

## RARAWA TAQA

v.

## THE STATE

[HIGH COURT, 1996 (Fatiaki J) 7 March]

### Appellate Jurisdiction

*Crime-sentence- committal for sentence to the High Court- principles governing- Criminal Procedural Code (Cap. 21) Section 222.*

A resident Magistrate imposed the maximum sentence of 5 years imprisonment for a single charge of rape. On appeal the High Court reduced the sentence and HELD: that in the absence of material justifying committal to the High Court for sentence, the sentence imposed in the Magistrates' Court should clearly reflect such mitigation as was placed before the Court.

Cases cited:

*Jonati Cama and Anor v. The State* (1995) 41 FLR 121

*Mohammed Kasim v. The State* Crim. App. No. 21/93 (FCA Reps 94/291)

*Timoci Momotu v. The State* (1995) 41 FLR 50

Appeal against sentence imposed in the Magistrates' Court.

*S. Matawalu* for Appellant

*K. Wilkinson* for Respondent

**Fatiaki J:**

On the 28th of March, 1995 the appellant was convicted by the Suva Magistrates' Court for an offence of rape after a contested trial. Thereafter the case was adjourned on two occasions to allow counsel to prepare a written plea in mitigation. On 2nd May 1995 the appellant was sentenced by the learned trial magistrate to 5 years imprisonment which is the maximum sentence that can be legally imposed on a single charge by a Magistrate exercising his criminal jurisdiction (see: Section 7 of the Criminal Procedure Code Cap. 21).

The appellant now appeals against the sentence on the following grounds :

- “(i) That the learned Magistrate erred in law and in fact in not considering the submissions in mitigation of the appellant.
- (ii) That if the learned Magistrate had considered and accepted the Appellant's submissions in mitigation it did not reflect in the sentence imposed.
- (iii) In the circumstances the sentence imposed for 5 years was excessive in all the circumstances of the case.”

A At the hearing of the appeal learned counsel for the appellant both in his oral and written submissions made no attempt to differentiate between the grounds of appeal and accordingly it is unnecessary for me to do so in this judgment.

Suffice it to say that the appeal is based on the simple proposition that where a court imposes the maximum penalty within its jurisdiction (in this case 5 years imprisonment) then plainly no allowance has been given for any mitigatory factors that might have been raised on the accused's behalf.

B In this latter regard the learned trial magistrate had a four page typed submission in mitigation which differentiated between mitigating circumstances which relate to the commission of the offence and those which were personal to the accused. There was also an additional submission which addressed the proper interpretation to be given to the judgment of the Fiji Court of Appeal in Mohammed Kasim v. The State Criminal Appeal No. 21 of 1993 (FCA Reps 94/291) in which the Court said at p.6 :

D "... we think the time has come for this court to give a clear guidance to the Courts in Fiji generally on this matter. We consider that in any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years ... We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than that starting point."

E Then the following paragraph occurs in the Fiji Court of Appeal's judgment (also at p.6) :

F "We should add a brief comment in respect of rape sentences imposed in the Magistrate Court. The maximum sentence in such cases for a single count is 5 years. It follows that ordinarily a Magistrate should commit a rape offender to the High Court for sentence unless there are clearly mitigating circumstances."

G In the above passages the Fiji Court of Appeal clearly laid down as a 'starting point' for adult offenders, a sentence of 7 years imprisonment "in any rape case without aggravating or mitigating features." In so doing the Court of Appeal did not say that the Magistrates' Court henceforth had no jurisdiction or power to impose a sentence in any rape case that came before it thereafter, nor in my view did the Court of Appeal intend thereby to alter the meaning and discretionary nature of the provisions of Section 222 of the Criminal Procedure Code.

Indeed subsequently the Fiji Court of Appeal in its judgment in Jonati Cama and Anor v. The State (1995) 41 FLR 121 delivered on 22nd May 1995, clarified the above paragraph when it said at p.5 :

“We would add that the statement made by this Court in Kasim (ibid) that ordinarily a Magistrate should commit a person convicted of rape to the High Court for sentence unless there are clearly mitigating circumstances was intended to be understood as relating to cases where such committing is authorised by Section 222 of the Criminal Procedure Code.”

A

Section 222 of the Criminal Procedure Code provides (so far as material for present purposes) :

B

“222(1) Where a person ... is tried by a resident magistrate for any offence, and such person is convicted by such magistrate of that offence, ... then, if, on obtaining information as to his character and antecedents, the magistrate is of opinion that they are such that greater punishment should be inflicted in respect of the offence than the magistrate has power to inflict, the magistrate may, in lieu of dealing with him in any manner in which the magistrate has power to deal with him, commit him ... to the (High) Court for sentence ...”

C

In Timoci Momotu v. The State (1995) 41 FLR 50 the Fiji Court of Appeal in its majority judgment said of the above Section (at p.11):

D

“This provides for the case of a trial which has proceeded in the Magistrates’ Court to the point of conviction, and the question is as to the circumstances in which the Magistrate may then commit to the High Court for sentence. The words used are clear. The Magistrate may do so if, on obtaining information as to the offender’s character and antecedents, he is of the opinion that those matters (that is the character and antecedents) are such that greater punishment should be inflicted. Clearly this is additional to the circumstances and gravity of the offence, which have by then been established. The Magistrate must decide as a separate matter whether the character and antecedents disclose matters which make the offence a more serious one than the details of the offence itself have already shown.”

E

F

Clearly a Magistrate Court has a statutory discretion to exercise when considering whether or not to invoke the provisions of Section 222 of the Criminal Procedure Code. Furthermore the discretion is activated (for want of a better term) not by the circumstances of the offence, not by the absence of mitigating factors or even by the existence of a sentencing guideline. It may be invoked only after the Magistrate has obtained information as to the character and antecedents of the offender which satisfies him that greater punishment should be inflicted for the offence than he has power to impose.

G

In the present case under appeal the learned trial magistrate appears to have been

A under the misapprehension that he had to justify his refusal to invoke the provisions of Section 222 of the Criminal Procedure Code and, in so doing, incorrectly referred to defence counsel's plea in mitigation and the accused's general good character as justification for exercising a jurisdiction he always had namely, to sentence an accused convicted before him.

B If I may say so Section 222 may be considered an enabling section which empowers a Magistrates' Court in certain defined circumstances, to commit an offender to the High Court for sentence. It is not a disabling provision which must be overcome by the Magistrates' Court as a pre-requisite to sentencing an offender, and the learned trial magistrate in so considering the Section erred in the interpretation of his powers.

C Of greater significance however, is the fact that the learned trial magistrate having decided that the case could be properly dealt with within his sentencing powers, then decided, in the face of counsel's plea in mitigation (which he appears to have accepted in part), that the appropriate sentence was the maximum single sentence of imprisonment which he had power to impose.

D In this latter regard the learned trial magistrate without mentioning the numerous matters raised by counsel both in his written and oral pleas in mitigation merely states:

"This is a serious case which requires a deterrent sentence."

E No reference is made either to any aggravating features in the case such as, any physical or emotional injuries suffered by the victim ; the degree of violence used by the accused ; the relative ages of the victim and the accused ; or the circumstances of the offence, which might have justified the imposition of the maximum sentence allowable.

F Needless to say the mitigating features which satisfied the learned trial magistrate that this was a case that could be suitably dealt with within his sentencing powers, may also, had they been properly considered, have resulted in some reduction (however slight) in the appellant's sentence.

Accordingly the appeal is allowed and the sentence is reduced to one of four years imprisonment with effect from the 2nd of May 1995.

*(Appeal allowed; sentence reduced.)*

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