JOVESA TURAGASAU, SEMI KEDRAWACA SAULECA & APISAI BARIA

A

v.

THE STATE

[HIGH COURT, 1990 (Sadal J) 15 June]

B Appellate Jurisdiction

Sentence- rape- young first offenders- Penal Code (Cap 17) Sections 149 and 150.

On appeal against sentences of immediate imprisonment imposed on 3 young offenders by the Magistrates' Court for the offence of rape the High Court stressed
C the seriousness of the offence and the importance of parity in sentencing.

Cases cited:

R v. Billam & Ors [1986] 1 W.L.R. 349
R v. Forde [1923] 2 K.B. 400

D

1st & 2nd Appellants in Person
K. Bulewa for the 3rd Appellant
I. Wikramanayke for the State

Appeals against sentences imposed in the Magistrates' Court.

E **Sadal J**:

0n the 19th December 1989 the three appellants, Jovesa Turagasau the first appellant, Semi Kedrawaca Sauleca the second appellant Apisai Baria the third appellant on their own plea were convicted of rape contrary to sections 149 and 150 of the Penal Code and each was sentenced to five years' imprisonment and
F to three strokes of corporal punishment, the latter being subject to confirmation by the High Court.

At first the three appellants appealed against the sentence as being harsh and excessive. The third appellant who was represented by counsel in this appeal also appealed on the ground that the sentence was wrong in principle.

G With the leave of the Court the third appellant on 26th April 1990 appealed against conviction on the grounds -

(a) that the plea was equivocal and conviction wrong and unlawful

(b) that the conviction was wrong and unlawful in all the circumstances of the case.

Again with the leave of the Court the third appellant on 25th May 1990 filed an

amended petition against the conviction. The grounds against conviction are -

"2(a) That the plea was equivocal and conviction wrong and unlawful. That the appellant did not intend to plead guilty at the trial but was coerced and placed under duress by the Police to admit the allegation after being assaulted during his interview at the Lautoka Police Station within 24 hours of his arrest and also immediately before his appearance in Court. A

That the record stated that "Other three accused questioned and admitted guilt". Police statement of the Appellant showed that he did not admit guilt. Case of an error on the face of the record. B

(b) that the conviction was wrong and unlawful in all of the circumstances of the case. That the learned Magistrate should have exercised extra caution and make detailed enquiries into: C

(a) Degree of involvement of each accused;
(b) Statements given to the Police by the Appellant; such statements should have been seen by the court as a matter of caution.
(c) The antecedent of the Appellant should have been carefully scrutinised by the Court, in particular the court should have been put on guard in view of the fact that the Appellant was a total stranger to city life and was therefore most unlikely to commit such serious offence so soon after his arrival to visit the city for the first time. D
(d) That the Appellant was not represented by Counsel at the trial and given his antecedents was totally at a loss and unfamiliar with criminal proceedings. It should have been incumbent on both the Prosecution and the Court to proceed with caution in the case. It appears that this was not done." E

There was another person also charged with these three appellants for the same offence. He too pleaded guilty. He is a juvenile and still awaiting sentence. F

The facts as recorded by the Magistrate and admitted by the appellants are as follows -

"Night 16/12/89 - Victim cam out from Kings Night Club after dance. Was with one of her friends - on her way to Lawaki. Was passing near Girmit Centre - adjacent to Nadovu grounds. All 4 accused approached victim and boyfriend. Assaulted boyfriend - dragged victim across FSC compound - 1st and 2nd Accused had sex with victim near tennis court followed by 3rd and 4th accused. Victim struggled to free herself but she was forced and punched. They then took victim to Nadovu G

> ground public toilet and continued to have sex. Then they left victim – went away. Victim received serious injuries - still in hospital. Medical Report - Exhibit I. Matter reported - extensive enquiry made - one of victim's earring found on person of Accused 1. Accused 1 questioned and revealed other 3 accused involved. Other 3 accused questioned and admitted guilt. The sex was without victim's consent."

So far as appeal against conviction is concerned, section 309(1) of the Criminal Procedure Code provides that no appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on such plea by a Magistrate's Court, except as to the extent or legality of the sentence. That section presupposes that the offence to which an accused has pleaded guilty is one known to law, that the admitted facts substantiate the offence charged, and the appellant understood the charge and unequivocally admitted his guilt. It is well established that an appeal against conviction can be entertained on a plea of guilty if it appears that upon the admitted facts the appellant could not in law have been convicted of the offence charged R v. Forde [1923] 2 K.B. 400 at 403; and it is on these propositions that the appeal against conviction is founded.

The charge of rape in question was properly framed and specified. The facts were stated which fully support the offence with which the appellants were charged and were admitted by the third appellant as well as other two appellants. The third appellant could not have been in any doubt about the position. In asking for leniency the third appellant stated (as recorded by the Magistrate) - "I am 18 years - unemployed – Natokawaqa. Stay with Accused 1 - originally from Vanuabalavu - came last month. Influence of liquor - leniency." In view of the third appellant's admission of guilt to the clearly expressed charge and his admission of the detailed facts I do not consider that this casts any doubt on the plea.

In any event, on the hearing of the appeal, virtually no attempt was made to argue the ground filed. Instead the counsel for the third appellant sought leave to call additional evidence - the third appellant and his father and the adoptive father. The leaned counsel submitted that the appellant was assaulted by police when interviewed. The learned counsel also submitted that the appellant came from an outer island and was new to this area. The application to call additional evidence was refused. The reason for the refusal was that the allegation that the third appellant pleaded guilty as a result of assaults by police during the time of interview and that he was not represented and other matter as contained in paragraph 2 in the amended petition of appeal do not constitute grounds for appeal.

As regards the sentence, counsel for the third appellant submitted that the learned Magistrate did not deal with each appellant separately and did not direct his mind to the question of rehabilitation.

In passing sentence the learned Magistrate did not differentiate between the three youth criminals.

The first appellant is 17 years old. He has two previous convictions - one of rape and the other of robbery with violence. He had comitted these crimes when he was a juvenile. Shortly after he again committed this heinous crime.

The second and third appellants 17 years and 18 years old respectively with no previous convictions.

The victim received serious injuries and was admitted in hospital.

The apellants were convicted of an extremely serious and vicious crime. It must be emphasised that rape is a most serious offence and should never be treated lightly by the Courts. That view has been expressed repeatedly in this Court. The learned Magistrate quite correctly took a serious view of this crime. Sentencing people of rape is a difficult and sensitive area of criminal law. Not only there has been an increase in rape, the nastiness of the cases has increased. This is no occasion to explore the reasons for that phenomenom, however obvious they may be. As for sentencing I adopt as correct the views expressed by Lord Lane in R v. Billam & Others [1986] 1 W.L.R. 349.

The Hon. Chief Justice has also recently issued guidlines to the Magistrates based on the statement of Lord Lane.

This was a gang rape. The first appellant a few weeks before the commission of this offence was treated very lightly for similar offence because of his age. The appeal by the first appellant against sentence is dismissed. The corporal punishment imposed on him is not confirmed because of time factor.

As for second and third appellants both are first offenders. The learned counsel for the third appellant has strongly urged the Court to show leniency because the appellant had recently come from Vanuabalavu and was new to the city life. The fact that the two appellants are first offenders will not save them from imprisonment in such cases. It is frequently said that the Courts should strive to treat co-offenders with equivalent severity – nothing gives the impression of inconsistent treatment more quickly than disparate sentences and nothing causes greater discontent in prisons than the feeling that one man has for no apparent reason been treated more harshly than another of similar criminality. But in the instant case the first appellant has because of his record shown propensity to crime. The second and third appellants are young men with clear records.

I therefore order that the sentence on each of the second and third appellants be altered to four years imprisonment. Corporal punishment is not confirmed.

(One appeal dismissed; two partly allowed and sentences varied.)