

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

CRIMINAL APPEAL NO. AAU0056 OF 2005S
(High Court Criminal Case No. HAC 24 of 2005L)

BETWEEN: **BIMLESH NAIDU** *Appellant*

AND : **THE STATE** *Respondent*

Coram: Ward, President
Ellis, JA
Scott, JA

Hearing: Tuesday 6th March 2007

Counsel: Appellant in person
Ms A Driu & Ms S Puamau for respondent

Date of Judgment: Friday 9th March 2007

JUDGMENT OF THE COURT

[1] The appellant was convicted following a trial in the Lautoka High Court of one count each of rape and wrongful confinement. He was sentenced on 4 August 2005 to nine years and six months imprisonment respectively and the sentences were ordered to be served concurrently with each other, giving a total sentence of nine years.

- [2] He submitted an application for leave to appeal against sentence on 10 August 2005 and added further grounds, also against sentence, in October 2005. The application was not listed before this Court until 8 June 2006. Leave to appeal sentence was granted. The single judge directed that the record should be prepared as quickly as possible in the hope that it could be heard in the Court sitting the following month, July 2006. It was then further delayed pending the determination of an application for legal aid.
- [3] The appellant appeared in person but advised the Court he had only been told that his application, made in writing on 7 August 2006, had been declined by the Legal Aid Commission in a letter dated 5 March 2007, the day before this appeal. The date of the hearing in this Court has been published for well over a month. The delay and the manner of informing him was disgraceful. The appellant was left in a position of having to represent himself at very short notice or wait even longer for his appeal to be heard.
- [4] The appellant was a taxi driver in Lautoka at the time of the offence. He met the victim, a young woman tourist from Italy, in Lautoka on 28 July 2005 in his work as a taxi driver. As a result of conversations that day in the street and a restaurant, he arranged to meet her in the evening, telling her they would be going to a hotel where there would be other people to meet. He met her in his taxi but then drove to a house where he left his taxi and continued with the complainant in a borrowed van. He did not take her to a hotel but drove the van to Saweni Beach where some beer and food were consumed. Despite her request to return to town, he drove to an isolated field off the Saweni Road, turned off the lights, locked the doors of the vehicle and made advances to her. At one stage the victim was able to leave the vehicle and there was an altercation outside during which the appellant punched her, bruising her and giving her a black eye. He struck her with a glass and threatened her saying that he had a knife. He terrified her to the point where she, realising that she was unable to escape, sought some protection by offering a condom for use. Despite her resistance, the appellant continued to force himself upon her and raped her.

- [5] He denied the offence when interviewed by the police and, at the trial, alleged consensual sexual intercourse. The assessors unanimously rejected his defence.
- [6] The appellant had, previously, applied for leave to appeal against conviction. Leave was refused but we note that there were, included in the ten grounds submitted at that time, two which related to the appeal against sentence.
- [7] The principal grounds of appeal against sentence are that nine years imprisonment is manifestly excessive, harsh and wrong in principle because the judge should have exercised more leniency. It is suggested that he failed to take into account the circumstances of the offence. The appellant also repeats the mitigating factors which were raised at the trial, in particular that he is the sole breadwinner for his family of a wife and small child. As a result of the sentence, they are insecure both from the point of view of their personal safety and their financial state.
- [8] Contrary to that contention, the judge clearly did consider the various matters the appellant now repeats. He referred to the personal circumstances of the appellant. He referred to the fact that the appellant had been employed continuously since leaving school and had been a taxi driver since 2002. He stated, "You have today, after your conviction, expressed your contrition and you have apologised to the complainant for what you have done. I take that into account. It is trite to say that is too little too late."
- [9] In passing sentence the judge explained the matters of which he took account:
- "... the circumstances surrounding the commission of the offences, your antecedents and the matters you have placed before the court in mitigation, including the contrition that you have shown following your conviction."
- [10] This Court has pointed out previously that a driver of a public service vehicle whether a bus, minibus or taxi, is in a position of trust to his passengers. In the case of *Bera Yalimawai v The State*, Crim App AAU 32/03, 18 March 2005, a

case of rape by a minibus driver referred to by the judge in the present case, this Court stated:

“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. ... 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.”

[11] When passing sentence, the judge referred to that case and explained:

“You abused your position in the extreme. This country is very dependent upon the tourist industry and conduct such as yours does little to encourage young people to visit this country. It discourages people from doing so. It detracts from the friendly nature that is portrayed overseas of the population of this country. You have betrayed not just yourself, not just your family but the population of your country by your conduct.”

[12] The additional grounds of appeal against sentence raised in the application for leave to appeal against conviction were that the judge was wrong to consider there had been a breach of trust because a relationship of trust between the victim and himself would only develop through a long period of association. The appellant also points out that the vehicle in which the offence took place was not his taxi because he had exchanged it that evening for a van.

[13] The trust referred to by the judge when passing sentence is the trust every member of the public is entitled to expect whenever travelling in a public service vehicle. That was the trust described in *Bera Yalimawai’s case* to which the judge referred when sentencing. Clearly breach of trust by a taxi driver in that sense is a serious aggravating circumstance.

[14] The first meeting with this complainant was whilst the appellant was working and the fact he was a taxi driver no doubt assisted him in first establishing contact. That added to the seriousness of the subsequent events but it must be borne in mind that those events developed from the complainant’s assessment of the

appellant as an individual after the initial meeting. That is not the same as the situation in Bera Yalimawai's case and the judge was wrong to treat it as such.

- [15] Further, the judge magnified its aggravating effect by linking it to the fact this woman was a tourist. Whilst we accept that, as a stranger to Fiji, she may have been less able to judge his advice on social contacts and of the type of people she was mixing with, the manner in which the judge linked the rape to a perceived duty to the whole of the people of Fiji was illogical and incorrect.
- [16] The starting point for cases of rape is seven years. The mitigating factors were that, although he had been fined for a minor, albeit sexual, offence four years before, he was otherwise of good character and had always been in employment. The manner in which the events of that evening developed from her agreement to spend time with him to the shared consumption of food and drink at Saweni Beach may reasonably have led him initially to believe she was a willing companion.
- [17] In aggravation are his refusal to take her back to town after they had eaten and the threats and violence which accompanied the rape. The circumstances in which the abduction occurred were covered by the charge of wrongful confinement and should not have affected the sentence for rape.
- [18] This Court will only interfere with a sentence if it is manifestly excessive or wrong in principle. We are satisfied that the judge placed an incorrect emphasis on the appellant's position as a taxi driver and the effect of his offence on the tourist industry. In all the circumstances, we consider the proper sentence is one of seven and a half years.
- [19] The appeal against sentence is allowed. The sentence of ten years imprisonment for rape is quashed and a sentence of seven and a half years substituted.

Result

- (1) The appeal against sentence is allowed.
- (2) Sentence of ten years imprisonment for rape is quashed and a sentence of seven and a half years substituted.



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Ward, President

A handwritten signature in cursive script, appearing to read "A. Ellis", positioned above a horizontal dashed line.

Ellis, JA

A handwritten signature in cursive script, appearing to read "G. Scott", positioned above a horizontal dashed line.

Scott, JA

Solicitors:

Appellant in person
Director of Public Prosecutions Office for the respondent