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

CRIMINAL APPEAL NO. AAU0010 of 2005S
(High Court Criminal Action No. HAA 091 of 2004S)

BETWEEN:

TEVITA POESE

Appellant

AND:

THE STATE

Respondent

Coram: Ward, President
Smellie, JA
Penlington, JA

Hearing: Monday, 21 November 2005, Suva

Counsel: Appellant in Person
Mr P. Bulamainaivalu for the Respondent

Date of Judgment: Friday, 25 November 2005, Suva

JUDGMENT OF THE COURT

Introduction

[1] The appellant was tried and convicted in the Magistrates Court on 4 counts of rape and one of insulting or annoying a female pursuant to s.154 (4) of the Penal Code.

[2] The victim was the appellant's daughter who was aged 11 at the time of the first offending and 15 or 16 at the time of the fourth rape. The offending took place between 23 June 1998 and 1 August 2002.

[3] The Magistrate imposed the following sentences:

Count 1	-	Rape 3 ½ years
Count 2	-	Rape 3 ½ years
Count 3	-	Section 154(4) offence which was incorrectly described in the charge as "Indecent Assault" 1 year
Count 4	-	Rape 3½ years
Count 5	-	Rape 3½ years

[4] The sentences were imposed consecutively, a total custodial term of 15 years.

Appeal to the High Court

[5] The appellant appealed to the High Court against both conviction and sentence. The High Court Judge dismissed the appeal against conviction, and although the appeal against sentence was also dismissed the sentences themselves were restructured as follows:

Count 1	-	Rape 15 years
Count 2	-	Rape 15 years
Count 3	-	Indecent Assault 3 years
Count 4	-	Rape 15 years
Count 5	-	Rape 15 years

[6] The sentences were ordered to be served concurrently.

[7] The appellant appealed to the Court of Appeal. His appeal came first before Ward, P. sitting as a single Judge. On 31 March 2005 the President held that there was no right of appeal against conviction and dismissed that appeal under s.35(2) of the Court of Appeal Act. Leave was granted, however, to appeal against sentence.

Appeal against sentence

[8] At the commencement of the appeal against sentence we invited the appellant to remain seated while the Court debated certain aspects of the sentencing judgment with State Counsel.

[9] We first raised with Counsel that, in the High Court, the Judge had relied upon s.7 of the Criminal Procedure Code (Amendment) Act 2003 which came into force on 13 October 2003. The amendment increased the jurisdiction of the Magistrates Court by lifting the maximum penalty that Court could impose for one offence from 5 to 10 years imprisonment. We pointed out to Counsel that the offending had occurred between June 1998 and August 2002 whereas the Amendment took effect over a year later in October 2003. To our surprise, Counsel first argued the change was retrospective. When, however, Article 28(1)(j) of the Constitution which provides inter alia:

> ***"28 - (1) Every Person Charged with an offence has the right:***
>
> ***(j)... not to be sentenced to a more severe punishment than was applicable when the offence was committed;"***

was drawn to his attention he acknowledged that his argument on a retrospective application of the amendment could not succeed. However, upon further consideration we are not persuaded that covers the point. The change in sentences which a Resident Magistrate may pass pursuant to s.7 of the Criminal Code Procedure (Amendment) Act 2003 applied from the date the Act came into force. But it does not change the maximum punishment applicable for rape (life imprisonment – s.150 Penal Code, Cap.17) and therefore does not offend s.28(1)(j) of the Constitution.

[10] Next we examined with Counsel the Judge's conclusion that the 2003 Amendment which lifted the Magistrates Court jurisdiction to 10 years imprisonment in the cases in which such sentences are authorized by law, also "logically" increased the

longest period of imprisonment a Magistrate could impose from 14 years (s.12(2)(a)) of the Criminal Procedure Code (Cap.21)) to 20 years (s.12(2)(b)).

[11] What the Judge said on this topic is to be found at pp 7 and 8 of the judgment under the heading "Sentence"

> *"Sentence*
>
> *The amendment to section 7 of the Criminal Procedure Code (Criminal Procedure Code (Amendment No.13 of 2003) increased the jurisdiction of the Magistrates Court on one count to ten years from five. Section 12 of the Code provides:*
>
> > *"12-(1) When a person is convicted at one trial of two or more distinct offences the court may sentence him for such offences, to the several punishments prescribed therefore which such court is competent to impose; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, unless the court directs that such punishments shall run concurrently.*
> >
> > *(2) In the case of consecutive sentences it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court;*
> >
> > *Provided as follows:-*
> >
> > > *(a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years; and*
> > >
> > > *(b) if the case is tried by a magistrates' court the aggregate punishment shall not exceed twice the amount of punishment which the court is, in the exercise of its ordinary jurisdiction, competent to impose.*
> >
> > *(3) For the purposes of appeal or confirmation the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence."*

State counsel submits that section 12(2)(a) must be read subject to section 12(2)(b), and that because the sentence which can be passed on one count in section 7 is ten years imprisonment the maximum on two counts is now 20 years imprisonment.

I agree the amount of punishment that the Magistrates Court is, in its ordinary jurisdiction competent to impose, is ten years imprisonment. Twice that maximum is 20 years imprisonment. Thus where the offender is tried in the Magistrates Court the maximum sentence which can be imposed is 20 years imprisonment. When the Code was amended to increase jurisdiction, section 12 remained without amendment. In the past, section 12(2)(b) provided authority for the passing of sentence of up to 10 years imprisonment on more than one count. Logically it must now be read to permit the passing of up to 20 years imprisonment."

[12] Having reached that conclusion the Judge considered there was jurisdiction to increase the sentence in respect of each rape to 15 years as recorded above.

[13] Despite the possible ambiguity between subsections 12(2)(b) and 12(2)(a) created as a result of the amendment, in our judgment, there is no justification for reading down s.12(2)(a) to substitute 20 years for 14 years when the legislature has not made that change. Furthermore in a statute affecting the liberty at the subject any ambiguity should be resolved in favour of the accused. On a correct application of the law no more than 10 years imprisonment could be imposed on each of the 4 rapes by the Magistrate. If consecutive sentences were imposed they could not in any event exceed 14 years – see s.12(2)(a).

[14] State Counsel also, however, (again to our surprise), sought to argue that by a combination of ss 6 and 319(2) of the Criminal Procedure Code the High Court Judge had jurisdiction to impose sentences beyond the maximum available to the Magistrates Court at the time of sentencing. Counsel took the two provisions relied upon in isolation rather than construing them in the context of the Statute as a whole and as a result has fallen into error. Section 6 relates only to sentences which the High Court can pass. Section 7 relates only to those that are a Resident Magistrate can pass. Section 8 to those a Second Class Magistrate can impose and

section 9 to those a Third Class Magistrate can impose etc. Those provisions 6 and 7 are governed by section 319 which deals with the powers of the High Court. State Counsel relied upon subsection (2) of section 319 whereas subsection (1) is crucially significant. The relevant portions of the entire section read as follows:

> *"319. – (1) At the hearing of an appeal the High Court ... may thereupon confirm reversed or vary their decision of the magistrates court... and may by such order exercise any power which the magistrates court might have exercised: (emphasis added).*
>
> *Provided that:-*
>
> *(a) ...*
> *(b) ...*
>
> *(2) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law, whether more or less severe, in substitution therefore as it thinks ought to have been passed."*

[15] It can be seen therefore that, on appeal from the Magistrate's Court, the High Court's jurisdiction is limited to making orders, (in this case variations of sentences), which do not go beyond exercising ***"any power which the magistrates court might have exercised."*** The submission of the State to the contrary in an attempt to support the increases from 3 ½ years to15 years is without merit.

[16] We turn now to the one year term of imprisonment imposed in the Magistrates Court in respect of the charge pursuant to s.154(4) of the Penal Code which was referred to in the charge sheet as a one of Indecent Assault. That description was highly misleading. Section154(4) does not relate to assaults at all. Rather it aims to punish intentional actions short of assault which insult the modesty of women or girls, intrude on their privacy or otherwise cause annoyance. The maximum penalty is one year imprisonment. It seems that in the High Court the Judge failed to notice the incorrect wording in the charge and proceeded to increase the sentence to three years imprisonment in the mistaken belief that the Court was dealing with an

indecent assault pursuant to s.154(1) of the Penal Code where the maximum penalty is five years imprisonment.

[17] That increase on the s.154(4) charge, of course, cannot stand. In our view a sentence of six months imprisonment would have been appropriate.

[18] The final extravagant submission of State Counsel, in an appearance which we can only describe as disappointing, invited us to lift the term of imprisonment from 3 ½ years to 15 years even further. That would be to heap injustice upon injustice in this case and we dismiss the suggestion out of hand.

[19] Before recording our decision we note that in ***Christina Doreen Skipper v. Reginam*** (Criminal Appeal 70/1978) this Court explained that before enhancing sentence, the Court should first warn the appellant that it has power to do so and give the appellant an opportunity to make representations. If ever there was a case that required such a warning this was it. The record does not disclose whether one was given.

[20] After exploring the above errors of law with Counsel we enquired of the appellant if he had any further issue of law he wished to advance. He had none.

Decision

[21] 1. The increased sentences imposed in the High Court are quashed having been imposed without jurisdiction and in error of law.

2. The total penalty in the Magistrates Court of 15 years is varied and reduced to one of a total of 10 years.

3. The sentence of 10 years is arrived at by imposing a penalty on each of the 4 rape convictions of 10 years and a sentence of 6 months on the s.154(4) charge, all to be served concurrently.

Ward, President

Smellie, JA

Penlington, JA

Solicitors:

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

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