374

IN THE COURT OF APPEAL, FIJI AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0009 OF 1997S
(High Court Criminal Case No. HAC0024 of 1995L)

BETWEEN: UMESH KUMAR *Appellant*

AND: THE STATE *Respondent*

Coram: The Hon Sir Moti Tikaram, President
The Hon Sir Ian Barker, Justice of Appeal

Counsel: Appellant in Person
Mr J. Naigulevu for the State

Hearing: 2 November 1999

Date of Judgment: 12 November 1999

JUDGMENT OF THE COURT

This appeal was heard by two judges only in compliance with Section 6 of the Court of Appeal Act.

The appeal is against sentence only. Leave to appeal and leave to appeal out of time was granted by the President on 7 October 1997.

The Appellant was charged before the High Court Lautoka with two counts - one for the offence of rape and the other for robbing the rape victim of her ear-ring valued at $25.00. He pleaded not guilty to both counts.

He was convicted on both charges by Sadal J. who concurred in the unanimous opinion of the assessors. The judge, on 17 March 1997, sentenced him to 6 years imprisonment on the rape charge and ordered that the Appellant also receive 3 strokes of corporal punishment. On the second count relating to robbery the judge imposed a sentence of 4 years imprisonment but ordered that the prison sentence passed on the second count run concurrently with that passed on the first count. So the total effective prison sentence that the Appellant received was 6 years imprisonment only.

Grounds of Appeal

The Appellant has appealed to this Court against severity of sentence only. In summary his contentions are -

(i) That he was not permitted to fully plead in mitigation.
(ii) That the sentence of 6 years and 3 strokes was harsher in comparison to those passed on offenders for similar offences.
(iii) That the object of punishment is to prevent crime and to reform prisoners and not to punish severely.
(iv) That the sentencing judge failed to take into account that he was a first offender.

The Facts

The facts of this case as found by the sentencing judge show -

(i) That the victim was only 8 years 8 months old at the time of the offence and that the Appellant was a mature person of 28 years of age.
(ii) That the Appellant forcefully had intercourse with the victim resulting in serious injury requiring sutures to her private parts. She also received injuries to her lips which were bleeding.

Re Corporal Punishment

Right at the outset we drew the State Counsel's attention to the provisions of Section 34(3)(f) of the Penal Code Cap. 17 which totally prohibits carrying out a sentence of corporal punishment after 6 months from the date of passing of the sentence by the High Court.

We further expressed our doubt about the constitutionality of any corporal punishment having regard to Section 25(1) of Fiji's 1997 Constitution. Section 25(1) reads as follows -

" *Freedom from cruel or degrading treatment*

25.—(1) Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment."

A similar provision existed in the 1990 Constitution, Section 8 of which said -

Protection from inhuman treatment

8. No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

We also informed the Appellant of our views and appraised him of the Court's powers to increase the sentence of imprisonment under Section 23(3) of the Court of Appeal Act (as amended by Section 3(3) of Decree No. 7 of 1990).

Mr Naigulevu the State Counsel agreed that since more than 6 months had already elapsed corporal punishment cannot be carried out.

Appellant's Background

The trial record shows that although the Appellant was a first offender he showed no remorse for his offence. Nor does he appear to show any contrition for his crime even now.

Although the sentencing judge did not specifically refer to the fact that the Appellant was a first offender he was clearly aware of the Appellant's antecedents which showed that he was a first offender. The antecedents were read out in open Court. The Appellant did not, understandably, cross-examine the police officer who presented the antecedents. The Court record clearly shows that the Appellant was given an opportunity to plead in mitigation and that he did so and in fact appeared to be defiant. There is no basis for the Appellant's complaint that he was not given an opportunity to fully plead in mitigation. It is difficult to see what further he could have said in mitigation.

Nature of Rape Committed

In sentencing the Appellant the trial judge said - *"This crime had very*

377

horrifying features. The girl was subjected to sexual indignities. The traumatic injuries which the child suffered will haunt her for the rest of her life.

Apart from raping this child the Accused took away her earring which he wanted to wear. He went to the extent of asking a neighbour to have his ear pierced".

We bear in mind that the Appellant's trial was before the High Court. So in respect of both charges he was liable to receive a sentence of life imprisonment with or without corporal punishment (See S.150 and S.293(1)(b) of the Penal Code Cap. 17). On the other hand in a trial before the Magistrates' Court the Resident Magistrate is limited to a sentence of 5 years imprisonment unless there are two or more counts in which case in charges like the present a Resident Magistrate may impose a total of 10 years imprisonment provided the maximum on each count does not exceed 5 years. (See Sections 7 and 12(2)(b) of the Criminal Procedure Code.) In view of the seriousness of the offence, the proper trial court was the High Court.

The Proper Tariff

We find no merit in the Appellant's contention that some offenders have received lesser sentence in similar cases. Circumstances of each case can differ widely as was rightly observed in this case by the trial judge. What courts look for or should look for is not uniformity of sentence per se but consistency of approach to sentencing. Similarly when comparing sentences one has to bear in mind whether the sentencing court was the High Court or the Magistrates' Court.

The proper tariff to be kept in mind in this case is that prevailing in the High Court for similar cases. The sentences imposed by the High Court for rape charges since 1993 have ranged from 6 to 9 years.

The Sentencing Task

The sentencing task is often a difficult process of balancing the objectives of just deserts, deterrence and public protection on the one hand and rehabilitation and mercy on the other. The ultimate object of all punishment is prevention of crime and reform is but one element in that approach.

Sentencing Guidelines

Appellate Courts often set sentencing guidelines to achieve consistency

of approach in particular types of crimes. In Mohammed Kasim v The State Crim. App. No. 21 of 1993 this Court indicated certain guidelines for sentencing in rape cases. The trial judge was aware of these guidelines but he preferred to follow the guidelines given in the English case of R. v Billiam (1986) 1 All E.R. 985. In assessing sentence, he may have taken into account the corporal punishment he imposed. In the Kasim Case the starting point, where there are no aggravating circumstances, was 7 years. In the Billiam Case it was 5 years. In the Kasim Case this Court of Appeal said -

> " *While it is undoubted that the grativy 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."*

In New Zealand, the starting point of sentencing for a defended rape without serious aggravating circumstances (such as child victim) is now 8 years. See R. v A. [1994] 2 NZLR 129.

Apart from the fact that the Appellant was a first offender, there are no mitigating features in this case. The fact that the victim was a child below 9 years of age and that violence was used against her resulting in her receiving serious injuries make this an aggravated case of rape. In our view the trial judge would have been justified in sentencing the Appellant to at least 8 years imprisonment even after taking corporal punishment into account.

The Delay

However we feel we ought to make some allowance for the inordinate delay in setting down this appeal for hearing. A delay of two years from the time of granting leave is unfair to the Appellant. We were informed that a request for the record was made by this Court on 18 December 1997 but the record was not received from the Lautoka Court until 24 March 1999. Such a delay is unacceptable particularly in a criminal case where convicted persons have appealed. Court officials and judges must give the preparation and certification of the Record a high priority in these cases.

When given an opportunity to show cause why his prison sentence on the first Count should not be increased the Appellant merely alluded to debt he owed on his farm and the difficulties he will encounter in managing it upon release from prison. He asked for leniency.

Conclusion

We are of the view that in all the circumstances including the long delay the proper sentence for the rape charge should be 7 years. In so doing, we recognise the principle that when increasing sentences on appeal, the Court does not normally impose the full amount of what might properly have been imposed at first instance. See, for example, R. v. Accused (CA272/91) [1991] 2 NZLR 277, 280.

We therefore set aside the sentence passed by the High Court and substitute it with the following sentence -

(i) For the rape charge (1st Count) - 7 years to run from the date of sentence passed in the High Court;

(ii) For the robbery charge (2nd Count) - 4 years to run concurrently with the sentence passed on the first count.

.....

Sir Moti Tikaram
President

.....

Sir Ian Barker
Justice of Appeal

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions, Suva

C:\OFFICE\WPWIN\WPDOCS\CHAND\AAU0009U.97S