IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Criminal Appeal No. 014 of 2013

BETWEEN : **THE STATE**

Appellant

AND : **LEONE KOTOBALAVU VERESA**

Respondent

BEFORE : **HON. MR. JUSTICE PAUL MADIGAN**

Counsel : Mr Korovou with Mr Fotofili for the State.
Mr. S. Waqanaibete (L.A.C.) for the Respondent.

Dates of hearing : 30 April, 16 May, 11June 2013
Date of Judgment : 4 July 2013.

JUDGMENT

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[1] On the 17th July 2012 in the Nasinu Magistrates Court, the respondent was convicted after trial of rape, contrary to sections 149 and 150 of the Penal Code, Chapter 17 Laws of Fiji. He was sentenced on the 25th January 2013 to 8 years' imprisonment, a sentence which was partially suspended in that he was to serve weekends in the prison and weekdays at large in the community. There was no minimum term set before he was eligible for parole but a Domestic violence Restraining Order with no-contact and non molestations conditions was put in place.

[2] The State appeals the sentence on the grounds that:

(a) that the Magistrate erred in law in imposing a partially suspended sentence, and

(b) that the Magistrate failed to consider section 18(1) of the Sentencing and Penalties Decree 2009 in not imposing a non parole sentence.

[3] The unique and disturbing facts of the case were rather clumsily summarized by the learned Magistrate as follows:

> *"The accused and the complainant are related as biological brother and sister. On the day in question, that afternoon, the victim was called by the accused to his home. The accused was acquainted by their parents regarding some lesbian behavior and stealing of money. He then questioned the victim regarding homosexual relationship (Lesbian) with a lady and stealing of $600 money which she denied. The accused was having party gathering and fully drunk at the moment. The victim was then assaulted and questioned. While in the process the victim urinated and passed feces(sic) because of fear and assaults. She was 22 years at that time. Then, on request of the accused's wife the victim had a bath and cleaned herself and then, she was taken into a room for counseling instead the accused ravished and raped her."*

[4] This brief and unhappily worded synopsis of the facts although rather perturbing in itself does not disclose the true facts of the case. According to the victim, the accused told her that he "would do something to her to make her forget she was a lesbian". She attempted to run away from him but he chased her onto the road and caught her; putting her in so much fear that it was then that she lost control of her bladder and bowels. He kept her in a locked bedroom for about three hours while he subjected her to sexual indignities. The accused confirmed the chase and the fact that she soiled herself but said he was too drunk to remember the rape. He did remember having sex with somebody but could not remember who with. At all times the accused's wife was in an adjacent room.

[5] It is not for this Court in this judgment to pass comment on those facts and they obviously speak for themselves.

[6] In his sentence, the learned Magistrate in referring to authorities which would suggest an appropriate sentence of 15 years for the crime, quite properly found himself restricted to the Magistrates Court's maximum sentence of 10 years imprisonment and therefore took that figure as his starting point. He added two years to this for aggravating features which he found to be;

(i) the complainant being his sister
(ii) breach of trust between brother and sister
(iii)the victim being severely assaulted.

[7] He reduced that 12 year interim sentence by 4 years for mitigating features which he found to be;

"(i) First offender and ex Special Police Inspector
(ii) 33 years of age
(iii) Married with 4 children
(iv) Care giver of wife's 64 year old grandmother
(v) Matter hanging over his head for 5 years
(vi) you suffered humiliation and mental agony
(vii) you are totally remorseful of your actions
(viii) you seek suspended sentence."

[8] These partially valid mitigating factors thus reduced the sentence to a term of 8 years, which was the final sentence that the Magistrate arrived at. He then went on to consider whether he could suspend the sentence, but quite properly found that by section 26(2) of the Sentencing and Penalties Decree 2009 ("the Decree") he could not "**wholly** suspend a sentence of more than two years". (His emphasis).

[9] The Magistrate then went on to consider other options he thought available under that Decree that would allow him to impose "a lesser or alternative sentence " pursuant to section 15(3) of the Decree as well as to satisfy what

he perceived to be the objective for first offenders to "bend over backwards to avoid immediate custodial sentence for first offenders" (He adopted the words of the Court of Appeal in **Prasad** AAU0023.93).

[10] He concluded his sentence by stating that "it is a sad and unfortunate incident , but he was so foolish and no proper judgment could be taken at that time due to his anomalous mind" before proceeding to pass the partially suspended sentence of weekend imprisonment.

[11] **Discussion**.

This Court will proceed to consider the propriety of the suspension of sentence as well as the lack of minimum term which are the grounds of appeal, but will not comment on the final length of sentence for reasons soon to be apparent.

[12] Section 26 of the Decree reads as follows:

"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 Magistrates Court.

(3).....

(4).....

(5)..... "

[13] A sentence of 8 years clearly cannot be suspended because it exceeds the statutory maximum stipulated in subsection (2)(b) and the Magistrate has not stated under what authority he has seen to partially suspend the sentence. He states in his sentence that he cannot **wholly** suspend the sentence (his emphasis) leaving himself the option to partially suspend it, but the section does not make this distinction. The qualifying clause "the whole or part of the sentence" contained in 26(1) must logically follow through to subsection (2).

[14] I find that the Magistrate had no power to partially suspend the sentence, there being no provision in the Decree for a sentence of more than 2 years to be suspended either in whole or in part. The sentence of eight years must therefore be wholly served *intra muros*.

[15] The second ground of appeal relates to the failure of the Magistrate to set a minimum term, the State submitting that the imposition of a minimum term is mandated by the provisions of section 18 of the Decree. Section 18 reads:

> 18 - (1)Subject to sub-section (2), when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is not eligible to be released on parole.
>
> (2)If a court considers that the nature of the offence, or the past history of the offender, make (sic) the fixing of a non-parole period inappropriate, the court may decline to fix a non-parole period under sub-section (1).
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> (3).....
>
> (4).....
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> (5).....
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> (6).....
>
> (7)..... "

[16] Again, it is clear from the statutory provisions that although it is correct that a minimum term **must** be imposed, there is a discretion for the sentencer not to do so. The alternative is admittedly contradictory but it is within the sentencing tribunal's powers when the nature of the offence or the past history of the offender are taken into account. It is unfortunate that the Magistrate did not state any reasons for not imposing a minimum term because it is not known if he was turning his mind to the offence or to the offender and it would have been far better had he done so, but it is a discretion that an appellate court should not interfere with lightly.

[17] Having said that, I find that in declining to impose a minimum term under s.18(2) when mandated to do so by s.18(1) , it must always be incumbent on the sentencer to provide reasons why he is doing so . Those reasons will either be the unusual nature of the offence or the special circumstances of the offender and nothing else. Failure to state the reasons will render the sentence invalid.

[18] The invalidity of the suspension restores the sentence of 8 years against this respondent and it is now for this court to set a minimum term. The State has not appealed the length of the 8 year term but this Court considers that in the unique and deplorable circumstances of this case, the 8 year sentence is manifestly lenient and totally inadequate.

[19] The facts and circumstances of this case would warrant a sentence of at least 12 years imprisonment, and probably more and the Magistrate should have used his powers to transfer the accused to the High Court for sentencing pursuant to section 190 of the Criminal Procedure Decree. The Magistrate was well aware of the range of sentences this offence would attract when he referred to sentencing authorities at the beginning of his sentence. When he did that, it should have been quite apparent to him that the case was beyond the scope of his sentencing powers and transferred the case.

[20] Section 256(3) of the Criminal Procedure Decree gives this Court the power to quash the sentence passed below and pass another sentence in substitution for the sentence as it thinks ought to have been passed, but that restricts this appellate Court to a maximum sentence of 10 years, which is the maximum sentence the Magistrate could have passed.

[21] This court is of the view that 10 years is still too lenient a sentence for the crime in the circumstances and would therefore adopt the following course: this Court sets aside the sentence passed below and by the terms of s.256(2)(e) of the Criminal Procedure Decree sends the case up to the High Court for sentencing; which is a procedure the Magistrate should have done at the time.

[22] The State's appeal against sentence is allowed and I make the following orders:

0. The sentence passed below is quashed pursuant to section 256(2)(a) of the Criminal Procedure Decree.
1. The accused is sent to the High Court for sentencing pursuant to section 190(1) of that decree.
2. A copy of this judgment will be sent to the Chief Registrar of the High Court to satisfy the requirement of s.190(2) of that decree.
3. The case will be called before me at 10am on 15 July 2013 for the parties to make sentencing submissions and to address me in mitigation.

Paul K. Madigan

JUDGE

At Suva
4 July 2013.