

On 21 July 1998 Pathik J. sitting at Labasa High Court dismissed the appeal against conviction and enhanced the Appellant's sentence from 5 years to 6 years imprisonment. He considered the case to be a "heinous" one. He relied, inter alia, on the observations of this Court made in Kasim v State, Criminal Appeal No. 21 of 1993 at p.6, as justifying a higher sentence.

The Appellant has now appealed to this Court both against conviction and sentence. This is therefore his second appeal. Second appeals are governed by the provisions of Section 22 of the Court of Appeal Act Cap. 12.

Section 22(1) and 22(1A) of Cap. 12 (as amended by Section 4 of the Court of Appeal (Amendment) Act 1998) reads as follows:-

22.-(1) Any party to an appeal from a magistrate's court to the High Court may appeal, under this Part, against the decision of the High Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only:

Provided that no appeal shall lie against the confirmation by the High Court of a verdict of acquittal by a magistrate's court.

(1A) No appeal under subsection (1) lies in respect of a sentence imposed by the High Court in its appellate jurisdiction unless the appeal is on the ground-

- (a) that the sentence was an unlawful one or was passed in consequence of an error of law; or*
- (b) that the High Court imposed an immediate custodial sentence in substitution for a non-custodial sentence."*

re Conviction

It is clear that a second appeal can only be brought on a question of law only.

The State supports the conviction and submits that the Appellant has no right of appeal as his appeal against conviction does not raise any question of law only.

Although the Appellant purports to appeal on several grounds, these grounds are really a mixture of opinions, assertions, statements and allegations. His real grievance is that the victim, his step daughter was (according to him) a consenting party and so he was wrongly convicted of rape. Whether the victim consented or not is essentially a question of fact. The question of consent was canvassed both in the Magistrates' Court trial as well as on appeal. There was overwhelming evidence before the trial magistrate to

hold that the Appellant had intercourse with the victim without her consent. The High Court did not err in law in upholding the conviction. In our view none of the grounds of appeal against conviction contains a question of law only. The appeal against conviction is therefore incompetent and is dismissed and the conviction is confirmed.

re Sentence

The Appellant has alternatively appealed against the increase of sentence from 5 to 6 years as being harsh and excessive. He has not said that the sentence was an unlawful one or passed in consequence of an error of law. In short he has not raised any question of law. This is understandable since he is a layman and is unrepresented. Whilst the Appellant cannot succeed in his appeal against sentence because his grounds do not raise any question of law this Court has of its own motion raised the question of the legality of the sentence - namely whether the High Court can in the exercise of its appellate jurisdiction impose a sentence higher than the maximum permitted by law to the Magistrates' Court.

Initially the State in its written submissions supported the increased sentence relying on the provisions of Section 319 of the Criminal Procedure Code and the observations of this Court in Kasim's Case where it said that the starting point for sentence for rape for an adult should be 7 years, where there were no mitigating circumstances.

The State asked that the appeal against sentence be also dismissed since the Appellant had no right of appeal bearing in mind the provisions of Section 22(1A)(a) of the Court of Appeal Act.

It is now clear that in Kasim's Case the Court of Appeal had in mind trials in the High Court or cases referred to it for higher sentence pursuant to Section 220 of the Criminal Procedure Code, when it suggested 7 years as a starting point for an adult in a rape case. The instant case is not one in which Section 220 of the C.P.C. comes into play.

This Court therefore asked the State to reconsider its submissions on sentence.

The State now concedes that the enhancement of sentence by the High Court on appeal beyond the maximum permitted to the Magistrate does raise the question whether the sentence imposed was an unlawful one or passed in consequence of an error in law. Indeed it goes further and concedes that the

High Court exceeded its jurisdiction in enhancing the 5-year sentence to 6 years.

The maximum sentence for rape under Section 150 of the Penal Code is life imprisonment. But a Resident Magistrate is restricted to a maximum of 5 years for one count. (See Sections 7 and 11 of the Criminal Procedure Code Cap. 21.)

Section 319(1) of the Criminal Procedure Code, amongst other things, gives the High Court power on hearing of an appeal to "confirm, reverse or vary a decision of the magistrates' court."

And Section 319(2) of the Criminal Procedure Code Cap. 21 reads as follows:

" 319.-(1) —
(2) *At the hearing of an appeal whether against conviction or against sentence, the Supreme Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the magistrate's court and pass such other sentence warranted in law, whether more or less severe, in substitution therefor as it thinks ought to have been passed.*

(Section substituted by 13 of 1969, s. 39.)"

Subsection 319(2) is identical with Section 300(2) of the C.P.C. (now replaced). In construing the old subsection in 1978 in The DPP v Gaj Raj Singh 24 FLR 43 the Court of Appeal held that "on appeal against sentence from a Magistrates' Court the Supreme Court (*now High Court*) may increase the sentence up to, but not beyond, the limit of the magistrates' jurisdiction in that respect."

The Court also quoted with approval the following general principles setting out the jurisdiction of an appeal Court, in Sohoni's Code of Criminal Procedure 15th Edition page 2230 -

"It is a fundamental principle that every Court of Appeal exists, for the purpose, where necessary, of doing or causing to be done, that which each Court subordinate to its appellate jurisdiction should have but has not done; or caused to be done, and nothing further. Therefore the jurisdiction in appeal is necessarily limited in each case to the same extent as the jurisdiction from which that particular case comes. It is a proposition which cannot be disputed that all powers conferred upon an appellate Court, as such, must be interpreted as subject to the general rule above stated. All jurisdiction starts with the first Court and remains a constant factor throughout all subsequent stages of the suit or proceeding governed by it."

The Court came to the conclusion that the phrase "ought to have passed" must mean ought to have been passed "by the Magistrate". We take the same view and hold that the High Court cannot on appeal from a Magistrates' Court vary the sentence to a point beyond the maximum permitted to the Magistrates' Court.

See also -

- (i) DPP v Jay Singh (FCA Cr. App. 2/78).
- (ii) Watisoni Bainivanua v Reginam 32 FLR 162 (1986).

In both the above cases the Court of Appeal held (inter alia) that the Supreme Court (now High Court) on appeal was limited to the imposition of sentence to the maximum applicable to the Magistrates' Court for the offence (or offences) involved.

We find that the enhanced sentence of 6 years was an unlawful one passed in consequence of an error of law.

Conclusion

As we have dismissed the appeal against conviction and have confirmed the conviction, and further as we have held the sentence of 6 years passed by the High Court to be an unlawful one being in excess of jurisdiction, it is open to us under Section 22(3) of the Court of Appeal Act to impose such sentence in lieu therefor as we think proper. (See Watisoni Bainivanua v Reginam 32 FLR 162.) Accordingly we set aside the sentence of 6 years and in lieu therefor restore the sentence of 5 years passed by the Magistrates' Court as the proper sentence in this case, having regard to the jurisdictional limit referred to above.

Orders

- (i) Appeal against conviction dismissed and conviction confirmed.
- (ii) Sentence of 6 years set aside as being unlawful, i.e. excess of jurisdiction.
- (iii) Sentence of 5 years restored in lieu therefor.

Moti Tikaram

 Sir Moti Tikaram
 President

M. Casey

 Sir Maurice Casey
 Justice of Appeal

