IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU0018 OF 1994
(High Court Criminal Case No. HAM0006 of 1994)

BETWEEN:

TIMOCI MOMOTU	**APPELLANT**
-and-	
S T A T E	**RESPONDENT**

Appellant in Person
Mr. C. Hook for the Respondent

Date of Hearing : 23rd February, 1995
Date of Delivery of Judgment : 2nd March, 1995

JUDGMENT OF DILLON J.A.

I have had the opportunity of considering the Judgments prepared by Quilliam and Thompson JJ.A.s I agree that the appeal against conviction should be dismissed for the reasons they have stated.

My decision relates solely to the appeal against sentence of 8 years imprisonment imposed in the High Court by Pain J.

I refer firstly to the provisions of s.220 of the Criminal Procedure Code which states as follows:-

> *"220. If before or during the course of a trial before a Magistrates' Court it appears to the Magistrate that the case is one which ought to be tried by the (High) Court or if before the commencement of the trial an application in that behalf is made by a public prosecutor that it shall be so tried, the Magistrate shall not proceed with the trial but in lieu thereof he shall hold a preliminary inquiry in accordance with the provisions hereinafter contained, and in such case the provisions of section 235 shall not apply."*

This section makes provision for three contingencies viz-

1. Election by the Magistrate before the trial commences;
2. Election by the Magistrate during the trial;
3. Upon application before the trial commences by a public prosecutor for the holding of a preliminary inquiry preparatory to a trial in the High Court. It is to be noted that there are no conditions or criteria imposed on the Magistrate in making the election. He has a discretion unfettered by any constraints but of course to be exercised judicially. Similarly there are no conditions precedent limiting any application by a public prosecutor. The character and antecedents of the accused person are not an issue in holding a preliminary inquiry preparatory to a trial on indictment in the High Court.

Consequently under the provisions of s.220 of the Criminal Procedure Code either the Magistrate or the public prosecutor may elect that the case be dealt with in the High Court rather than summarily in the Magistrates Court.

I turn now to consider s.222 of the Criminal Procedure Code which provides:-

> *"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 the 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"*

This section makes provisions for three possible contingencies viz.

1. Where an accused person is convicted by a Magistrate on a plea of guilty;
2. Where an accused person is convicted after the evidence has been part heard and a change of plea to guilty has been entered;
3. Where an accused person is convicted by a Magistrate after a defended hearing.

The question is whether the sentence which the Magistrate may impose in each of those situations is to be determined by reference to "...information as to his character and antecedents......"

Firstly on a plea of guilty it will of course be necessary for the Magistrate to make reasonable enquiries to obtain that information, since normally such would not have been immediately available to him on a guilty plea.

Secondly in circumstances where the conviction has been entered part way through a defended hearing the Magistrate then has to make an election as to whether he imposes a sentence within his limited jurisdiction or whether the prisoner is committed to the High Court for sentence. Once again the Magistrate would usually have to make further enquiries additional to the information available to him from a part heard trial.

Thirdly in circumstances where a full trial has taken place as in this present case under consideration the complainant has given evidence detailing the gravity of the offence. The accused also gave evidence which was not accepted by the Magistrate. In such circumstances the trial itself adequately provides the information as to the accused's character and antecedents justifying the Magistrate committing the accused to the High Court for sentence.

In my opinion s.222(1) does not require further investigation by the Magistrate where all the evidence produced at the trial clearly indicates the type of character and antecedents of the accused person.

The Magistrate in the present case summarized the evidence upon which he relied for committal to the High Court as follows:-

> *"During the trial, the court cannot help but notice an expression of distress from the victim. This frightening experience is very much noticeable, may still be clearly visible and lingering in her mind.*
>
> *The victim is a young lady, with a small figure. If she alleges that she was too frightened to resist, because of her own life which might be taken away unnecessarily, if she gives a wrong decision at that point in time, she is not to be blamed.*
>
> *The Accused person is a strong man, with a facial expression of a drug addicted person.*
>
> *The method applied by the Accused can only be described as despicable and atrocious.*

> *The normal sentence of 5 years imprisonment passed in the lower Court is not sufficient for this horrific crime. The Accused should be placed away from society for a very long time. It is recommended that a longer sentence of more than 5 years be imposed by the High Court."*

Those observations graphically described the seriousness of the rape; they clearly indicated the need for a lengthy deterrent sentence; but more importantly they disclosed the opinion the Magistrate had obtained as to the character of the accused as one who "..... can only be described as despicable and atrocious".

Counsel for the Respondent addressed the question of whether a Magistrate after hearing all the evidence at a trial is nevertheless still required to make further or additional enquiries as to an accused's character. He put it this way. If the accused in the present case was a first offender; of previous good character; and came from a good family background, such circumstances independent of the evidence adduced at the trial, would prevent the Magistrate from committing the accused person to the High Court for sentence.

The evidence of the offence described by the Magistrate as "despicable and atrocious" in my opinion was an adequate source of "information as to his character......" i.e. of the accused. This requirement the Magistrate has fulfilled.

Counsel for the Respondent has referred to two decisions of

the English Divisional Court which are of considerable assistance since s.29 of the English Magistrates Court Act 1952 corresponds to s.222 of the Criminal Procedure Code. Section 29 provides as follows:-

> *"Where on the summary trial under subsection (3) of section eighteen or section nineteen of this Act of an indictable offence triable by quarter sessions a person who is not less than seventeen years old is convicted of the offence, then if on obtaining information about his character and antecedents the court is of opinion that they are such that greater punishment should be inflicted for the offence than the court has power to inflict, the court may, instead of dealing with him in any other manner, commit him in custody to quarter sessions for sentence..."*

The first case referred to was **R v King's Lynn Justices, Ex parte Carter and Others** 1968 3 ALL ER 858. Lord Parker C.J. in his Judgment at page 862 said:-

> *"As I see it, speaking for myself, the expression "character and antecedents" being as wide as it possibly can be, justices are entitled to take into consideration in deciding whether or not to commit, not merely previous convictions, not merely offences which they are asked to take into consideration, but matters revealed in the course of the case connected with the offence charged which reflects in any way on the accused's character."*

Again at page 860 of the same Judgment the Chief Justice stated:-

> *"No one has ventured to lay down, and I do not*

think this Court would venture to lay down exactly what is comprised in those words "character and antecedents; they are wide words..."

There can be no doubt in my opinion that the evidence heard by the Magistrate in this present case undoubtedly reflected on the appellant's character. His very description of the appellant's conduct clearly illustrated the opinion he had formed from the information he had obtained.

The second case referred to by counsel for the Respondent was **R v Lymm Justices, Ex parte Brown** 1973 1 ALL ER 716. In this case Lord Widgery C.J. referred to the Judgment of Lord Parker C.J. already referred to and commented as follows:-

"Lord Parker CJ was saying in the clearest terms that although it is right and desirable for justices to make as full an enquiry as possible before committing themselves to a decision to try the case summarily, yet if they do not do that, either because they have been over-persuaded by the prosecution, or for any other reason, they can have regard to facts subsequently emerging in deciding whether or not to apply s.29, and that in my judgment is exactly what the justices did in this case. They discovered after they had agreed to try the case summarily and after the conviction that the applicant was a policeman and had committed these offences when on duty. Those were matters of antecedents for the purpose of s.29, as is not disputed, and in my judgment they were perfectly within the direction given by Lord Parker CJ in deciding to commit under s.29."

In my view all the evidence available to the Magistrate in this present case which led to him convicting the accused for a most serious rape coupled with the list of previous convictions admitted to by the accused provided more than sufficient information as to character and information to fully justify the Magistrate committing the accused to the High Court for sentence. S.222 does not specify how when and where such information is to be acquired. However evidence presented in the course of a defended trial can be itself of such a quality that no further enquiry is necessary. Certainly in the present case, the description of the severity of the rape, of itself, has clearly identified the view formed by the Magistrate of the accused's character and antecedents and so requiring a sentence to be imposed by the High Court.

There can be no doubt that the Magistrate was influenced by the gravity and severity of the offence. That very fact identifies the character of the accused. No further enquiry is necessary. No further information is required.

The conviction for a rape which was described as "despicable and atrocious" more than adequately identifies the informed opinion of the Magistrate and certainly justifies the committal of this case to the High Court for sentence.

For those reasons I disagree with the Judgment of Quilliam and Thompson JJ.A.s. The procedure followed by the Magistrate in this case was in accord with the provisions of s.222(1). The gravity of the offence in my opinion merited the sentence of 8 years imposed.

I would accordingly dismiss the appeal.

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Mr. Justice J. D. Dillon
Judge of Appeal