IN THE COURT OF APPEAL, FIJI ISLANDS
APPELLATE JURISDICTION

Criminal Appeal No: AAU0117/07
[HC Crim. Appeal No: HAA22/07]

BETWEEN:

MATURINO RAOGO

Appellant

AND:

THE STATE

Respondent

Coram:	Goundar JA Inoke JA Madigan JA
Hearing:	17th November 2009
Counsel:	Appellant in person Mr. M. Korovou for State
Date of Judgment:	9th April 2010

JUDGMENT OF THE COURT

Background

[1] The appellant pleaded guilty in the Taveuni Magistrates' Court to one count of wrongful confinement and two counts of rape. On 19 August 2005, he was

sentenced to 9 months imprisonment for wrongful confinement, to be served concurrently with consecutive terms of 9 years imprisonment for each count of rape. The total sentence of 18 years imprisonment was made consecutive to a pre-existing term of 5 years imprisonment that the appellant was serving for defilement in an unrelated case.

[2] The appellant appealed against sentence to the High Court. The learned judge of the High Court allowed the appeal and varied the sentences as follows:

> "i) the sentence passed in this matter in the Taveuni Magistrates' Court is vacated and substituted with a total sentence of 14 years imprisonment effective from the 19 August 2005;
>
> ii) the minimum terms of imprisonment that the appellant must serve is 11 years without remission;
>
> iii) the above sentence is to be served concurrent to any sentence you were serving at the time;
>
> iv) the appeal partially succeeds in the manner outlined above."

[3] The appellant filed an appeal against sentence to this Court. On 10 February 2009, Byrne JA granted leave to appeal on one ground. The issue for consideration is whether the High Court was right in saying that the appellant was not entitled to the usual remission of sentence if a minimum sentence was imposed.

[4] The learned judge's statement on the entitlement of remission arose in the following context:

> "20. Having heard the submission of both your counsel and counsel for State on this matter, I consider the following factors relevant for my determination under section 33 of the Penal Code Cap 17:

- The concern expressed by your Village Crime Committee that you are no longer welcome in your village because of your persistent criminal activity;

- Your list of previous convictions, 46 in total to date, shows that you have utter disrespect for other people's property and the privacy of their persons;

- The needs for the public to be protected from its members like you who despite being given opportunity to mend your ways have chosen to live a life that brings fear in the life of many, especially the women and young children.

21. In the light of the above, I consider that you must serve a minimum term of 11 years of your total sentence of 14 years. The effect of this is that you will not be entitled to the usual remission of sentence normally given to prisoners."

Consideration of appeal

[5] The power to grant remissions to prisoners is given to the Controller of Prisons by section 63 of the Prisons Act, Cap. 86. Section 63 provides:

> "(1) Every convicted criminal prisoner under sentence of imprisonment for any period exceeding one calendar month, whether by one sentence or cumulative sentences, and whether suffering extramural punishment or not, shall after serving one month's imprisonment or extramural punishment, as the case may be, be eligible by satisfactory industry and good conduct, to a remission of one-third of his total sentence of imprisonment.
>
> Provided that the remission so earned shall not reduce the period of imprisonment or extramural punishment to less than one month.
>
> (2) On the recommendation of the Controller, the Minister may grant such further remission as he shall determine on special grounds, such as exceptional merit or permanent ill health.

> (3) For the purpose of giving effect to subsection (1), each convicted criminal prisoner, on admission, shall be credited with the full amount of remission that he could earn and shall forfeit such portions of such remission as a punishment for idleness, lack of industry, or any other offence against prison discipline, as the Controller or the supervisor shall determine:
>
> Provided that –
>
> (a) the maximum forfeiture of remission of sentence which may be imposed on a person undergoing extramural punishment for any one extramural offence shall be one month;
>
> (b) the maximum forfeiture of remission of sentence which may be imposed for any one prison offence shall be three months;
>
> (c) the Controller may restore any forfeited remission in whole or in part."

[6] The power to fix a minimum term of imprisonment is derived from section 33 of the Penal Code. Section 33 provides:

> "Where an offence in any written law prescribes a maximum term of imprisonment of ten years or more, including life imprisonment, any court passing sentence for such offence may fix the minimum period which the court considers the convicted person must serve." (underlining ours)

[7] The maximum penalty prescribed for rape is life imprisonment. Rape is therefore an offence for which minimum term can be fixed. The discretion to fix a minimum term lies with any court, albeit, it is usually exercised by a sentencing court. However, there is nothing in section 33 to suggest that a minimum term cannot be fixed in an appeal if the sentencing court has not done so. We do not think the

High Court's exercise of discretion to fix a minimum term in the present case was unlawful.

[8] However, the ground of appeal does not arise from the decision to fix a minimum term, but from the statement of the learned judge that the appellant was not entitled to the usual remission if a minimum term was imposed.

[9] The appellant relies on the decision of a single judge of appeal in ***Dwayne Hicks v. The State*** *Criminal Appeal No. AAU0021 of 2007*, that allowed an appeal against sentence of a fixed term of imprisonment on the ground that the prisoner was entitled to the one third remissions for good conduct under the Prisons Act even on a minimum fixed term. If we are to follow ***Hicks***, then the ground of appeal has to be allowed because the decision makes it clear that a prisoner is entitled to remission on a fixed period of sentence.

[10] However, we disagree with the decision in ***Hicks***. While we accept that remissions under the Prisons Act are entitlement of the prisoners upon qualification, we cannot ignore the clear legislative intent in providing the courts with the discretion to fix terms of imprisonments before prisoners are eligible for release from prison.

[11] In 2003, the Parliament amended section 33 of the Penal Code. Before the amendment, section 33 read:

> "Whenever a sentence of imprisonment for life is imposed on any convicted person the judge who imposes the sentence may recommend the minimum period which he considers the convicted person should serve."

[12] As can be seen, the amendment significantly changed section 33. Previously, the discretion under section 33 lay only with the High Court. The power was confined to offences punishable by life imprisonment. The nature of power was to recommend a minimum period. After the amendment, any court can fix a minimum term, provided the offences are punishable by more than 10 years imprisonment. And the minimum period is fixed which the court considers the convicted person "must serve."

[13] There is no ambiguity in the amended provision of section 33 of the Penal Code. When a court fixes a minimum period, the offender must serve that period. In our view, the phrase "must serve" is mandatory and not merely directive. We are of the opinion that a prisoner whose sentence is fixed by a court cannot be released until the fixed period is served. But if a prisoner whose sentence is fixed qualifies for remission, he will be eligible for release only after serving the fixed period. In such a situation, the remission has to be deducted from the period of imprisonment that was not fixed.

[14] The intention of the amendment to section 33 of the Penal Code was clearly to increase sentences for certain offences by giving the courts power to fix a period that the offender must serve. We find support for this view in the second reading speeches in the Parliament of the then Attorney General & Minister for Justice who introduced the Penal Code (Penalties (Amendment)) Bill, 2003. We in particular refer to the following statement of the Attorney General and the Minister:

> "Mr. Speaker, Sir, the Prison Regulations is being examined with a view to introducing amendments which can be synchronized with the proposed amendments to section 33 (that I am explaining now) to ensure that prisoners whose sentences are fixed under section 33 of the Penal Code are not released too early on Compulsory Supervision Orders before the expiry of their normal terms or fixed terms."

[15] The above reference provides support for the view that the mischief to which section 33 is directed or the purpose which it was intended to serve was to restrict the operations of early releases under the Prisons Act.

[16] We therefore hold that the learned High Court judge was correct in saying that the appellant will not be entitled to the remissions under the Prisons Act until he had served the fixed period of imprisonment.

[17] However, the matter does not rest there. Although not raised as a specific ground of appeal, the appellant in his submissions raised an issue about the lawfulness of the term of 14 years imprisonment imposed on him by the High Court. Since the appellant is unrepresented and that there was no objection taken by the State when this issue was raised, we decided to consider the issue in the interests of justice.

[18] The sentencing powers of the Magistrates' Court are contained in sections 7 and 12 of the Criminal Procedure Code. The maximum sentence that a magistrate can impose for one offence is 10 years imprisonment and not more than 14 years imprisonment for more than two offences at one trial. This limitation is contained in section 12 of the Criminal Procedure Code:

> "(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 therefor 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."

[19] It is clear that section 12 is directed solely at the powers of the Magistrates' Court. It deals with consecutive sentences for multiple offences and the circumstances under which a magistrate can aggregate such sentences. It puts no constraint upon the sentencing powers available to a judge of the High Court. However, the sentencing powers of a judge of the High Court in an appeal are confined to section 319 of the Criminal Procedure Code:

> (1) At the hearing of an appeal, the High Court shall hear the appellant or his legal practitioner, if he appears, and the respondent or his legal practitioner, if he appears, and the Director of Public Prosecutions or his representative, if he appears, and the Commissioner of the Fiji Independent Commission Against Corruption or his representative, if he appears, and the High Court may thereupon confirm, reverse or vary the decision of the magistrate's court, or may remit the matter with the opinion of the High Court thereon to the magistrate's court, or may order a new trial, or may order trial by a court of competent jurisdiction, or may make

> such other order in the matter as to it may seem just, and may by such order exercise any power which the magistrate's court might have exercised:
>
> Provided that –
>
> (a) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred;
>
> (b) the High Court shall not order a new trial in any appeal against an order of acquittal.
>
> (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 magistrate's court and pass such other sentence warranted in law, whether more or less severe, in substitution therefor as it thinks ought to have been passed.

[20] The meaning of phrase in subsection (2) 'ought to have been passed' was considered by this Court in ***DPP v Gaj Raj Singh*** *[1978] 24 FLR 43* dealing with similar words in what was then section 300(2):

> "... section 300(2) limits the powers of the [High] Court in such cases to passing such other sentence 'warranted in law as it thinks ought to have been passed.' Unless that last phrase is interpreted to mean 'passed by the magistrate' that is the court from which the appeal is brought, the words would be meaningless."

[21] It therefore follows that the High Court in an appeal does not have unfettered sentencing powers. Where the High Court substitutes another sentence in an appeal, it may not exceed the magistrate's sentence powers. In the present case, the learned magistrate imposed 9 years imprisonment on each count of rape and 9 months imprisonment on the one count of wrongful confinement. These individual

terms of imprisonment were within the jurisdiction of the Magistrates' Court. However, after imposing the individual sentences, the learned magistrate ordered the sentences on the two counts of rape to be served consecutively, making a total sentence of 18 years imprisonment. This order to serve the sentences consecutively, in our view, was made in an error because the total sentence of 18 years imprisonment exceeded the maximum jurisdiction of the Magistrates' Court as provided by section 12 of the Criminal Procedure Code.

[22] The High Court after concluding that the Magistrates' Court had exceeded its jurisdiction, instead of quashing the order making the sentences consecutive, reduced the aggregate sentence from 18 years imprisonment to 14 years imprisonment.

[23] In our view the learned judge's approach is contrary to the provision of section 12 of the Criminal Procedure Code. When an offender comes for sentencing on a number of offences at one trial, as was the case here, the sentencing magistrate is required to impose individual sentences for each offence. After imposing individual sentences, the magistrate is required to consider whether to order the sentences to be served concurrently or consecutively.

[24] In exercising the discretion to order the sentences to be served consecutively, the magistrate should consider whether the overall aggregate sentence is just and appropriate and reflects the totality of the criminality involved. *(**Pauliasi Bote v. The State** Criminal Appeal No. AAU0011 of 2005).* The magistrate should always step back and take a last look at the total just to see if it looks wrong (***Wong Kam Hong v. The State** Criminal Appeal No. CAV0002 of 2003S).*

[25] If the learned judge would have approached the appeal in the manner outlined above, the error made by his lordship could have been avoided. We are of the view that the quashing of the individual sentences and substituting them with a total sentence of 14 years imprisonment constitute an error of law justifying an intervention of this Court. The learned judge should have first imposed individual sentences not exceeding the maximum jurisdiction of 10 years imprisonment of the Magistrates' Court and then should have considered making the sentences concurrent or consecutive bearing in mind that the total sentence cannot exceed 14 years imprisonment.

[26] We therefore allow the appeal and quash the orders made by the High Court. We re-instate the individual sentences imposed on the appellant in the Magistrates' Court. We think it would be just and appropriate to make the sentences for wrongful confinement and two counts of rape concurrent because the offences involved the same victim and they arose from the same transaction. However, these sentences are ordered to be served consecutively with the pre-existing sentence that the appellant was serving because a different victim is involved and that we are satisfied that the order does not breach the totality principle. Given the guilty pleas of the appellant, we decided not to fix any minimum term.

[27] For the sake of clarity, the sentences are as follows:

> Wrongful confinement – 9 months imprisonment;
> Rape – 9 years imprisonment;
> Rape – 9 years imprisonment;
> To be served concurrently effective from 19 August 2005 but consecutive with any pre-existing sentence.

[28] The appeal is allowed to this extent.

Hon. Justice D. Goundar
Judge of Appeal

Hon. Justice S. Inoke
Judge of Appeal

Hon. Justice P. Madigan
Judge of Appeal

At Suva
9th April 2010

Solicitors:
Appellant in person
Office of the Director of Public Prosecutions for State