

IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO: AAU0014 OF 1995S
(High Court Criminal Case No. 35 of 1995)BETWEENRANJEEV KUMAR F/N BAL KRISHNAAPPELLANT

-and -

THE STATERESPONDENTMr R. Singh for the Appellant
Ms R. Olutimayin for the RespondentDate and Place of Hearing:
Date of Delivery of Judgment:20 August, 1996, Suva
30 August, 1996JUDGMENT OF THE COURT

The Appellant Ranjeev Kumar was charged in the Magistrates Court at Ba on the 31 July 1995 with 3 offences - viz - rape robbery with violence and assault causing actual, bodily harm. It was alleged that those offences were committed on the 29 July 1995 at Wavuwavu. Jointly charged with the Appellant was Lepani Vunisa who was represented by Counsel and who pleaded not guilty.

The Appellant was not represented by Counsel. He elected trial in the Magistrates' Court pleaded guilty to the 3 offences with which he was charged was convicted by the Resident Magistrate and was remanded to the High Court at Lautoka for sentence under the provisions of section 222 of the Criminal Procedure Code Cap. 21.

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At sentencing in the High Court on the 11 August 1995 the Appellant was for the first time represented by Counsel who made application to Lyons J. to withdraw the guilty pleas previously made and to substitute instead pleas of not guilty. In making this application counsel relied on -

- (1) a Judicial discretion to allow such an application both in the High Court and as well in the Magistrates Court;
- (2) The mandatory requirements of section 6 (3) of the Constitution (which provided that accused be afforded reasonable facilities to consult a legal representative of his own choice);
- (3) Matters required to be considered by the Court because the Appellant had been unrepresented.

The learned judge did not consider that the circumstances of this case meant the Appellant had been deprived of his rights under section 6 (3) of the Constitution. But he expressed doubt as to whether the Appellant had received what could be described as ".....adequate consideration due to his unrepresented status."

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As a result the learned Judge referred the Appellants application to change his plea back to the Resident Magistrate with directions that further consideration be given to the Appellant's request to change his pleas to not guilty.

On the 16 August 1995 this referral from the High Court came before the Resident Magistrate who had accepted the original pleas of guilty. On that day the Appellant filed an affidavit setting out in some detail the reasons why he had originally pleaded guilty. He claimed that he had been subjected to physical and verbal abuse to torture by the Investigating Police Officer and because of an assurance given to him by the Investigating Police Officer that he would only receive a suspended sentence.

On the 21 August 1995 the Resident Magistrate issued his Ruling and recounted the circumstances when the initial pleas of guilty were entered. He referred to several authorities which he considered relevant and concluded -

"I have carefully considered Defence and Prosecution submission and the affidavit submitted by the accused. I have no doubt that the accused admitted his guilt voluntarily and with understanding therefore, I cannot set aside the guilty plea."

4.

The Appellant then appealed to the High Court against that Ruling. His appeal was based on an alleged failure by the learned Magistrate -

- (1) to apply the principles enunciated in the case of Michael Iro v. R (1966) 12 F.L.R. 104;
- (2) to comply with the directions given by the High Court;
- (3) and to adequately consider the unchallenged affidavit of the Appellant.

The learned Judge after a detailed review and analysis of both the evidence and Counsel's submissions and a consideration of the Appellant's affidavit concluded -

" Thus I hold that the Appellant has failed to demonstrate that in the exercise of his judiciary discretion the learned Magistrate was "plainly, wrong". In my view the decision that the learned trial Magistrate came to was on a proper consideration of all matters before him and application of the correct legal principles and the decision

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that he came to in disallowing the Appellant's change of plea was reasonable in all of the circumstances. I thus dismiss the Appellant's appeal."

Following the dismissal of that appeal the Appellant on the 28 August 1995 was sentenced by the learned Judge to 8 years imprisonment on the charge of rape; 2 years imprisonment on the charge of robbery with-violence; and 1 year imprisonment on the charge of assault causing bodily harm - all sentences to be served concurrently.

On the 14 September 1995 the Appellant filed in this Court an "application for sentence appeal" alleging "... that the sentence, 8 years imposed on me is harsh and excessive." On the 1 December 1995 the Appellant filed a more detailed submission. He conceded that -

"Since I realize now, that my confession stands although it was contrary to the facts, I therefore, submit that the sentence, imposed is severe and very harsh. I seek clemency for a lesser sentence."

and concluded -

"I beg for a lesser and lenient sentence."

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It is clear that the appeal to this Court by the Appellant in person was an appeal against sentence only. Nevertheless Counsel both for the Appellant and the State filed submissions and addressed us on the basis that the appeal was against conviction as well as sentence. We shall therefore treat the appeal as being against both the conviction and the sentence imposed.

The conviction was entered by the learned Magistrate initially following a plea of guilty; and subsequently after a referral back by the High Court. In this appeal we are in effect being asked to overrule the judicial discretion exercised by the learned Magistrate when he recorded that he had "... no doubt that the accused admitted his guilt voluntarily and with understanding...." Of course the learned Magistrate had the advantage of assessing the Appellants demeanour; of considering the Defence and Prosecution submissions; and of taking into account the information set out in the Appellants subsequently filed affidavit.

Any attack against judicial discretion properly exercised must be founded on either an error of law or a mistake of fact in order to arrive at an alternate conclusion. We cannot identify any such error or mistake justifying such a reversal of the learned Magistrates decision.

Accordingly we uphold Lyons J.'s decision to dismiss the appeal against conviction.

Turning now to consider the concurrent sentence of 8 years imprisonment on the charges of rape robbery with-violence and assault causing bodily harm, the learned Judge very carefully considered the evidence; the seriousness of the rape; the extent of the assault; and the need to impose a deterrent sentence. In taking into account the Appellants youth, he did not give undue weight to his previous conviction but recognized the Appellants early plea of guilty which as a consequence saved the victim the anguish and anxiety of having to publicly relate again her ordeal at a defended Court hearing.

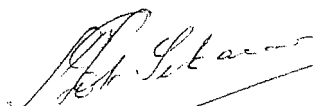
The learned Judge in assessing an appropriate penalty relied on a Court of Appeal decision which he stated had ruled that 7 years imprisonment should be the starting point for an appropriate sentence for rape. Obviously he was referring to the appeal decision of Mohammed Kasim v. The State F.C.A. No. 21 of 1993 which stated:-

"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

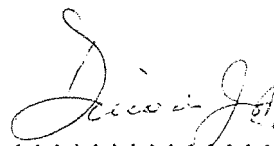
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too frequent and that the sentences imposed by the Courts for that crime must more nearly reflect the understandable public outrage."

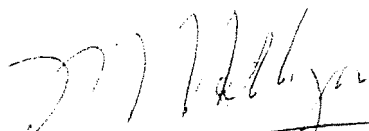
We are satisfied that the learned Judge was justified in taking a serious view of this case. We find that the sentence of 8 years imprisonment was in all the circumstances neither manifestly excessive nor wrong in principle. Consequently the appeal against sentence is also dismissed.



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



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 Mr Justice Dillon
 Judge of Appeal



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 Mr Justice Hillyer
 Judge of Appeal