A

(1) JONE CIVATABUA
(2) SAIMONI KACILALA

v.

B

REGINAM

[COURT OF APPEAL—Speight V. P., Mishra J. A., O'Regan J. A.]

Criminal Jurisdiction

C

(Criminal Law—Rape—factors to be regarded by Courts in imposing sentence. Abduction contrary to Penal Code s.252—inappropriate charge—"unnatural lust"— in the context meant sodomy—no evidence of any intention thereof—substituted conviction for abduction. "Unnatural lust"—meant in the context, sodomy.)

D

Hearing: 14 September, 1987.
Judgment: 25 September, 1987.

S. Matawalu for the first Appellant
K. Bulewa for the second Appellant
M. Raza, (Director of Public Prosecutions) *and S. Singh* for the Respondent

E

Appeals by Jone Civatabua and Saimone Kacilala against their convictions for offences on 25 October 1985 against the person of a young woman Tadulala.

That morning Lite Tadulala was walking down McGregor Street Suva she encountered a group. eight or so young men and two girls. One of the men (second appellant) seized her by the hand against her will and pulled her some distance. She went to the ground was dragged along the roadway. eventually to the Lau Rehabilitation Centre. She sustained multiple abrasions. One of the girls threw a stone which caused the complainant a head wound. There an attempt was made by an unidentified man to molest her. She avoided him. Shortly afterwards the first appellant came along and had intercourse with her. He said this was consensual, she said it was rape.

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The first appellant was convicted of this charge and sentenced to imprisonment for 8 years. He appealed against both conviction and sentence but abandoned the former.

Considerations to be taken into account in imposing punishment for rape were referred to by Lord Lane C. J. in *R. v. Roberts* thus

H

"first to all to mark the gravity of the offence: second to emphasise public disapproval. third. to serve as a warning to others. Fourth. to punish the offender. and last but by no means least. to protect women."

There was a plea in mitigation, the facts of which are set out in the Reasons for Judgment.

The second appellant was charged with abduction (Penal Code section 252) and assault occasioning actual bodily harm.

He was duly convicted and appealed against conviction and sentence. These were abandoned except that against the conviction for abduction.

Section 252 reads

> "Any person who kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected, to grievous harm, or slavery, or to the unnatural lust of any person or knowing it to be likely that such person will be so subjected; or so disposed of, is guilty of a felony ...."

The Prosecutor in opening the prosecution case had referred to "unnatural lust" as meaning intercourse outside the bounds of marriage. That was not challenged by the defence.

On appeal appellant's counsel submitted that the expression referred to sodomy and bestiality but because of the reference to "any person" meant sodomy in the context of the preferred charge.

Reference was made to the power of the Court of Appeal set out in the Court of Appeal Act section 22(2) to substitute a conviction for some other offence. That section read

> "Where a party to an appeal brought under the provisions of this section has been convicted of an offence and ..... the Supreme Court could have found him guilty of some other offence, and on the finding of ..... the Supreme Court it appears to the Court of Appeal that the court must have been satisfied of facts which proved him guilty of that other offence, the Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the conviction entered ..... of that offence and pass such sentence (whether more or less severe) in substitution for the sentence passed . . . . . by the Supreme Court for that other offence."

Reference was made also to the Penal Code section 249 which rendered abduction simpliciter a felony.

Held: The sentence of 8 years' imprisonment for rape, a prevalent offence in Fiji imposed on the First Appellant was, despite the alleged mitigating factors, which were clearly not overlooked by the trial judge, appropriate. Whether or not the appellant was aware of the earlier sufferings of the complainant, she was bearing signs of the injuries and in a very distressed state; yet he subjected her to the further ordeal and indignity of rape.

Appeal of first appellant dismissed.

A In the second appellant's trial the meaning attributed to the impression "unnatural lust" which was conveyed to the assessors viz "intercourse outside the bounds of marriage" was incorrect. The expression, in the context meant Sodomy.

B See definition of "unnatural—against the order of nature. Shorter Oxford Dictionary and Criminal Code of Queensland section 208: Indian Penal Code 1860 section 367: Commentary of Sir Hari Singh; Penal Code section 152 prescribed abduction of a woman for the purpose of her being subject to vaginal intercourse, s.252 prescribed inter alia abduction of a man or woman for the purpose of being subjected to sodomy. There being no evidence of any intention or from which it could be inferred on the part of the appellant to have the appellant subjected to sodomy, the conviction could not stand.

C *Appeal Upheld*: In respect of the second appellant the power of substitution conferred by s.22(3) was invoked. Conviction for abduction, contrary to s.249 substituted for conviction at the trial. Appellant sentenced to imprisonment for 5 years.

Appeal against sentence of imprisonment for two years for assault occasioning actual bodily harm dismissed.

D Case referred to:

R. v. Roberts (1982) 1 All E.R. 609

Judgment of the Court

O'REGAN J.A.:

E The charges preferred against both appellants all involved allegation of offences against the person of a young woman named Lite Tadulala which were said to have occurred on the 25th October 1985.

F On that morning. Miss Tadulala was walking along McGregor Road in the city of Suva on her way to work when she came upon a group of eight or so young men and two girls. One of the young men. whom she later identified as the second appellant. took her by the hand against her will. pulled her across McGregor Road into and along Mitchell Street to Gorrie Street and thence to the Lau Rehabilitation Centre. During these events she went to the ground and thereafter was dragged along the roadway and sustained multiple abrasions to her right leg and a small head wound. The latter. however was caused by a stone thrown by one of the girls and thus not referable to the second appellant.

G At the Rehabilitation Centre she was shown some consideration by one of the inmates who sponged her head and other wounds and had one of the girls present provide her with a shirt to replace her own which had become bloodstained. Subsequently an attempt was made by an unidentified man to molest her but she managed to avoid him. but shortly afterwards the first appellant came upon the scene and in short order had intercourse with her. intercourse which he said was consensual and she said was rape.

H Arising out of these incidents the first appellant was charged with rape contrary to section 149 of the Penal Code—a charge upon which he was ultimately convicted and sentenced to imprisonment for 8 years. He originally appealed against both conviction and sentence but at the hearing before us abandoned the former.

On his behalf, Mr Matawalu stressed that the first appellant was not present during the events preceding the arrival of the complainant at the Rehabilitation Centre and that there was no evidence that he was aware of them. He also brought to our notice that the learned Judge had made no reference in his observations in passing sentence to the appellant's reference in his plea in mitigation to his reformation since the incident and his prayer for leniency in the interest of his rehabilitation. And, in all those circumstances, he submitted that the sentence was manifestly excessive and should, as he put it, be drastically reduced.

It seems clear that the first appellant was not privy to or even present at the events preceding the complainant's entry into the centre. But whether he subsequently became aware of them or not, the fact is that when he first saw her she was bearing signs of her injuries and in a very distressed state. But notwithstanding that he subjected her to the further ordeal and indignity of rape.

The Judge did not refer to the appellant's profession of reformation but it is clear from the record that it did not escape him that it was at a centre for rehabilitation at which endeavours by his own people to rehabilitate him were being made, that he chose to embark upon such gross misconduct and it may well have struck him, as it strikes us, that his assertion of present and future rehabilitation may well have a hollow ring about it.

The appellant has a long list of convictions which are in the main for a variety of minor offences but they are punctuated with three instances of serious assaults and all in all his history indicates proclivity to contempt for others and general lawlessness.

The crime of rape is all too prevalent in Fiji and that, of course, is a relevant feature to which regard must be paid on sentencing offenders.

In cases of rape the sentence must be such as:

"first of all mark the gravity of the offence: second to emphasise public disapproval, third, to serve as a warning to others. Fourth, to punish the offender, and last but by no means least, to protect women."

See *R. v. Roberts* (1982) 1 All E.R. 609 per Lord Lane C. J.

Having taken account of those considerations and of the prevalence of the offence in this country we are of the opinion that the sentence of imprisonment for 8 years is not excessive: to the contrary, we think it entirely appropriate.

Accordingly the first appellant's appeal against sentence is dismissed.

The second appellant was charged first with abduction contrary to section 252 of the Penal Code and with assult occasioning actual bodily harm, and convicted on both counts. He appealed both against conviction and sentence but at the hearing all the grounds of appeal against conviction except one were abandoned and that one related solely to the charge of abduction under section 252.

Section 252 provides:

"Any person who kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected, to grievous harm, or slavery, or to the unnatural lust of any person or knowing it to be likely that such person will be so subjected: or so disposed of, is guilty of a felony . . . . . ."

We have set out the body of section in full to show the context in which the offence actually charged finds itself.

The appellant was in fact, charged that he:—

A "did abduct Lite Tadulala, knowing it to be likely that she would be subjected to the unnatural lust of any person."

The appeal alleged non-direction by the learned trial Judge as to the meaning of the phrase "unnatural lust".

In opening the case in the court below the learned prosecutor told the assessors that unnatural B lust meant "sexual intercourse outside the bounds of marriage". That proposition was not challenged by counsel for the accused and, as well might be expected, this appellant, who by that stage of the trial, had taken over the conduct of his own defence, and did not refer to it in his final address. And neither did the learned judge in his summing up.

Before us, Mr Raza allowed that the prosecution has stated the meaning of the C phrase too narrowly but he himself did not attempt to submit as to its meaning.

Mr Bulewa submitted that in its widest connotation the phrase referred to the offences of sodomy and bestiality but in the context of the other charge preferred, because of the dual reference to "any person" in the section, it related solely to sodomy. We uphold Mr Bulewa's submission.

Construing the phrase in its ordinary meaning—as we first do before resorting to D authority and texts—we find the Shorter Oxford dictionary 3rd edition defining "lust" as "libidinous desire" and "unnatural" as "not in accordance with the usual order of nature".

The words "the order of nature" have been incorporated into the law of Queensland relating to both sodomy and bestiality. Section 208 of the Criminal Code of that state provides:

E *Unnatural offences:*

Any person who—

(1) has carnal knowledge of any person against the order of nature: or
(2) has carnal knowledge of an animal:
(3) permits a male person to have carnal knowledge of him or her against the F order of nature:

is guilty of a crime.

On a literal construction of subsections (1) and (3) it is clear that they relate to sodomy. The dual use of the phrase "any person" in subsection (1) and the words "him and he" in subsection (3) preclude any other construction.

G Section 367 of the Indian Penal Code 1860 has like provisions. It reads:

"Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment......"

H In this commentary on that section Sir Hari Singh Gour referring to this section had this to say:—

"Kidnapping or abduction of a woman for gratification *of natural lust* is punishable under the last section. Kidnapping or abduction for the gratification *of unnatural lust* is punishable under this section." A

—4th edition p. 1817

(The emphasis is ours.)

There are similar contrasting provisions in the Criminal Code of this country.

Section 152, so far as it is relevant, provides: B

"Any person, with intent to ...... carnally know any woman of any age or to cause her to be .... carnally known by any other person, takes her away, or detains her, against her will is guilty of a felony ...."

"Carnal knowledge", generally speaking, encompasses both vaginal and anal intercourse but in C this section we think it refers only to the former. If the phrase *"unnatural lust"* in section 252 encompasses vaginal intercourse as the assessors in this case were led to believe and the reference of carnal knowledge in section 152 was intended to encompasses sodomy, those two sections would be providing for two identical offences, a result which we cannot accept to have been the intention of the legislature. We conclude therefore that Section 152 prescribes as a felony, inter alia, abduction of a woman for the purpose of her being subjected to vaginal intercourse and D section 252 prescribes abduction inter alia, of man or woman for the purpose of being subjected to sodomy. And the references we have made to the Penal Codes of Queensland and Indian lend confirmation to those conclusions.

In the present case there was no evidence of any itention on the part of the appellant to have the complainant subjected to sodomy and none from which such an intention could be inferred. It follows, therefore, that the conviction cannot E stand.

Mr Raza invited us in that event, to exercise the powers conferred upon us by subjection (2) of section 22 of the Court of Appeal Act (Cap. 12) which provides:—

"Where a party to an appeal brought under the provisions of this section has been convicted of an offence and .... the Supreme Court could have found him guilty of some other offence, and on the finding of .... the Supreme Court it F appears to the Court of Appeal that the court must have been satisfied of facts which proved him guilty of that other offence, the Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the conviction entered .... by the Supreme Court a conviction of guilty of that offence and pass such sentence (whether more or less severe) in substitution for the sentence passed ...... by the Supreme Court for that other offence."

Mr Raza invited us to substitute a conviction under either section 152 to which G we have earlier referred or section 249 which renders abduction simpliciter a felony. Having regard to the requirements of section 22(5) of the Court of Appeal Act we think the appropriate course is to substitute a conviction for abduction contrary to section 249. We so order. And we pass a sentence of imprisonment for five years in substitution for the sentence passed by the Supreme Court.

The appellant has appealed also against the concurrent sentence of imprison- H ment for two years on the charge of assault occasioning actual bodily harm.

Whilst the complainant's injuries were not of a serious nature the circumstances in which she sustained them were and, all in all, we think the sentence was entirely appropriate. The appeal against sentence on that charge is dismissed.

Appeals dismissed.