

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0032 OF 2003S
(High Court Action NO. HAC0011 OF 2003)

BETWEEN:

BERA YALIMAIWAI

APPELLANT

AND:

THE STATE

RESPONDENT

Coram: Ward, P
Tompkins, JA
Smellie, JA

Counsel: Appellant in person
A Prasad for respondent

Hearing: 16 March 2005

Date of Judgment: 18 March 2005

J U D G M E N T

[1] This is an appeal against a sentence of 7 years imprisonment for rape. The appellant pleaded guilty and was sentenced by Shameem J on 30 June 2003.

[2] The offence had been committed on 24 November 2001. The appellant was the driver of a minibus and the victim was a 19 year old passenger from Nadi to Suva. When the minibus reached Sigatoka, the appellant asked a friend to drive so the appellant could start drinking rum and Coke. He asked the victim to sit in the front seat with him. She agreed and drank with him during the remainder of the journey until she fell asleep.

[3] After the other passengers had alighted in Suva, the appellant offered to drive the victim on to Nausori where she lived. However, instead of going directly to Nausori, he drove to Wailoku and stopped at a remote place by the road. He dragged the girl out of the front seat and forced her into the rear. He took off her clothes, performed oral sex and raped her. He then took her to Nausori where she complained straight away to her relatives. She was taken to the police and then to hospital.

[4] The appellant was interviewed by the police and admitted the rape.

[5] He initially sought to appeal against conviction but, at the hearing, abandoned that and only pursued his appeal against the sentence.

[6] This was his first offence. He was 33 years old at the time he was sentenced, married with two children and working as a minibus driver.

[7] The learned judge, in accordance with the guidelines in the Mohamed Kasim case, took a starting point of seven years imprisonment. She considered the plea of guilty, the appellant's previous good character and the fact the appellant had expressed his remorse both to the police and the court as mitigating factors meriting a reduction of the sentence of two years.

[8] However, the judge also considered that the age of the victim, the infliction of oral sex and the abduction in breach of his position of trust as a minibus driver aggravated the offence and increased the sentence by the same amount leaving a final figure of seven years imprisonment.

[9] The appellant submitted lengthy written submissions in which he compares sentences passed in similar cases and cites a number of authorities on the principles of sentencing. He again expressed his remorse and asked the court for a final chance. He pointed out that he is a first offender and now has three daughters. His family is suffering from this imprisonment and he has found his experience in prison very hard.

[10] We understand those feelings and accept that he is genuinely remorseful. However, this court will only interfere with the sentence if it can be shown to be manifestly excessive or that the sentencing judge was wrong in principle or law.

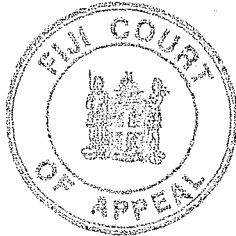
[11] We have considered the learned judge's reasons and we can see no ground to alter her sentence. Whilst the physical injuries and the degree of actual force were not great in this case, the fact remains that the real harm of rape is not necessarily measured in those terms and any rape victim is almost certain to be left with a serious lasting trauma.

[12] We agree with the judge that the breach of the appellant's position of trust as the driver of a public service vehicle was a very serious aggravating factor. She was right to lay emphasis on that. The public is entitled to expect to be safe when using any public service vehicle. Any driver who abuses that erodes public confidence in the public transport system as a whole.

[13] The appeal is dismissed and the sentence of 7 years imprisonment confirmed.

B Ward

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WARD, PRESIDENT



[Signature]
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TOMPKINS, JA

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SMELLIE, JA

Solicitors:

Appellant in Person

Office of the Director of Public Prosecutions, Suva for the Respondent