THE STATE

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v

ALIPATE TANOA MOCEVAKACA

[HIGH COURT, 1990 (Fatiaki J) 14 February]

Revisional Jurisdiction

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Sentence- rape- young first offender- mitigatory effect of customary reconciliation- Penal Code Cap. 17 Sections 149 & 150.

A 19 year old first offender was sentenced to 5 years imprisonment. On the sentence being referred to the High Court for review the Court HELD: that the sentence failed properly to reflect all the circumstances including a customary reconciliation and the need to avoid sending young offenders to prison. The sentence was varied and the offender was conditionally discharged.

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No case was cited.

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Defendant in Person
R. Perera for the Director of Public Prosecutions

Review by the High Court of a sentence imposed in the Magistrates' Court.

Fatiaki J:

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This case came before the Court at the request of the Chief Magistrate seeking an exercise of this Court's power to revise the sentence of 5 years imprisonment imposed on the defendant upon his conviction for an offence of Rape.

On Friday the 9th of February, 1996 after hearing the defendant, the complainant and her mother and learned counsel from the Office of the Director of Public Prosecutions I released the defendant and bound him over in the sum of $200 with his father as surety in a like sum on condition that the defendant keep the peace and be of good behaviour for a period of 2 years.

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On that occasion I stated that I would give my reasons in writing at a later date and I do so now.

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The brief facts of the case as outlined by the police prosecutor were that on the day in question the complainant went on a school picnic outing to Deuba. The defendant who attended the same school as the complainant was also at the same beach but in a separate group drinking beer.

During lunch the complainant left her group and went looking for a bottle opener. She recognised the defendant and approached him and instead of helping her the

defendant raped her.

The learned Chief Magistrate before sentencing the defendant very properly requested a Social Welfare Report. The Report speaks highly of the defendant, and his home environment and concludes with a recommendation that he be placed on probation.

In sentencing the defendant to 5 years imprisonment the learned Chief Magistrate said :

> "I must say this is a tragic case. On the eve of looking forward to a bright future having passed his Fiji School Leaving Certificate the accused is caught up in a very serious criminal case where custodial sentence cannot be evaded. The case will also be a precedent in that a student at secondary school level has to be sentenced to a custodial sentence. I find it difficult passing this sentence as fully understood the implications of this decision on the future of this accused. It will serve as a warning to other students to be more careful and exercise wisdom in the things they do and not be caught in impulsive behaviour of this kind.
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> He will serve a 5 year sentence. "

If I may say so the learned Chief Magistrate appears to have completely ignored the contents and recommendations of the Social Welfare Officer's report and imposed an unduly harsh deterrent sentence exercising to the full his sentencing powers as a Magistrate.

No consideration has been given to the defendant's guilty plea nor has he been treated with any degree of leniency or individualisation. Indeed if anything this case has been elevated to the status of a sentencing precedent to deter other secondary school students who might be minded to commit similar offences.

I accept that deterrence is a valid objective of punishment but experience has shown that deterrent sentences are of marginal value when dealing with, offences that are committed on the spur of the moment either in the heat of passion or under the influence of drink or both, as occurred in this instance.

The defendant who pleaded guilty to the offence is 19 years of age and has recently passed the Fiji School Leaving Certificate examinations. He is a first offender and has very good future prospects if he is given an opportunity. He has already spent 2 weeks in prison and hopefully has learnt a salutary lesson from that experience.

This court has said before and I say it again that our prisons are already too full of young Fijian men and the courts have a duty to try and reverse that trend wherever it is possible and just. In other words every effort must be made to

keep young first offenders out of prison even I might add at the risk of being lenient.

A Needless to say in the case of young first offenders there can rarely ever be any conflict between the general public interest and that of the offender.

If I may say so society has no greater interest than that its young people should become useful law-abiding citizens and the difficult task of the Courts is to determine what punishment or treatment gives the best chance of achieving that end. The realisation of that objective is the primary and by far the most important

B consideration in sentencing young first offenders.

I am of course mindful of the Sentencing Guidelines recently issued to the Magistracy by the Honourable Chief Justice and which undoubtedly influenced the learned Chief Magistrate in his remark that a custodial sentence was inevitable in offences of this nature.

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Whilst I respectfully agree with the broad tariff laid down in those Guidelines I am not persuaded by its inevitability. The offence of rape like many other offences against the person is capable of being committed with varying degrees of violence and affects victims in varying ways, some more permanent than others. To ignore these facts in the sentencing of rape cases is to turn a blind eye to the

D obvious.

In this case the defendant's family (I was informed in court by the complainant's mother) has collectively apologised to the victim and her family according to Fijian cultural traditions, for the grave wrong done to their daughter and although not obliged to, the victim's family have graciously accepted the apology and the two families are now reconciled.

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Unfortunately the learned Chief Magistrate had this most recent development brought to his attention only after he had passed the sentence. It is significant that in seeking this revision the learned Chief Magistrate states (perhaps with hindsight) :

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> "I would not have taken the course of sentencing I imposed in this case by looking at other forms of sentencing other than a custodial sentence."

I am satisfied that such traditional reconciliation is a relevant and appropriate factor to be taken into account in sentencing.

G The Hlonourable Chief Justice whilst recognising a lacuna in our laws as long ago as 1982 sanctioned this factor when he said :

> " ...., the main factor which has given rise to this Court exercising its revisional powers in this case is that the sentencing court did not with respect give sufficient credit to the customary sanctions which from time immemorial have always been available within a

> village community for regulating the social behaviour and conduct of its people .... Though these have no legal force *as such they* are nevertheless entitled, in a suitable case, to recognition by the courts in such a manner so as to uphold their sanctity and moral force within the Fijian society. As observed above all the respondents had been dealt with appropriately in the Fijian customary way and whatever potential strife that might, have resulted between the two villages because of the incident had also been taken care of appropriately in the Fijian customary way. One could not wish for a more civilised way of sorting out a potentially explosive situation.".

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I accept that the learned Chief Justice was there dealing with an offence that had been committed in a Fijian village but the principle is just as capable in my view of being applied to offences committed in urban centres where the parties belong to the same cultural group and understand and accept the offender's genuine. offer of reconciliation.

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Additionally, the victim herself has affirmed this reconciliation to the Court and says that she has forgiven the defendant. In the face of such magnanimity should the Court, nevertheless insist on retributive punishment? I think not. Indeed it is difficult to imagine how in the particular circumstances of this case the public interest could be served or advanced by the destruction a long prison sentence would almost certainly have, of this young man's future prospects.

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The sentence imposed by the learned Chief Magistrate was accordingly revised as earlier mentioned.

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(Sentence varied.)

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