

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

**Criminal Appeal No. AAU 67/05**  
(High Court Criminal Appeal no. HAA 86/04L)

**BETWEEN:**

**JOSEVA VUDIABOLA NARABE**

***Appellant***

**AND:**

**THE STATE**

***Respondent***

**Coram:**

**Ward, P**  
**Scott, JA**  
**McPherson, JA**

**Hearing:**

**22 November 2006**

**Counsel:**

**Appellant in Person**  
**D.D. Gounder for the Respondent**

**Judgment:**

**24 November 2006**

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**JUDGMENT OF THE COURT**

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[1] On 23 March 2004 the Appellant was convicted and sentenced by the Nadi Magistrates' Court as follows:

1. Burglary - 12 months imprisonment
2. Rape - 6 years imprisonment

3. Unnatural offence- 3 years imprisonment
4. Robbery with Violence- 6 years imprisonment
5. Wrongful confinement- 12 months imprisonment

Counts 2, 3 and 4 were to be served consecutively, Counts 1 and 5 concurrently. The Appellant was therefore sentenced to a total of 15 years imprisonment.

- [2] The brief facts were that at about 11 p.m. the Appellant went to the complainant's residence. He climbed a fence and entered the house. The complainant was in bed asleep. The Appellant, without saying anything, began to have sexual intercourse with her. When she realised what was happening she began to shout. The Appellant who had brought a 4 inch nail with him held it to her neck and told her to be quiet. He then raped and sodomised her. When he had finished, he asked her for money for beer. She offered him \$100 however he took another \$360 as well. He then forced the complainant to accompany him to a shop to buy beer. On arrival at the shop the complainant raised the alarm. The Appellant ran off but was later apprehended.
- [3] Following his arrest the Appellant co-operated fully with the police. He admitted the offence and said that he had been acquainted with the complainant. He pleaded guilty to the five charges. He had six previous convictions, four for larceny and one for robbery with violence in 2001 for which he had been sentenced to a suspended term of imprisonment.
- [4] The Appellant appealed against sentence to the High Court at Lautoka. On 29 October 2004 at a somewhat informal hearing

the judge told the Appellant that the sentence of 15 years was wrong and would be reduced, probably to 9 years.

- [5] Judgment was delivered later on the same day. The judge began with the offence of rape and took as his starting point the 7 year period established in Mohammed Kasim v. The State (Cr. App. 21/97). In the judge's view the circumstances in which the rape was committed aggravated the offence and therefore 9 years imprisonment was warranted.
- [6] The judge then turned to the remaining offences. Given that they all arose from the same incident he took the view that the sentences imposed should have been concurrent. That was plainly correct. He also took the view that the terms imposed in respect of the other offences were not wrong in principle. We agree. The overall result was that the Appellant's 15 year sentence was reduced to 9.
- [7] On 8 September 2005 the Appellant filed a second appeal against his sentence to this court. When granting him leave, the President pointed out to the Appellant that since this was a second appeal it was confined to points of law. Unless the sentence imposed by the High Court was unlawful or passed in consequence of an error of law, no appeal lay (Section 22 (1) A(a) of the Court of Appeal Act – Cap. 12).
- [8] The Appellant's submissions to us were largely repetitive of the grounds originally filed. He again pointed out that he had pleaded guilty at the first opportunity, thus sparing the complainant the ordeal of giving evidence. He suggested that the 9 years imprisonment offended the totality principle, that the

sentence passed was manifestly excessive, especially in comparison to sentences imposed on offenders who had committed more serious crimes. The Appellant also suggested that he was so intoxicated at the time as to be temporarily insane.

- [9] So far as the sodomy was concerned the Appellant reminded us that the High Court at Lautoka had recently ruled that the criminalisation of sodomy was discriminatory and therefore contrary to Section 38 (2) (a) of the Constitution. This submission can be dealt with shortly. The Appellant sodomised the complainant against her will; that is not permitted by any clause in the Constitution.
- [10] The remaining grounds of appeal and the arguments adduced in their support do not, with one exception, in our view give rise to any conclusion that the sentence passed was unlawful or passed in consequence of an error of law.
- [11] The only matter which gives us concern is that, as explained by the judge, he arrived at the conclusion that the head sentence should be one of 9 years imprisonment because of the aggravating circumstances. Unfortunately he did not specify exactly what he took those aggravating circumstances to be. Neither did he mention, nor apparently take into account, the Appellant's mitigation which was an early guilty plea which, in a case of this type, is a particularly significant mitigating factor. In our view it would have been proper to discount the sentence on that ground by two years.

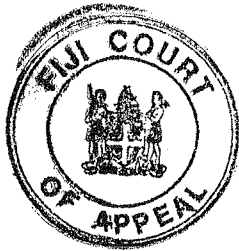
[12] While we are aware that the resulting sentence of seven years imprisonment might, in the light of the whole of the Appellant's conduct, be regarded as somewhat lenient, we do not think that we would be justified in interfering with the judge's estimation of the degree of aggravation which resulted in a head sentence of 9 years.

RESULT

Appeal allowed : overall sentence reduced to 7 years imprisonment.

*Ward P.*

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Ward P.



*Scott J.A.*

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Scott J.A.

*McPherson J.A.*

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McPherson J.A.

Solicitors

Office of the Director of Public Prosecutions for the Respondent