PRAVIN CHANDRA PAL SINGH v STATE (HAA0091 of 2005S)

HIGH COURT — APPELLATE JURISDICTION

WINTER J

29 August 2005

Criminal law — sentencing — attempted rape — Appellant advised of right to counsel and under caution in police interview — unrepresented in Magistrates Court trial — first offender — gross abuse of trust and emotional harm — whether 7 years' imprisonment harsh and excessive — Penal Code (Cap 17) s 151.

The stepfather (Appellant) was charged with attempted rape of his 11-year-old stepdaughter (complainant). The complainant gave a statement regarding the incident. A subsequent medical report confirmed that there was evidence of this charge. The Appellant was advised of his right to counsel and that he was under caution during the police interview. However, the Appellant was unrepresented in the Magistrates Court trial. The Appellant was convicted of attempted rape and sentenced to 7 years' imprisonment.

The Appellant appealed his conviction and sentence and argued that the absence of counsel prejudiced his constitutional rights. The Appellant also contended that there was no appropriate warning given about the process of the court hearing and his right to cross-examine. The Appellant further argued that the sentence of 7 years' imprisonment was harsh and excessive.

Held — (1) The Appellant was not completely prejudiced although there was technically some deficiency in reminding the Appellant again of his rights to counsel. The evidence established that the Appellant was informed of his right to counsel and was advised that he was under caution in the course of his lengthy police interview.

(2) The starting point of 3 years' imprisonment was appropriate in principle and the general range of sentences run from 12 months to 5 years for a first offender as enunciated in the cases of *Nemani Kaverevere and Anor v State* and *Hari Chand v State*.

The 7 years' imprisonment was harsh and excessive. The aggravating feature of gross abuse of trust and emotional harm was balanced out against the mitigating feature of being a first offender, leaving an effective sentence of 3 years' imprisonment.

Appeal against sentence allowed. Appeal against conviction dismissed.

Cases referred to

Devi v State 0017 of 1999S; *Hari Chand v State* Crim App HAA0003 of 2005; [2005] FJHC 123; *Jioji Aunima v State* Crim App HAA0033 of 2001; [2001] FJHC 105; *Nemani Kaverevere and Anor v State* Crim App HAA0053 of 2002; [2002] FJHC 133; *Suren Singh and Ors v State* Crim App HAA0079 of 2000S; [2000] FJHC 115, applied.

S. Shah for the Appellant

D. Prasad for the State

Winter J. This is an appeal against conviction and sentence. I am giving this appeal decision immediately after hearing the case. It is an ex tempore decision and accordingly I reserve the right to recall and perfect the decision as I see necessary.

Background

The Appellant was charged with attempted rape contrary to s 151 of the Penal Code (Cap 17), that on 3 December 2004 at Lami in the Central Division, he attempted to have unlawful carnal knowledge of the named complainant without her consent.

The Appellant is the stepfather of the complainant. It is said that on the day in question, he went with her to fetch some firewood. During that outing, the complainant says that he fondled her breasts, kissed her on the lips and touched her genitals. She said that he inserted his finger inside her vagina and that he rubbed his penis against her vagina. She says the penis was a bit erected and it penetrated just a bit. She says that she did not like what he did to her. She tried to get away but could not.

A subsequent medical report confirmed that there was a slight bruising on the labia minora of the vagina. This medical examination took place on the following day.

At the time of the incident, the complainant was 11 years old. Her mother remains living with and supports her partner, the Appellant.

The appeal

The Appellant was represented at this appeal by Mr Shah. I say straight away that I am grateful for his diligence in pursuing this appeal by the supply of written materials that have been most helpful.

In so far as the conviction appeal is concerned, I apprehend the prime argument is that the Appellant was unrepresented during his Magistrates Court trial and that he was not given the appropriate cautions at his first or subsequent appearance about the opportunity to have counsel or to make application for legal aid.

It is said that as he was unrepresented, his trial was prejudiced because he was not assisted in learning about his rights to ask questions or indeed to test some of the evidence.

The State while not conceding the point, do admit that when the Appellant first appeared in the Magistrates Court, he was not advised of his rights to counsel or his right to make application for legal aid.

However, the State's counsel points out in oral submissions that this was not a situation of a complete denial of advice of his rights. Counsel points to the copy record and indicates that those rights were given to the Appellant during the course of his lengthy police interview.

On checking the record, I find that to be so. One needs only refer to the interview statement recorded at p 28 of the record to see that the detective corporal conducting the interview, made it quite clear to the Appellant that he had a right to instruct a lawyer and that was a right to instruct a lawyer of his own choice and if he could not afford one, then a counsel from the Legal Aid Commission would be provided for him and a consultation could take place.

At question 10, in response to being advised of that right, the Appellant clearly elected to talk to his father on the telephone. He was provided with the telephone and made a telephone call for some minutes.

At the continuation of the interview, he was readvised that he was under caution. In other words, that he is not obliged to say anything but anything he did say may be taken down and used in evidence against him. He acknowledges that he was advised of that and then at question 12 he is again told that he has a right to counsel. The interview then continued.

I find that although the Chief Registrar, who was the officiating magistrate before whom the Appellant made his first appearance, failed to give the Appellant suitable warnings to meet constitutional obligations, nonetheless, this is not a case where absolutely no warnings were given whatsoever. The interview and charging occurred within a matter of two days and I find that at the operative time

during the course of the first and subsequent appearance in the Magistrates Court, the accused would have been quite aware of his ability to instruct counsel which he simply declined to do so.

I note that in any event he was granted bail and he would have an opportunity to instruct counsel during the course of his period of bail remand but elected not to do so. I am fortified in that view because once he was convicted, he quickly instructed present counsel Mr Shah, to appear and mitigate penalty on his behalf. That to me indicates that he knew he could instruct a lawyer.

However, the matter goes further than that. Counsel for the Appellant argues that the absence of counsel prejudiced his client and that the lack of an explanation in court as to his rights under the Constitution is compounded by the fact that there was no appropriate warning to the Appellant about the process of the court hearing and in particular no warning about his rights to cross examine.

In support of this argument, counsel refers to Blackstone's *Criminal Practice* and Archibald. Blackstone at D.14/9 and Archibald at para 4.309 and again to the decision of *Devi v State* 0017 of 1999S at 10 (*Devi*).

I have had occasion in the past to adopt the decision of *Devi*. A decision of the Court of Appeal and I do so again. I have also had occasion to adopt the decision of my sister Shameem J in *Suren Singh and Ors v State* Crim App HAA0079 of 2000S; [2000] FJHC 115.

In the latter judgment, her Honour takes some care to remind magistrates in the lower court of an appropriate procedure to adopt before plea is taken.

It is clear that that procedure was not used here. However, the importance of both *Singh* and *Devi* is that when taken in combination, it is clear that not only on appeal does an Appellant have to point to a failure in the technical requirements of the constitutional process but also point to some specific prejudice flowing as a result of that failure before the conviction can be considered unsafe.

In this case, we are dealing not unusually with a stark allegation of sexual violation involving really only the victim and the accused. The victim in this case says you did these things to me, the accused while placing himself in the location and time denies any violation whatsoever.

Those circumstances when coupled with a medical report mean that careful consideration would have to be given before the rights to cross-examination were taken up.

Indeed, in my view, even if the Appellant had instructed a lawyer to represent him in court, that lawyer would be confronted with this very issue.

In circumstances where the case resolves around the victim making the allegation and the accused offering a simple denial in the context of a medical report which indicates some slight injury to the vaginal area of the complainant, senior and experienced counsel would hesitate before electing to cross-examine in a full and vigorous manner. In my view, the wise counsel would be to act completely as this Appellant did during the course of trial and refrain from asking questions that may compound and support the prosecution case. There may have been some merit in relying on the strength of the denial, coupled with the consideration of the burden and onus of proof in a criminal trial to try and persuade the court that the statement from the victim was not sufficient to secure a conviction.

Accordingly, for those reasons, while I accept there was technically some deficiency in reminding the Appellant again of his rights to counsel or the ability to apply for legal aid, I don't find that he was prejudiced in these particular circumstances of this case.

Sentence appeal

In terms for a sentence appeal, the Appellant says that the sentence imposed by the learned magistrate was harsh or manifestly excessive.

The sentence imposed was a term of imprisonment for 7 years.

Counsel very thoughtfully provided a number of decisions which I considered. They are *Jioji Aunima v State* Crim App HAA0033 of 2001; [2001] FJHC 105 (*Aunima*) which is a decision of the High Court at Suva by my sister Shameem J. The decision involving *Nemani Kaverevere and Anor v State* Crim App HAA0053 of 2002; [2002] FJHC 133 in the High Court at Suva, a decision of my brother Jiten Singh J, and of more recent and impressive date, the decision of my sister Shameem J in the High Court at Labasa, *Hari Chand v State* Crim App HAA0003 of 2005; [2005] FJHC 123 (*Chand*).

I adopt these decisions as authoritative for the proposition that for the charge of attempted rape, a starting point of 3 years' imprisonment is appropriate in principle and that the general range of sentences run from 12 months to 5 years for a first offender.

In *Chand* for example, a case involving quite similar circumstances except allegations of sexual violation by oral sex, my sister justice having reviewed the authorities again indicated a starting point of 3 years' imprisonment was quite correct. My brother Singh J in dealing with quite a violent episode of attempted rape nonetheless, maintained an appropriate sentence of 3 years' imprisonment was quite proper. *Aunima* makes it quite clear that a sentence of the range of 12 months to 5 years is quite appropriate.

The sentencing decision is short. It refers to principles surrounding attempts, the gross abuse of trust, but the construction of the term of imprisonment imposed is not clear. Regrettably, the learned magistrate does not indicate any starting point for the offence, does not apply an increase by way of aggravation or the comprehensive mitigation.

I now do so.

I adopt the starting point of 3 years. The aggravating features in this case were the gross abuse of trust and the emotional harm that must have flowed from the course of this conduct. For the aggravating features, I would have added a period 1 year to the starting point making the total of 4 years' imprisonment.

I would then have considered the mitigating features prime among which is that this Appellant was a first offender.

In my view, the appropriate course would have been to balance out the aggravating and mitigating features against each other leaving an effective sentence of 3 years' imprisonment and accordingly in conclusion, I make the following orders:

1. I dismiss the appeal against conviction.
2. I grant the appeal against sentence.
3. I quash the sentence of 7 years' imprisonment imposed against the Appellant by the magistrate on 6 June 2005.
4. I substitute a sentence of imprisonment of 3 years' jail.

Appeal against sentence allowed. Appeal against conviction dismissed.