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

CRIMINAL APPEAL N0.AAU0012 OF 2005S
(High Court Cr.Appeal N0. HAA0080/2004L)

BETWEEN:

RAJESH KRISHNA NAIDU
f/n Munisami Naidu

APPELLANT

A N D:

THE STATE

RESPONDENT

Coram: Ward, P
Eichelbaum, JA
Gallen, JA

Counsel: Appellant in person
W Kurisaqila for the respondent

Hearing: Monday 25 July 2005

Judgment: Friday 29 July 2005

JUDGMENT OF THE COURT

[1] On 14 May 2004, the appellant pleaded guilty in the magistrates' court to incest, contrary to section 178(1) of the Penal Code. The allegation was that he had sexual intercourse with his 14 year old daughter on one occasion in December 2003. There was no allegation that it was repeated. The offence was not reported until the daughter was discovered to be pregnant. The magistrate sentenced the appellant to two years imprisonment and the prosecution appealed the sentence to the High Court on the single ground that the sentence was manifestly lenient having regard to the circumstances of the case.

[2] The learned High Court judge allowed the appeal on the basis that the penalty under section 178(1) had been increased to twenty years imprisonment by Act 7 of 2003. He allowed the State's appeal and increased the sentence to nine years imprisonment.

[3] The appellant appeals that decision to this Court. His grounds amount simply to a repetition of the mitigation he made in the lower courts. Under section 22 of the Court of Appeal Act, this Court can only allow an appeal against sentence passed by the High Court in its appellate jurisdiction if the sentence was unlawful or passed in consequence of an error of law or if the court imposed a sentence of immediate imprisonment in substitution for a non-custodial sentence. Clearly, the grounds he has raised give him no right of appeal.

[4] However, the appellant was given leave to appeal by a single judge of appeal who explained:

> "The learned High Court judge … pointed out that the maximum penalty had been increased by Act No 7 of 2003 from 7 years to 20 years. … It would appear from the learned judge's reasons that the realisation that the wrong maximum sentence had been followed was his. I note that the judgment was reserved for some days and it is not possible to ascertain from the judgment whether the new Act was mentioned at the hearing. As it was not a ground of appeal and as the respondent to the appeal was unrepresented, he should have been given an opportunity to consider the new direction in which the appeal was going. There is nothing in the judgment to show whether or not that was done."

[5] Counsel for the respondent opposes the appeal on the ground that the appellant has no right of appeal under section 22 and should not have been given leave.

[6] Mr Kurisaqila, who appeared for the respondent in this Court, was not counsel in the High Court. He was unable to assist about the manner in which the question of the appropriate maximum sentence came to the attention of one Judge. He agreed the judgment makes it clear that the only ground pursued in the High Court by the present

respondent was that the sentence was manifestly lenient and there is no indication that any application was made to add any other ground. He shared this Court's view that it would appear the realisation that the magistrate had been unaware of the amendment to the section was that of the judge himself. Equally, there is no record of the appellant having been informed of the amendment or having been given any opportunity to consider it

[7] It is apparent from the record that the magistrate and, presumably, counsel for the State believed the maximum sentence was still seven years. That is the penalty stated in the 1985 Revised Laws but the Penal Code (Penalties) (Amendment) Act, No 7 of 2003, increased the penalty to twenty years and came into effect on 6 June 2003. The magistrate must have been referring to a volume of the laws which had not been updated. Until the next, long overdue, revision of the Laws occurs, such errors are likely to arise. This Court appreciates the pressure under which many magistrates work and we suggest it might be helpful to establish a procedure whereby all magistrates are advised as and when relevant statutes come into effect so they can ensure that their own copies of such acts as the Magistrates Court Act, the Penal Code and the Criminal Procedure Code are kept up to date.

[8] Appeal to the High Court from the magistrates' court is governed by Part X of the Criminal Procedure Code. Section 308 gives the right of appeal to "any person who is dissatisfied with any judgment, sentence or order of a magistrates' court in any criminal cause or matter to which he is a party".

Section 311(6) provides:

> "(6) Except by leave of the High Court it shall not be lawful for the appellant on the hearing of the appeal to allege or give evidence on any ground of appeal not included in the petition or in the additional grounds, if any, filed under subsection (4)."

[9] Clearly, in the absence of leave, the State was not entitled to raise any matter other than the ground it had filed namely, that the sentence was manifestly lenient. All

the submissions in support were on the basis of a maximum sentence of seven years imprisonment.

[10] No application was made to allow the respondent to raise the amendment and the present appellant was given no opportunity to comment.

[11] Undoubtedly the learned judge was in a difficult position. He had been addressed by counsel for the appellant/State on the basis of the old penalty. Having subsequently discovered the error, he understandably considered he must sentence in accordance with the law as it stood at the time of the offence. On the other hand, had he decided the appeal only on the basis of the submissions made to him by the appellant, he would have sentenced within the smaller range. By ruling in accordance with the amended law, he was effectively allowing the State the benefit of an additional ground it had not sought.

[12] Where we feel he was in error was that, and only that, having discovered the mistake, he did not list the case again to hear from the parties to the appeal.

[13] In the particular circumstances of this case, we do not consider it is appropriate to send the case back to the High Court. If that were to be done, the State would be able to address the court on what would effectively be a fresh ground. As the State did not raise that ground in its appeal to the High Court, we consider it would be unjust to the present appellant to allow it to do so now.

[14] Regrettably, as we consider the sentence passed by the magistrate was, even within the sentencing limits of the un-amended section, lenient we consider the proper order must be to allow the appeal, set aside the sentence passed by the learned High Court judge and reinstate the sentence ordered by the magistrate.

Order:
Appeal against sentence allowed.
Sentence of nine years imprisonment set aside and sentence of two years reinstated.

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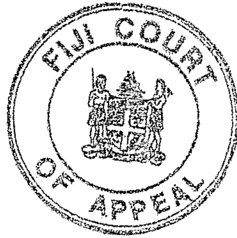
Ward, P



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Eichelbaum, JA

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Gallen, JA

Solicitors:
Appellant in person.
Office of the Director of Public Prosecutions, Suva for the Respondent