IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL NO. AAU 78 OF 2010
(High Court HAC 26 of 2010)

BETWEEN	:	**TOMASI TIKO BULIVOU**	***Appellant***
AND	:	**THE STATE**	***Respondent***

Coram	:	**Calanchini P** **Gamalath JA** **Waidyaratne JA**
Counsel	:	**Mr. S. Waqainabete for the Appellant** **Mr. J. Prasad for the State**
Date of Hearing	:	**13 November 2014**
Date of Judgment	:	**5 December 2014**

JUDGMENT

Calanchini P

[1] I have had the opportunity of reading the draft judgment of Waidyaratne JA and agree with his reasons and proposed orders.

Gamalath JA

[2] I also agree with the reasoning and conclusion arrived at by Waidyaratne JA.

Waidyaratne JA

[3] The Appellant was charged before the High Court at Lautoka on two counts of attempted rape contrary to Section 151 of the Penal Code Cap 17, five counts of rape contrary to Section 149 and 150 of the Penal Code, one count of defilement of a girl under 13 years of age contrary to Section 155(1) of the Penal Code and one count of indecent assault contrary to Section 154(1) of the Penal Code. Of these nine counts, the first six counts were in respect of one victim and counts 7 to 9 were in respect of another victim. These offences had been committed during the period of 1st January 2005 and 31st December 2008. The first victim is the daughter of the sister of the Appellant and she had been five years old when the first attempted rape had taken place and the second victim had been 8 years old when the offence had been committed on her by the Appellant.

[4] The trial commenced on 30th August 2010. The Appellant was unrepresented.

[5] At the commencement of the trial before the assessors on 30th August 2010 the Appellant pleaded guilty to count five of committing defilement on the girl S.C. and on the sixth count of committing rape on the same victim.

[6] The trial progressed and the prosecution summoned five witnesses during two days of trial.

[7] On 1st September 2010, the Appellant changed his plea of not guilty to guilty on the remaining seven counts and accordingly was convicted on all counts.

[8] Thereafter the learned trial Judge has permitted both parties to file submissions on sentencing and mitigation and requested assistance of the duty solicitor from the Legal

Aid Commission to which the duty solicitor has complied, filing mitigating submissions dated 2 September 2010.

[9] On 3rd September the Appellant was sentenced to 20 years imprisonment with a non parole period of 16 years imprisonment. Summary of the sentences are as follows:

Count No.1	Attempted Rape	5 years imprisonment
Count No.2	Rape	16 years imprisonment
Count No.3	Rape	16 years imprisonment
Count No.4	Rape	16 years imprisonment
Count No.5	Defilement	5 years imprisonment
Count No.6	Rape	16 years imprisonment
Count No.7	Attempted Rape	5 years imprisonment
Count No.8	Rape	16 years imprisonment
Count No.9	Indecent Assault	3 years imprisonment

The sentences in respect of Count 1 to 6 were ordered to run concurrently making the total amounting to 16 years of imprisonment. The sentence on counts 7 to 9 were also ordered to run concurrently with the total amounting to 16 years. The learned trial Judge thereafter ordered that in respect of his two sentences of 16 years imprisonment the second term of 16 years should commence after four (4) years of serving the first sentence, thereby making it part consecutively. Therefore, the total sentences imposed on the Appellant was 20 years with 16 years term of non parole.

[10] The Appellant has appealed against the conviction and sentence *inter alia* on the following and the main grounds are:

1) that the learned trial Judge erred in law and in fact when he advised the Appellant to reconsider his plea prior to the calling of the last witness and that resulted in the Appellant's equivocal plea.

2) that the learned trial Judge erred in law and in principle when he made part of the sentence to run concurrently and the other part consecutively without having a reasoned justification.

Ground 1

[11] At the hearing counsel for the Appellant conceded that the record does not support the contention of the Appellant that the learned trial Judge advised the Appellant to reconsider his plea of not guilty prior to summoning of the last witness for the prosecution and that resulted in the equivocal plea of the Appellant.

[12] Nevertheless I intend to further consider this ground of appeal in detail before arriving at a final determination.

In **Turner vs. R** (1970) 2 QB 321 and in several other cases of the Common Law the issue of involuntary plea was discussed. It is summarised in the 20th Edition of *Blackstone* at paragraphs D.12.94 to D.12.98 and the most relevant passages to this case are as follows:

> *"D.12.94 A plea of guilty must be entered voluntarily. If at the time he pleaded, the accused was adjudged to such pressure that he did not genuinely have a free choice between 'guilty' and 'not guilty', his plea is a nullity. (**Turner** [1970] 2 QB 321). On appeal the Court of Appeal will have the same options as it has when a plea is adjudged ambiguous, namely that it must quash the conviction and sentence but will be able, in its discretion, to issue a writ of venire de novo for a retrial as the original proceedings constitute a mistrial. Pressure to plead may come from a number of source; the court, defence counsel or other factors. Whatever the source, the effect is the same.*

> *D.12.95 The Court. The example of this principle is provided by **Barnes** (1970) 55 Cr. App R 100, where the Judge during a submission of no case to answer made in the absence of the jury but in the presence of the accused, said that, having regard to prosecution evidence, B was plainly guilty and was wasting the Court's time by pleading not guilty. Despite this pressure B did not change his plea. Allowing his appeal against conviction on other grounds, the Court indicated that the Judge's remarks were "wholly improper and if B had pleaded guilty in consequences of them, the plea would have been null."*

[13] In such circumstances, the only way to assess and determine whether the plea of guilty can stand as a voluntary plea is by examining the record of the proceedings in the High Court and according to the court record it reveals the following:

> ***"BEFORE THE HON. MR JUSTICE THURAIRAJA ON WEDNESDAY THE 1ST DAY OF SEPTEMBER 2010 AT 9 AM IN THE FORE NOON***
>
> ***MS BULL*** – ***for State***
> ***MR IN PERSON*** - ***for Accused***
>
> *Court to Accused* - *How are you today.*
> *Accused* - *Fine.*
> *Court* - *Did you have your breakfast.*
> *Accused* - *No.*
>
> *Court* - *Do you understand the court proceedings.*
> *Accused* - *Yes.*
> *Court* - *Do you need any assistance now.*
> *Accused* - *No.*
> *Accused* - *I want a short adjournment to reconsider my plea.*
> *Court* - *How long do you want.*
> *Accused* - *About 15 minutes.*
> *Court* - *State Counsel do you have any objection.*
> *State Counsel* - *I have no objection.*
> *Court* - *Adjourned for a while. Now the time is 10.50.*
>
> ***Now the time is 12 noon.***
>
> *Accused* - *Sir I want to change my plea.*
> *Court* - *Why do you want to change your plea.*
> *Accused* - *After hearing the evidence of witnesses I want to plead guilty. I also want to save the Court time. I don't want to travel to prison and court everyday. I want to save everybody's time.*
> *Court* - *Did anyone want you to change the plea.*
> *Accused* - *No Sir. It is my own decision.*
> *Court to State Counsel* - *Do you have objections or observations.*
> *State Counsel* - *Certainly no objections. I have no adverse observation.*

Court	-	*Now I proceed to take this plea on all 9 counts again on the request of the accused.*
Court to Accused	-	*Now the Registrar will read the consolidated charge sheet to you as per your request.*
Court to Accused	-	*Now the Registrar will read the charge sheet to you. First you have to understand the charge. If you understand say you understand if you don't, say you didn't, if you need any clarification, you may ask the Court if you need any assistance you may ask court.*
Court	-	*Do you understand.*
Accused	-	*Yes Sir (with a smile).*

1st Count	-	*I understand*	-	*Pleading guilty*
2nd Count	-	*I understand*	-	*Pleading guilty*
3rd Count	-	*I understand*	-	*Pleading guilty*
4th Count	-	*I understand*	-	*Pleading guilty*
5th Count	-	*I understand*	-	*Pleading guilty*
6th Count	-	*I understand*	-	*Pleading guilty*
7th Count	-	*I understand*	-	*Pleading guilty*
8th Count	-	*I understand*	-	*Pleading guilty*
9th Count	-	*I understand*	-	*Pleading guilty*

Court	-	*Did anyone promise, threaten or induced you to change your plea.*
Accused	-	*No.*
Court	-	*Is this your considered decision.*
Accused	-	*Yes.*
Court	-	*Can I accept your plea as free and fair decision.*
Accused	-	*Yes.*

Considering all circumstances I am convinced that the accused is tendering plea on his own without promise or threat or inducement. Therefore, I convict the accused for all 9 counts as charged.

Accused	-	*I got the summary of facts and I saw the trial. I am happy with that.*
Court	-	*I am formally discharging the assessors after thanking them for this commitment.*

Since the accused admitted summary of facts you may file sentencing submission.

Court - *You may file or submit all factors in mitigation of sentence.*

Accused - *Yes I can file it tomorrow.*

At this juncture I request Mr Lee from Legal Aid Commission to assist the accused person as duty solicitor.

Mr Lee kindly agreed to assist the accused.

I instructed the Police Officer PS Kenikula to take the accused person to Legal Aid Commission to give instruction to Mr. Lee.

Sentencing will be on 03/09/2010 at 9.00 a.m."

[14] The above proceedings demonstrate that though the Appellant was unrepresented, the Appellant knew and understood the legal process. The way the Appellant conducted himself in these proceedings indicates that he had confidence and knowledge in what he was doing. It is quite clear that the Appellant on his own volition made a request to Court to change his plea of not guilty to one of guilty. Therefore his plea is voluntary. For the above reasons, I see no merit in the first ground of appeal and dismiss the same.

Ground 2

[15] The Appellant through his counsel has filed the ground of appeal against the sentence stating that the learned trial judge "erred in law and principle when he made a part of the sentence to run concurrently and the other part consecutively." Hence, the Appellant submits that the sentences be made concurrent.

[16] Counsel for the Appellant based his argument on Section 22 of the Sentencing and Penalties Decree of 2009. Section 22(1) provides:

"Subject to subsection (2) every term of imprisonment imposed on a person by a court, must unless otherwise

directed by court, be served concurrently with any uncompleted sentence or sentences of imprisonment."

[17] According to Section 22(1) the sentencing Judge must give a reasoned justification if he is to make the sentence consecutive when imposing sentences on more than one count.

[18] In **Asaeli Vukitoga v. The State** AAU 0049 of 2008 the Court of Appeal referring to the decision in **Joji Waqasaqa v. The State** Cr. App. No. CAV 009 of 2005 pronounced:

> *"... If the Court said (and it did) that where the 'default position' to depart from that position in making sentences concurrent, then a Court must know when the 'default' position is concurrency makes a reasoned justification to depart from the 'default' position in making sentences consecutive or partly consecutive."*

[19] In the present case the Appellant did not fall into any of the categories referred to in Section 22(2) of the Sentencing and Penalties Decree.

[20] There is no complaint regarding the individual sentences pronounced on each counts.

[21] Section 4(1) of the Sentencing and Penalties Decree No. 42 of 2009 set out the objectives of Sentencing as follows:

> *"1. To punish offenders to an extent in a manner, which is just in all the circumstances;*
> *2. To protect the community from offenders;*
> *3. To deter offenders or other persons from committing offences of the same or similar nature;*
> *4. To establish conditions so that rehabilitation of offenders may be promotes or facilitated;*

5. *To signify that the Court and the community denounce the commission of such offence; or*
6. *Any combination of these purposes."*

[22] Section 4(2) of the Decree further provides that in sentencing offenders a Court must have regard to:

> *"a. The maximum penalty prescribed for the offence;*
> *b. Current sentencing practice and the terms of any applicable and guideline judgments;*
> *c. The nature and gravity of the particular offence;*
> *d. The defender's culpability and degree of responsibility for the offence;*
> *e. The impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;*
> *f. Whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so."*

[23] Further, Section 15(3) of the Sentencing and Penalties Decree also provides that;

> *"As a general principle of sentencing, a court may not impose a more serious sentence unless it is satisfied that a lesser or alternative sentence will not meet the objectives of sentencing stated in Section 4 and sentence of imprisonment should be regarded as the sanction of last resort taking into account all matters stated in the General Sentencing Provisions of the decree."*

[24] The learned trial Judge should have determined the appropriate sentence, taking into account the above provisions.

[25] In the instance case the learned trial Judge has pronounced a sentence of 20 years imprisonment in total by ordering the appellant to serve the terms of 16 years with the second term of 16 years to commence after four years of serving the 1st sentence.

[26] The learned trial Judge in deciding to make the two sentences of 16 years to run concurrently and a part to run consecutively based his decision to do so, only in taking into consideration the gravity of the offence committed on two young children aged five years at the time of the offence.

[27] The reason stated by the learned trial Judge to justify his decision that the victims were 'infants' aged 6 years at the time the appellant commenced committing the offence" is one of the serious aggravating factors considered by him earlier which resulted in the enhancement of the sentence by 7 years.

[28] Hence, the fact considered by the learned trial Judge to justify the maximum sentence appears to be repetitive and cannot be held to be a reasoned justification to impose even a partly consecutive sentence. Therefore, the learned trial Judge has erred in law in imposing the sentence in that manner. However, considering the fact that the Appellant had committed these offences continuously on **two** young children, the proper punishment must reflect society's resentment and rejection of such prolonged suffering and abuse. The sexual offenders also must be deterred from committing this kind of offences.

[29] Section 23(3) of the Court of Appeal Act provides:

> *"On an appeal against sentence, the Court of Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted by law by the verdict (whether more or less severe) in substitution therefore as they think ought to have been passed, or may dismiss the appeal or make such other order as they think just."*

[30] Therefore, without making adjustments to the sentences passed on the separate counts making up a total sentence of 20 years imposed on the Appellant is quashed and varied

to be two terms of 16 years to run concurrently with a non parole period of 14 years from 1st September 2010.

Order of the Court

The Appeal is allowed to the extent that the sentence of 20 years and 16 years of non parole imposed on the Appellant is quashed and substituted with two sentences of 16 years imprisonment to run concurrently and a non parole period of 14 years.

Subject to the above variation in the sentence the appeal is dismissed.

Hon. Mr Justice Calanchini
PRESIDENT, COURT OF APPEAL

Hon. Mr Justice Gamalath
JUSTICE OF APPEAL

Hon. Mr Justice Waidyaratne
JUSTICE OF APPEAL