IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

HAA NO. 34 OF 2016

BETWEEN : JONE TABAKA

Appellant

AND : STATE

Respondent

Counsel : Mr. M. Fesaitu for Appellant

Ms. L. Latu for Respondent

Date of Ruling : 25th of November, 2016

JUDGMENT

Introduction

1. The Applicant files this Petition of Appeal against the Sentence imposed by the learned Magistrates of Tavua on the 28th of June 2016 on the following grounds *inter alia;*

Appeal against Conviction,

i) That the learned Magistrate erred in law that the guilty plea is equivocal; and

ii) That the leaned Magistrate erred in law when he took irrelevant factors into account and by failing to take relevant factors into account,

Appeal against Sentence,

i) *That the leaned Magistrate erred in law that he mistook the facts and imposed the 3 years 10 months and 28 days sentence which is wrong in principle in all the circumstance of the case; and*

ii) *The learned Magistrate erred in law when gave a non-parole of two years before being eligible for parole,*

2. The Appellant and the Respondent appeared in court on the 21st of September 2016. Both the parties agreed to have the hearing by way of written submissions. I accordingly directed the parties to file their respective written submissions, which they filed as per the directions. Having carefully considered the respective written submissions of the parties and the copy record of the proceedings of the Magistrates court, I now proceed to pronounce my judgment as follows.

Background

3. The Appellant was charged in the Magistrates court of Tavua for one count of Indecently Insulting or Annoying Any Person, contrary to Section 213(1) (b) of the Crimes Decree and one count of Sexual Assault, contrary to Section 210 (1) (a) of the Crimes Decree. The Appellant was first produced before the Magistrates court on the 26th of May 2016. The Appellant pleaded guilty for both of the offences on the 27th of June 2016. He was then convicted and sentenced for a period of four years for the offence of Sexual Assault and four months imprisonment for the offence of Indecently Insulting or Annoying Any Person. The learned Magistrate ordered that both sentences to be served concurrently and reduced one month and two days for the time spent by the Appellant in

remand custody prior to the sentence, making the final sentence to be serve as three (3) years, ten (10) months and twenty eight (28) days. The learned Magistrate has further ordered that the Appellant is not eligible for any parole for a period of two years. Aggrieved with the said sentence the Appellant filed this petition of appeal.

The Law

4. Since the Appellant has been convicted upon his own plea of guilt, he is only allowed to appeal against the Sentence pursuant to Section 247 of the Criminal Procedure Decree, which states that;

"No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates court, except as to the extent, appropriateness or legality of the sentence"

5. Gounder JA in **Saqainaivalu v State [2015] FJCA 168; AAU0093.2010 (3 December 2015)** has discussed the applicable principles of reviewing of a sentence by an appellate court, where his Lordship held that;

"It is well established that on appeals, sentences are reviewed for errors in the sentencing discretion (Naisua v The State, unreported Cr. App. No. CAV0010 of 2013; 20 November 2013 at [19]). Errors in the sentencing discretion fall under four broad categories as follows:

i) Whether the sentencing judge acted upon a wrong principle;

ii) Whether the sentencing judge allowed extraneous or irrelevant matters to guide or affect him;

iii) Whether the sentencing judge mistook the facts;

iv) Whether the sentencing judge failed to take into account some relevant consideration.

Reasons for sentence form a crucial component of sentencing discretion. The error alleged may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (House v The King [1936] HCA 40; (1936) 55 CLR 499). What is not permissible on an appeal is for the appellate court to substitute its own view of what might have been the proper sentence (Rex v Ball 35 Cr. App. R. 164 at 165)"

Ground I

6. The first ground of appeal is founded on the contention that the plea of the Appellant was not unequivocal. He submitted that he was not in a proper state of mind to make a decision of his plea when he entered his plea of guilt.

7. The Fiji Court of Appeal in **Nalave v State [2008] FJCA 56; AAU0004.2006; AAU005.2006 (24 October 2008)** has discussed the approach of the appellate court in determining appeal against conviction that was entered upon the plea of guilty, where the Fiji Court of Appeal held that;

"It has long been established that an appellate court will only consider an appeal against conviction following a plea of guilty if there is some evidence of equivocation on the record (Rex v Golathan (1915) 84 L.J.K.B 758, R v Griffiths (1932) 23 Cr. App. R. 153, R v. Vent (1935) 25 Cr. App. R. 55). A guilty plea must be a genuine consciousness of

guilt voluntarily made without any form of pressure to plead guilty (R v Murphy [1975] VR 187). A valid plea of guilty is one that is entered in the exercise of a free choice (Meissner v The Queen [1995] HCA 41; (1995) 184 CLR 132).
In Maxwell v The Queen (1996) 184 CLR 501, the High Court of Australia at p. 511 said:

> ***The plea of guilty must however be unequivocal and not made in circumstances suggesting that it not a true admission of guilt. Those circumstances include ignorance, fear, duress, mistake, or even the desire to gain a technical advantage. The plea may be accompanied by a qualification indicating that the accused is unaware of its significance. If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered.***

8. The Fiji Court of Appeal in **Tuisavusavu v State [2009] FJCA 50; AAU0064.2004S (3 April 2009)** held that it is the onus of the Appellant to establish that the plea of guilt was not unequivocal. The Fiji Court of Appeal in Tuisavusavu (supra) held that;

> *'The authorities relating to equivocal pleas make it quite clear that the onus falls upon an appellant to establish facts upon which the validity of a guilty plea is challenged (see Bogiwalu v State [1998] FJCA 16 and cases cited therein). It has been said that a court should approach the question of allowing an accused to withdraw a plea 'with caution bordering on circumspection' (Liberti (1991) 55 A Crim R 120 at 122). The same can be said as regards an appellate court considering the issue of an allegedly equivocal plea.*

Whether a guilty plea is effective and binding is a question of fact to be determined by the appellate court ascertaining from the record and from any other evidence tendered what took place at the time the plea was entered. We are in no doubt from the material before us that the 1st appellant's plea was not in any way equivocal. As the 1st appellant admitted to us during argument, he pleaded guilty to the charge after having been advised to do so by his counsel in the hope of obtaining a reduced sentence. As was stated by the High Court of Australia in Meissner v The Queen [1995] HCA 41; (1995) 184 CLR 132);

> ***"It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence."***

9. The Appellant has not provided any material to suggest that the plea was made under a circumstances that he could not understand the consequence of it. The learned Counsel for the Appellant in her submission has merely stated that he was not in a proper state of mind to make his plea. Apart from that there is no material or evidence to suggest that the plea of the Appellant was equivocal.

10. The record of the proceedings of the Magistrates court states that the Appellant was properly explained and given time to exercise his rights to obtain legal assistance. Initially, he had indicated to the court that he needs time to obtain legal aid assistance. However, on the 27th of June 2016, he has informed the court that he will represent himself. The Appellant has then informed the court that he was ready to take his plea. The charges were read over to him in I-taukei language ,which he preferred for. He has then pleaded guilty for the offences. The learned Magistrate in his sentence has stated that the court was satisfied that the pleas was entered on the Appellant's own free will. He was then read over the summery of facts, which he admitted in open court. Accordingly, I am satisfied that the record of the proceedings of the Magistrate court has confirmed that the Appellant was given all of his rights and his plea of guilt was not equivocal. In the absence of any material to suggest otherwise, I find the first ground of appeal has no merit and fails accordingly.

11. The learned Counsel for the Appellant informed the court that the Appellant does not wish to pursue the second ground of appeal and abandon it.

Ground III

12. The third ground of appeal is founded on the contention that the learned Magistrate erred in law that his sentence is wrong in principle in all the circumstances of the case.

13. The learned Magistrate has correctly considered the offence of Sexual Assault as the principle offence and then accurately identified the applicable tariff limit as 2 to 8 years.

14. Justice Madigan in **State v Laca - Sentence [2012] FJHC 1414; HAC252.2011 (14 November 2012)** has outlined the acceptable tariff for the offence of Sexual Assault in more elaborative manner, where his lordship has held that;

"The maximum penalty for this offence is ten years imprisonment. It is a reasonably new offence, created in February 2010 and no tariffs have been set, but this Court did say in Abdul Kaiyum HAC 160 of 2010 that the range of sentences should be between two to eight years. The top of the range is reserved for blatant manipulation of the naked genitalia or anus. The bottom of the range is for less serious assaults such as brushing of covered breasts or buttocks.

A very helpful guide to sentencing for sexual assault can be found in the United Kingdom's Legal Guidelines for Sentencing. Those guidelines divide sexual assault offending into three categories:

Category 1 (the most serious)

Contact between the naked genitalia of the offender and naked genitalia face or mouth of the victim.

Category 2

i) Contact between the naked genitalia of the offender and another part of the victim's body;

ii) Contact with the genitalia of the victim by the offender using part of his or her body other than the genitalia, or an object;

iii) Contact between either the clothed genitalia of the offender and the naked genitalia of the victim; or the naked genitalia of the offender and the clothed genitalia of the victim.

Category 3

Contact between part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia).

These very sensible categories of offending are adopted by this Court and they provide a very useful guide to sentencing within the tariff of two to eight years.

22. It was revealed in the Summary of Facts which the Appellant had admitted in open court that he has rubbed his erected penis on the backside of the victim. This act undoubtedly falls within the scope of category 2 (i) as expounded in **Leca (supra).**

23. Having correctly identified the acceptable tariff and the level of assault, the learned Magistrate has selected four years as the starting point.

24. The learned Magistrate has then added three years for the aggravating factors and reduced one year for the mitigation and further two (2) years for his plea of guilt, reaching the final sentence of four years imprisonment.

25. The learned Counsel for the Appellant did not make any submission challenging the sentence imposed for the count of Indecently Insulting or Annoying a Person.

26. In view of the reasons discussed above, I find the third ground of appeal has no merits and fails accordingly.

Ground IV

27. The fourth ground of appeal is founded on the contention that the learned Magistrate erred in law when he imposed a non-parole period of two years.

28. Section 18 (4) of the Sentencing and Penalties Decree states that;

"Any non-parole period fixed under this Section must be at least 6 months less than the term of the Sentence"

29. The head sentence of this case is three (3) years, ten (10) months and twenty eight (28) days, that is more than six months of the non-parole period of two years. Hence, I do not find any merit in the fourth ground of appeal.

30. Having considered the reasons discussed above, I refuse this Petition of Appeal and dismiss it accordingly.

31. Thirty (30) days to appeal to the Fiji Court of Appeal.

R. D. R. Thushara Rajasinghe

Judge

At Lautoka
25th November, 2016

Solicitors : Office of Legal Aid Commission
Office of Director of Public Prosecution