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

CRIMINAL APPEAL NO. AAU0098 OF 2008S
(High Court Criminal Action No. HAA053 of 2008S)

BETWEEN: IOWANE SIRELI

Appellant

AND: THE STATE

Respondent

In Chambers: Andrew Bruce, Justice of Appeal

Hearing: Monday, 17th November 2008, Suva

Counsel: Appellant in Person
A. Elliott for the Respondent

Date of Judgment: Tuesday, 25th November 2008, Suva

JUDGMENT

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1 Iowane Sireli (the Applicant) originally made application for leave to appeal against a sentence imposed by Aruna Prasad sitting as a Resident Magistrate at Suva following the conviction of Iowane Sireli after trial on a charge of rape. The learned Magistrate impose a sentence of six years. On the date appointed for the hearing of this application, the applicant also applied for leave to appeal against his conviction. The State, represented by Mr Anthony Elliott, took no point as to the timing of the additional application for leave to appeal against conviction. Accordingly, I proceeded to hear the application.

2 The Applicant appealed against his conviction and sentence to the High Court. On 8 September 2008, Goundar J dismissed the appeal. The Applicant has applied for leave to appeal against the sentence to the Court of Appeal.

3 The facts that were found by the learned Magistrate were admirably summarised by Goundar J in his judgment below. I cannot improve on his summary which is as follows:

> "The complainant is a young woman in her early twenties. She grew up in the same village as the appellant. She has known the appellant from a young age. The complainant was in a relationship with the appellant's nephew (Lasike), who also resided in the same village. Lasike's home was a few meters away from the appellant's house.
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> On 2 June 2006, Lasike and the complainant attended a fundraising together at a home in the village. Later in the night, they walked to the roadside. The complainant was drunk. Lasike left the complainant at the roadside and went to buy a cigarette from a shop. The complainant said that while she was waiting at the roadside for her boyfriend to return from the shop, she was forcefully taken underneath a nearby house by one Jo Waisuku and raped.
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> When Lasike returned, he saw the complainant crying. Lasike took the complainant to the appellant's house but it was closed. Lasike knew the appellant and his wife were attending a function at his home. He went home, got the key to the house from he appellant's wife, and returned to the complainant. Lasike took the complainant inside the appellant's house, and after a conversation left her there, and returned home to check if the function at his home was over. Lasike said the complainant closed the door when he left but he does not know whether the complainant locked it. After 10 minutes, Lasike returned and found the complainant outside and the appellant and his wife inside their house. Lasike noticed injury on the complainant's face. He took the complainant to her home and left her there.
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> The complainant said she was raped by the appellant when she was lying down inside he appellant's bedroom after her boyfriend had left. She said the appellant pulled her down from the bed on to the floor and had sexual intercourse with her. She resisted but the appellant covered her mouth. While the appellant was having sex, his wife walked in and punched the complainant. Under cross examination the complainant said she recognized the appellant because she had seen him many times in the village. She said although there was no light inside the bedroom, she recognized the appellant's face and when his wife walked in, she turned on the light and punched her when she saw the appellant on top of her.

The appellant's caution interview was tendered without any objection. The appellant said that when he and his wife returned to their home, he saw the complainant lying in his bedroom. He said he tried to wake her up and tell her to go home. He denied raping her.

The appellant's sworn evidence was consistent with his caution statements. The appellant's wife gave evidence confirming the account given by him."

4 In relation to the application for leave to appeal against conviction, the applicant complained that the Leonard Magistrate leading the law when he took into account irrelevant considerations. Further, the Applicant contended that the trial was considered conducted in a very un-fear manner which resulted in a miscarriage of justice. Finally the applicant contended that the learned trial judge occurred in his treatment of the burden and standard of proof.

5 The focus of the contentions of the Applicant in his oral submissions was that the Applicant was not permitted to call witnesses which would have established or would have tended to establish is innocence. He gave as an example the fact that his relatives could have testified in relation to the drinking session which the Applicant attended prior to the event is the subject of the charges. In reality, none of these people could have assisted the case for the applicant because what was in issue was what happened at his house. He also contended that there were witnesses who could support his version of events in relation to what happened at the house. In the result, the only person who was there apart from the Applicant and the victim of this offence was the wife of the Applicant. She was given every opportunity to relate the version of events before the learned Magistrate. There was nothing in this point which could assist the Applicant.

6 The complaint about the wrong application of the burden and standard of proof were dealt with comprehensively and, with respect, convincingly by Goundar J in the High Court. I will not repeat what that learned judge said in that regard save to say that I agree with every word of what he said.

7 The essence the grounds of appeal in the application for leave to appeal against sentence is that the learned judge failed to take into account the previous character and conduct and future life and conduct of the Applicant. Further, the Applicant complains that the sentence was neither just nor appropriate. The Applicant complains that the learned judge failed to take into account the classic determinants of sensing *ie* retribution, deterrence, prevention and rehabilitation.

8 The Applicant also complains that he was not guilty of the charge. Further, the Applicant complains (*sic*) "there was no reasonable credit given by the Learned Trial Judge on the first available opportunity by the appellant to plead guilty." Finally, the Applicant complains that the judge had failed to take into account appropriate factors for mitigation which should be deducted from the sentencing tariff appropriate to the case.

9 I took the view that the appropriate course in this case was to give the Applicant an opportunity to present his application for leave to appeal in open court. The essence of his submissions was to reiterate his grounds of appeal outlined above.

10 The maximum sentence for an offence of rape is life imprisonment. The courts of Fiji have noted with considerable anxiety the incidence of rape in this community. In this regard, in 1994, the Court of Appeal observed in ***Mohammed Kasin v The State*** Case Number 14 of 1993:

> We consider that in any rape case without aggravating or mitigating circumstances features the starting point for sentencing an adult should be a term of imprisonment of seven years. It must be recognized by the Courts that the crime of rape has become altogether too frequent and that the sentences imposed by the courts for that crime must more nearly reflect the understandable public outrage. We must stress, however, that the particular circumstances of the case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than that starting point.

11 It is also worthy of note that in ***State v Lasaro Turagabeci & Others*** HAC 0008 of 1996, the Court observed:

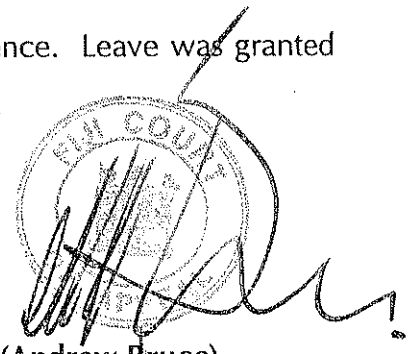
> The Courts have made it clear that rapists will be dealt with severely. Rape is generally regarded as one of the gravest sexual offences. It violates and degrades a fellow human being. The physical and emotional consequences of the victim are likely to be severe. The Courts must protect women from such degradation and trauma. The increasing prevalence of such offending in the community calls for deterrent sentences.

12 The learned Magistrate in her reasons for sentence indicated a starting point of seven years but reduced the sentence to one of six years after taking into account mitigating factors which principally concerned the previous good character of the Applicant.

13 As will be apparent from the summary of the facts which I have quoted above, a substantial aggravating factor in this case is that the victim had been raped sometime before she went to the house occupied by the Applicant and his wife. She was guided there by her boyfriend. In simple language, she was seeking the refuge, protection and support of the Applicant and his family. Instead of providing the refuge protection and support which the victim so obviously needed and sought, the Applicant raped her.

14 It is plain from the authorities that deterrence is at the forefront of sentencing for rape. The learned Magistrate completely accepted and followed this principle. She applied the tariff. Her analysis cannot be faulted. The same must be said of the analysis of Goundar J. Indeed, I think that the Applicant was extremely fortunate not to have attracted a higher sentence because of the aggravating factors to which I have made reference.

15 In the course of the hearing, the Applicant asked whether he could withdraw his applications for leave to appeal against conviction and sentence. Leave was granted and the order of this court is that the application is dismissed.



(Andrew Bruce)
Justice of Appeal