

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

CRIMINAL APPEAL NO.AAU 19 of 2018

Juvenile Case No.01 of 2011

BETWEEN : **JOSATEKI RALULU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Gamalath, JA**
Prematilaka, JA
Bandara, JA

Counsel : **Ms. Nasedra. S for Appellant**
Ms. Elo. W for Respondent

Date of Hearing : **14 November 2019**

Date of Judgment : **28 November 2019**

JUDGMENT

Gamalath, JA

[1] I have read the judgment of Prematilaka J in draft and I agree with its conclusions.

Prematilaka, JA

[2] This appeal only against the sentence in terms of section 21(1)(c) of the Court of Appeal Act arises from the sentence imposed on the appellant by the Magistrates Court of Lautoka on 04 January 2018 where he had been convicted and sentenced to 05 years imprisonment with a minimum term of 02 years to be served.

[3] The appellant, a juvenile (young person) at the time of committing the offence, had been charged with a single count of rape but after trial found guilty of sexual assault contrary to sections 210(1)(a) and (2) of the Crimes Act by the learned Magistrate exercising extended jurisdiction in terms of section 4(2) of the Criminal Procedure Act. The learned Magistrate had summarised the facts in his sentencing order dated 04 January 2018 as follows.

'On the 12th July 2011 the victim, who was 4 years old at the time came to your house. You took her inside a room and tried to insert your penis into the victim's mouth. It did not go inside her mouth and your penis only made contact with her lips. Later the victim complained to her father about the incident. The matter was later reported to the Police and you were initially charged for rape. You pleaded not guilty and after a full hearing you were convicted for a lesser offence of sexual assault.'

[4] In the impugned order the learned Magistrate had stated that the tariff for the offence of sexual assault under sections 210(1)(a) and (2) of the Crimes Act is 5-10 years of imprisonment as proposed in **State v Ratawake** - Sentence HAC 223 of 2015: 28 November 2016 [2016] FJHC 1078 and he had no power to suspend a sentence over 02 years of imprisonment.

[5] It appears that **Ratawake** has also suggested tariffs of 02-08 years of imprisonment for offences under section 210(1) and 07-16 years of imprisonment for offences under section 210(3) of the Crimes Act respectively. Further, according to **Ratawake** the tariff for an offence under section 210(2) is 05-10 years of imprisonment. In fact sections 210(2) and (3) contain additional elements making the offences described under section 210(1) more aggravated carrying heavier penalties. The sentence prescribed in the Crimes Act for an offence under section 210(1) is 10 years imprisonment while under section 210(2) the offender is liable to 14 years of imprisonment. Section 210(3) prescribes a maximum penalty of life imprisonment.

[6] Section 26 of the Sentencing and Penalties Act, 2009 deals with the suspended sentences.

‘26. — (1) On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.

(2) A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—

(a) does not exceed 3 years in the case of the High Court; or

(b) does not exceed 2 years in the case of the Magistrate’s Court.

(c).....’

[7] Section 4(3) of the Criminal Procedure Act 2009 restricts the sentencing powers of the Magistrates Court in the exercise of extended jurisdiction to those vested in the Magistrates Court by the Criminal Procedure Act. These sentencing powers are mainly set out in section 07 the Criminal Procedure Act. Therefore, logically and by necessary implication the power to suspend sentences by the Magistrates Court should be deemed to be regulated by section 26(2)(b) of the Sentencing and Penalties Act, 2009, for the Magistrates Court cannot assume the powers of the High Court in suspending a sentence under section 26(2)(a) of the Sentencing and Penalties Act. Suspending sentences is part and parcel of the general power of sentencing. Thus, whether the Magistrates Court exercises ‘direct’ jurisdiction under section 4(1)(b) and 4(1)(c) of the Criminal Procedure Act or ‘extended’ jurisdiction under section 4(2) of the Criminal Procedure Act, it cannot suspend a sentence of imprisonment when it exceeds 02 years. However, it must be mentioned that section 26 does not limit the powers of courts as to the length or the operational period of the suspended sentence. For example in **State v Vinakasigadua** HAC 156 of 2010:18 February 2011 [2011] FJHC 77 the sentence of imprisonment was suspended for 10 years and in **State v AA** HAC 122 of 2016: 21 September 2016 [2016] FJHC 842 the term of imprisonment was suspended for 05 years.

[8] Therefore, it is clear that the learned Magistrate is right in his reference to the tariff for the offence of sexual assault which the appellant was charged with and also regarding lack of jurisdiction to suspend the sentence he eventually imposed on the appellant.

[9] However, unfortunately neither counsel seems to have brought to the attention of the learned Magistrate the provisions of the Juveniles Act in the matter of sentencing, for its provisions have a material bearing on the legality of the sentence imposed on the appellant as he had been a juvenile (young person) at the time the offence was committed.

[10] Section 30 of the Juveniles Act is as follows.

'30.- (1) No child shall be ordered to be imprisoned for any offence.

(2) No young person shall be ordered to be imprisoned for an offence, or to be committed to prison in default of payment of a fine, damages or costs, unless the court certifies that he is of so unruly a character that he cannot be detained in an approved institution or that he is of so depraved a character that he is not a fit person to be so detained. (Amended by 23 of 1975 s.3)

(3) A young person shall not be ordered to be imprisoned for more than two years for any offence. (emphasis added)

[11] The only ground of appeal urged before the single Judge of this Court at the leave stage had been that

'The Learned Magistrate erred in fact and in law in sentencing the Appellant to a term of 05 years imprisonment which is in breach of Section 30(1), (2) and (3) of the Juveniles Act.'

[12] The Leave Ruling dated 23 August 2019 deals with this sole ground of appeal as follows.

'[4] The sole ground of appeal is concerned with the imposition of a five years term of imprisonment when the appellant was still only 15 years old at the time of offending. It would appear that the appellant was sentenced on 4 January 2018 on the basis that he was at the time of sentencing an adult over the age of 18 years. The appellant was born on 4 April 1996. At the time of sentencing he was about 21 years

9 months old. However at the time of the offending on 12 July 2011, the appellant was 15 years 3 months old.'

'[5] In section 2 of the Juveniles Act 1973 a juvenile is defined as a person who has not attained the age of 18 years and includes a child and a young person. A young person is a person who has turned 14 but has not yet reached 18 years. As a result the appellant was a young person at the time the offence was committed. Under section 30(2) (sic) of the Juveniles Act a young person shall not be ordered to be imprisoned for more than 2 years for any offence. Therefore the appellant should not have been sentenced to a term of imprisonment of more than 2 years. The sentence of 5 years imprisonment represents a ground of appeal that is likely to succeed as an arguable error in the exercise of the sentencing discretion. The appellant is entitled to be sentenced to the less severe sentence that applied to him as a juvenile at the time the offence was committed. Leave to appeal is granted.' (emphasis added)

[13] It may be mentioned for the purpose of clarity that the definitions of 'juvenile' and 'young person' in section 2 of the Juveniles Act had been amended by section 57 of the Prisons and Corrections Act by increasing the upper age limit from 17 years to 18 years and the single Judge ruling reflects the current position. 'Child' still means a person who has not attained the age of fourteen years.

[14] I agree with the single Judge. I further hold that the crucial threshold for sentencing is not the time of sentencing but the time of the commission of the offence. Guilty persons are punished according to the statutory sentencing regime prevalent at the time of the commission of the offence. Unfortunately, the learned Magistrate had fallen into a sentencing error; perhaps, by the fact that appellant was no more a juvenile/young person at the time of sentencing. Some vigilance on the part of counsel could have easily prevented the learned Magistrate from making this error resulting in avoidable appeal proceedings. Therefore, the appellant being a juvenile/young person at the time of the commission of the offence, sentence of 05 years of imprisonment imposed by the learned Magistrate is illegal.

[15] The Court of Appeal in Matagasau v State AAU0120 of 2017: 4 October 2018 [2018] FJCA 161 had previously taken up the same position by stating that

'[8] Under section 30 (3) of the Juveniles Act 1973, a young person shall not be imprisoned for more than 2 years for any offence.'

- [16] The only issue that remains to be resolved is as to what course of action should be taken after the current sentence is set aside by this Court. The appellant had served his sentence from 04 January 2018 until he was enlarged on bail pending appeal on 23 August 2019 (*i.e.* about 01 year, 07 months and 19 days). The appellant's period of remand pending trial during which he had been on bail, has been about a week and not regarded as a significant factor in his sentencing. He still has about 04 months and 12 days remaining from 02 years of maximum imprisonment that could have been imposed.
- [17] Having considered all the factors that the learned Magistrate had taken into account in the impugned sentencing order, I do not propose to disturb the sentence in any other way other than limiting it to the maximum imprisonment of 02 years as mandated by section 30(3) of the Juveniles Act. In fact that is the basis of the only sentencing error pointed out on behalf of the appellant.
- [18] This Court has been informed by the counsel for the appellant and confirmed by his employer in writing that the appellant has been working as a casual labourer since 03 September 2019. Considering the fact that the appellant has already served a substantial portion of the 02 year period of imprisonment I have proposed and the fact that he is gainfully employed at present, I do not think that the appellant should be made to suffer the balance portion of incarceration at this juncture. However, given the propensity to commit sexual offences the appellant had shown in the early days of his life some deterrence into the future without obstructing his rehabilitation is not unwarranted.
- [19] Therefore, I quash the sentence imposed by the learned Magistrate on 04 January 2018 and allow the appeal under section 23 (3) of the Court of Appeal Act. Acting further under section 23(3), I proceed to substitute a sentence of 02 years of imprisonment on the appellant in place of the sentence of 05 years of imprisonment to run from 04 January 2018. Having considered the period of sentence the appellant has already served and the short period of remand, I determine that he has to serve a sentence of 04 months imprisonment which is, however, suspended for 05 years as I am satisfied that it is appropriate to do so in all the circumstances of this case.


Bandara, JA


[20] I agree with the reasoning and conclusions reached by Prematilaka JA.

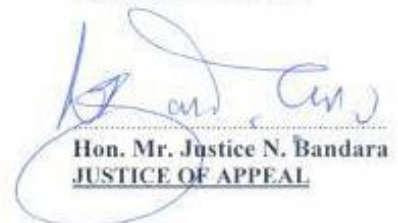
The Orders of the Court:

- (i) *Appeal is allowed.*
- (ii) *The sentence imposed on the appellant by the learned Magistrate on 04 January 2018 is quashed.*
- (iii) *The appellant is sentenced to a term of 04 months imprisonment to run from 28 November 2019 but the sentence is suspended for 05 years.*




Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL


Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL


Hon. Mr. Justice N. Bandara
JUSTICE OF APPEAL