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

CRIMINAL APPEAL NO. AAU0025/03S
(High Court Criminal Action NO.HAC007 of 2003)

BETWEEN:

VILIAME TAMANI

APPELLANT

AND:

T H E S T A T E

RESPONDENT

Coram: Ward, President
Barker, JA
Scott, JA

Hearing: 1 March, 2005

Counsel: Mr. A. Rabo for appellant
Ms. A. Prasad for respondent

Date of Judgment: 4 March, 2005

JUDGMENT OF THE COURT

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[1] The appellant was charged with two offences of indecent assault, one of rape and six of incest over the period January 1995 to June 1997. In all the charges, the victim was his daughter.

[2] The appellant and the victim's mother had separated by the time she was born and she had been brought up by her mother and grandparents. In 1994, when the victim was 20 years old, the appellant's relatives asked if she could go and live with her father's family. Her father was married to another woman by then and had children from that marriage. The offences started after the victim had gone to live with the appellant. They started with a number of indecent assaults by the father leading, eventually, to rape in the later part of 1995. Thereafter, the father continued to have sexual intercourse with his daughter over a period of two years until she reported it to a sister at the Fiji School of Nursing. The prosecution evidence was that, during that time, she had effectively lived as his wife. The charges of incest arose from that period.

[3] The appellant pleaded not guilty in the Magistrates' Court and was convicted on all charges. The magistrate committed him to the High Court for sentence and Shameem J sentenced him to 2 years imprisonment on each count of indecent assault, 11 years on the rape and 3 years on each count of incest. All sentences were ordered to be served concurrently making a total sentence of 11 years imprisonment.

[4] In such a case, the appellant has the same right of appeal as if the whole trial had taken place in the High Court and he applied for leave to appeal and to appeal out of time. Tompkins JA gave leave to appeal out of time but omitted to give leave to appeal grounds of fact and mixed fact and law. However, the tenor of the ruling on the application is that the learned judge intended to give leave and counsel for the respondent does not take any point on the possible absence of leave. For the avoidance of any doubt we grant leave.

[5] The original grounds of appeal were drafted by the appellant himself but the appeal proceeded on later grounds filed by counsel headed "Further Grounds of Appeal":

> ***"1. The learned Magistrate erred in law in admitting in evidence alleged caution statement of the appellant in that –***
>
> (a) ***the State failed to establish with any degree of certainty that the caution statement was taken and recorded on the date and place alleged.***

(b) the alleged caution statement of the appellant was taken in contravention of the appellant's right to consultation with or access to, a legal practitioner.

(c) The alleged caution statement of the appellant was taken and recorded in breach of the Judge's rules in that –

(i) the appellant was not given any break or refreshment during the 3 hours and 15 minutes interview.

(ii) the alleged statement was not read back to the appellant before being asked by the interviewer to sign it.

(iii) *the appellant was required to admit all the offences, further that he could not add to or alter his statement, and was made to sign the same without opportunity of consulting a legal practitioner.*

2. *The learned magistrate erred in law in accepting as corroboration for the evidence of the complainant purported admissions of the appellant drawn by Her Worship from alleged caution statement of the appellant such statements not being credit worthy as being unlawfully obtained.*

3. *That the learned Magistrate erred in fact and in law in accepting sworn evidence of the complainant of her explanation for failing to report alleged offences of indecent assault, of rape and of incest within reasonable time, such complaint not having been made within reasonable time.*

4. *That the learned Magistrate erred in fact and law in accepting sworn evidence of retraction by the complainant of prior admissions by her in Exhibit "D1" of having filed false complaint against the appellant resulting in alleged offences.*

5. *That the finding of the learned Magistrate that there was no consent for the offence of rape is erroneous in fact and law as being against the weight of the evidence.*

6 *That the burden of proof on the mens rea for the offence of rape was not discharged by the Prosecution beyond a reasonable doubt.*

7. *That the sentence, in the circumstances, is manifestly excessive and, further, is not supported by the evidence.*"

[6] At the trial before the magistrate, the defence had challenged the interview of the accused under caution by the police on two grounds, first that the appellant made it only because a police officer told him that he would remain in custody until he admitted the offences and, second, that it was not taken at the time stated on the interview itself. The magistrate rejected both objections and admitted the interview.

[7] Ground 1 seeks to challenge the interview on different grounds, none of which had been raised at the trial. Counsel suggests that, as the appeal is to be by way of a rehearing, the appellant is free to raise any further matter even if not raised at the trial. There was no evidence in the record of the matters raised and no application to adduce fresh evidence to support it. As the matters counsel now seeks to raise would, if correct, have been known at the time of the trial, it is unlikely such an application would have had any chance of success.

[8] The description of the appeal as a rehearing means that the appellate court has a duty to reconsider the materials raised in the lower court with such other materials as it may have decided to admit. The court must then make up its own mind. It does not, as counsel appeared to be suggesting, mean that a totally fresh case can be raised.

[9] Counsel for the appellant did not pursue the first ground. Neither did he pursue ground 2. He told the Court it depended on the suggested breaches of the

Constitution set out the first ground of appeal in support of the contention that the interview under caution was wrongly admitted.

[10] Ground 3 deals with the time of the complaint. The evidence in the case was that the complainant had been subjected to various intimacies before the appellant forced her to have sexual intercourse with him. Following that rape, she made no complaint over the next two years during which the appellant had regular sexual intercourse with his daughter both at their home and after she had moved to Suva to study at the Fiji School of Nursing. Eventually, approximately two years after the rape, she told one of the staff at the school that her father had indecently and sexually assaulted her and related how she was afraid of him. The content of her complaint at that time was admitted in evidence and the magistrate, in her detailed and carefully reasoned judgment, referred correctly to the law on recent complaint.

[11] Counsel for the appellant asked the Court to find that a complaint after such a long time could not be credible as it was not recent. He appears to use the term "recent complaint" in that context and suggests that the time which elapsed before the victim complained should have rendered her evidence of the whole series of offences inadmissible. Whether the evidence was weakened or rendered less credible as a result of delay is matter of fact for the magistrate. She considered the evidence of the reason of delay in relation to the circumstances of this case. The Magistrate noted the offences were being committed by the victim's father of whom she professed to be frightened and accepted the truth of the complainant's evidence. That was a matter of fact she was entitled to make on the evidence before her and we see no reason to interfere.

[12] The fourth ground of appeal refers to a document produced in the trial by the defence. In it, the complainant retracted her complaint against her father. When shown it, she admitted it was written by her and explained that it had been written at the dictation of her stepmother but was not true. Again the magistrate considered the evidence and accepted the complaint's account. There was evidence to support such a finding and this ground fails.

[13] Grounds 5 and 6 also questioned the magistrate's finding of fact. We do not consider it necessary to go into them in detail. Each was explained in the judgment and was based on the evidence the magistrate accepted as truthful at the trial. She had the advantage of seeing and hearing the witnesses. The burden of showing that the trial magistrate was wrong in her decision on facts lies on the appellant and counsel did no more than suggest she should not have believed the complainant. We find no fault in the magistrate's conclusions and these two grounds also fail.

[14] The appeal against conviction is dismissed.

[15] The sentence of 11 years imprisonment was described by counsel for the appellant as "rather harsh". He suggested a total sentence of 3 to 4 years would have been appropriate.

[16] This was an extremely serious case. The learned judge correctly assessed the case when considering sentence:

> ***"There is evidence that your daughter lived in a state of continued fear until eventually she confided in the nurses at the Nursing School who reported the matter to the police.***
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> ***There are many aggravating factors ... and very little mitigation. The length of time the victim suffered in silence, the betrayal of trust and innocence, her attempts at committing suicide in her desperation and her inability to escape from you even at the Nursing School ... are all aggravating factors which must lead to deterrent sentences. In your favour is that you have raised a family despite your wife's illness and [you are] a first offender. However your daughter was forced to give evidence ... and relived her distress in the witness box."***

[17] The judge reviewed the levels of sentences in similar cases and we are satisfied the sentence is correct.

[18] **Order:** **1.** Leave to appeal. **2.** Appeals against conviction and sentence dismissed.

Ward, President

Barker, JA

Scott, JA

Solicitors:

Esesimarm & Co., Waqadra, Nadi for the Appellant

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