which we must hold to have invalidated their committal. Although he received information as to their character and antecedents, he observed that, because this Court had stated in Kasim v The State (Criminal Appeal No. 21 of 1993, that a minimum of 7 years' imprisonment would normally be the appropriate sentence for an adult found guilty of rape without any mitigating circumstances, and as there were no mitigating circumstances in the present case, he was "duty bound to send both the accused up to the High Court for sentence pursuant to S.222 of the Criminal Procedure Code". We raised the matter ourselves and invited Mr Wilkinson to address the question. He submitted that, as the resident magistrate had received evidence of the antecedents of both appellants, that could be presumed to have been one of the factors which influenced him to commit them

to the High Court for sentence.

In our view, while it may be possible to draw such an inference in some cases, it is not possible to do so in this case in view of the terms in which the learned resident magistrate expressed himself. He referred only to the seriousness of the offence and the fact that there were no mitigating circumstances which might make a sentence of less than seven years' imprisonment appropriate. There was nothing in what he said which could, in our view, be taken to show that he had turned his mind to the question whether the appellants' antecedents were such that a sentence of more than five years' imprisonment should be imposed. On the contrary, it is, we consider, clear that he considered that he had to commit for sentence because the offence itself called for a sentence of seven years' imprisonment.

We are satisfied that the resident magistrate erred in law in failing to address his mind to the question which he should have addressed before deciding to commit the appellants to the High Court for sentence. His purported exercise of his power of committal, therefore, miscarried. In consequence the learned trial judge lacked the power to sentence the appellants; he should have remitted the case to the Magistrates' Court for the resident magistrate to consider afresh, after addressing his mind to the proper questions, whether he should commit one or both of the appellants to the High Court for sentence or sentence one or both of them himself.

The jurisdiction of this Court to entertain an appeal against the conviction of the appellants in the Magistrates' Court is dependent on the High Court having dealt with them pursuant to the provisions of section 222 of the Criminal Procedure Code (section 222(2)(b)). Although the High Court purported to deal with them in pursuance of that section, it in fact did not have the power to do so because of the invalidity of the committal. We have come to the conclusion that in those circumstances this Court must set aside the sentences imposed by

the High Court and remit the case to the Magistrates' Court for the resident magistrate to consider afresh, after addressing the questions which he is required by law to address, whether to sentence one or both of the appellants himself or to commit one or both of them to the High Court for sentence.

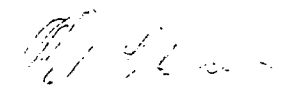
He may well conclude that the first appellant's character and antecedents, which apart from his participation in the rape and three convictions for being drunk and disorderly are apparently not unsatisfactory, are not such that a sentence of more than five years' imprisonment, the maximum sentence which the resident magistrate can impose, should be imposed. He may well also conclude that, because of the second appellant's eight previous convictions, including robbery with violence, burglary, housebreaking, entering and larceny, doing an act intended to cause grievous harm and assault occasioning actual bodily harm, his character and antecedents are such that a sentence of imprisonment of more than five years should be imposed. It is, of course, entirely a matter for the resident magistrate to decide what course to follow in respect of each of the appellants. We have referred to the possibility that he may decide differently in respect of each of them because we think it desirable to make clear the nature of the appeal rights which each appellant will have after sentence has been passed on him. If he is sentenced in the Magistrates' Court, he can appeal to the High Court against his conviction and against the sentence (Magistrates' Courts Act (Cap 14) section 41 and Criminal Procedure Code section 308). If, however, he is sentenced in the High Court after a fresh committal to that Court for sentence, he can appeal again to this Court against his conviction and his sentence (Criminal Procedure Code section 223(2)(b)).


We would add that the statement made by this Court in Kasim's case that "ordinarily" a magistrate should commit a person convicted of rape to the High Court for sentence unless there are clearly mitigating circumstances was intended to be understood as relating to cases where such committal is

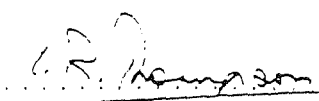
authorised by section 222 of the Criminal Procedure Code.

Orders:

1. The appeal against committal and sentence is allowed in respect of both appellants.
2. The order committing the appellants to the High Court for sentence is set aside.
3. The sentence imposed by the High Court on each of the appellants is set aside.
4. The case is remitted to the Magistrates' Court in Suva with a direction that the resident magistrate is to decide afresh whether to sentence either or both of the appellants himself or to commit either or both of them to the High Court for sentence pursuant to section 222 of the Criminal Procedure Code.
5. The appellants are to be taken before the Magistrates' Court in Suva on a date to be notified by the Magistrates' Court but in any event no later than 12 June 1995 and until such date are remanded in custody.

  
 .....  
 Sir Moti Tikaram  
President Fiji Court of Appeal

  
 .....  
 Sir Mari Kapi  
Judge of Appeal

  
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 Mr Justice I.R. Thompson  
Judge of Appeal