ASESELA DROTINI v STATE (AAU0001 of 2005S)

COURT OF APPEAL — CRIMINAL JURISDICTION

WARD P, STEIN and FORD JJA

21, 24 March 2006

Criminal law — sexual offences — rape — indecent assault — whether sentence imposed excessive, harsh, oppressive, and outside the tariff — whether Appellant adversely prejudiced by lack of representation.

The Appellant was convicted of one count of indecent assault and two counts of rape. The victim was the stepdaughter of the Appellant and was 9 or 10 years old at the time the first offence was committed.

The Appellant was found guilty by the three assessors to all three counts, and the learned judge concurred. The Appellant was sentenced to two-and-a-half years' imprisonment on the indecent assault and 11 years on each count of rape all to be served concurrently.

The Appellant appealed against his conviction and sentence on two grounds: (1) that the learned judge should not have allowed trial to proceed when the Appellant was unrepresented; and (2) that the sentence of 11 years for rape was excessive, harsh, oppressive, and outside the tariff for such offenses.

Held — (1) The evidence established that the Appellant was given sufficient time to find counsel, was advised correctly on his rights by the trial judge and was able to conduct his case competently. The Appellant was also recorded to having understood the charges and pleaded not guilty to all of them. During trial, the Appellant conducted his own defence including the cross-examination of the complainant. Thus, there was no doubt that the Appellant had a fair trial.

(2) The Appellant alleged that the sentence of 11 years was excessive and outside the tariff for such offences. He claimed that the tariff was lower when these offences were committed. Further, the Appellant suggested that the appropriate range of sentences for rape was three to five years and, for more serious cases, five to seven years. The court ruled that this was not correct. The court ruled that the sentencing court should not hesitate to increase the sentence substantially above the starting point described in *Mohammed Kasim v State* where there are further aggravating factors. In the present case, the Appellant made no attempt to avoid his daughter becoming pregnant and this was regarded as a substantial aggravation of the breach of trust. Moreover, there was no mitigating factor as the Appellant pleaded not guilty and after having his stepdaughter go through the trauma of giving evidence and being cross-examined by him, he declined to go into the witness box himself.

Appeals dismissed.

Cases referred to

Billam v R [1986] 8 Cr App Rep (S) 48, cited.

Mohammed Kasim v State [1994] FJCA 25, considered.

Appellant in person

A. Prasad for the Respondent

[1] Ward P, Stein and Ford JJA. The Appellant was convicted of one count of indecent assault and two of rape. The indecent assault and the first rape were committed in 2000 and the second rape in 2003. The victim was the stepdaughter of the Appellant and, at the time of the first offences, was 9 or 10 years old.

[2] The three assessors gave unanimous opinions of guilty to all three counts. The learned judge concurred with their opinions and convicted the Appellant. He was sentenced to two-and-a-half years' imprisonment on the indecent assault and 11 years on each count of rape. All were ordered to be served concurrently.

[3] There is one ground of appeal against conviction, namely, that the learned judge should not have allowed the trial to proceed when the Appellant was unrepresented. He also appeals against sentence on the ground that the sentence is harsh and oppressive and wrong in principle because it was outside the tariff for such offences.

Ground 1

[4] The Appellant tells the court from the bar that he applied for legal aid and that it was refused because the lawyers found the case repulsive. He explained that he made the application after the trial judge had directed legal aid counsel to represent him. He told this court that both application and refusal were made orally.

[5] There is no evidence to support this account. The record shows that, at the first appearance in the Lautoka High Court on 3 November 2003, the Appellant asked for legal aid. At the next appearance he was unrepresented and successfully applied for bail.

[6] He appeared on 23 January 2004 and told the court that he was looking for a lawyer.

[7] Following a number of appearances, he was advised, on 2 July 2004, that the trial would be heard on 16 November 2004. At a subsequent appearance on 2 September 2004, the record states that he was advised to obtain counsel immediately.

[8] When he appeared on 16 November 2004, he was still unrepresented and advised the court that he was ready for the hearing. It was adjourned to the 17th when the Appellant again advised the court that he was ready. As a result of the indisposition of the judge the trial was adjourned to the following day when the Appellant is recorded as having understood the charges and pleaded not guilty to them all.

[9] The trial proceeded and he conducted his defence including cross-examination of the complainant. He made no further application to find counsel but he tells this court that he proceeded with the trial because he could not afford a lawyer and was not working.

[10] It is preferable that anyone facing a serious charge should be able to be represented by counsel. Unfortunately the limited resources of the State and the financial circumstances of many defendants mean they are unrepresented. In such circumstances the trial court should ensure that the defendant has been allowed reasonable time to instruct counsel. Once he has, the court also has a duty to hear the case as expeditiously as possible. Whenever an accused is unrepresented the court should explain the procedure sufficiently for the accused to be able to conduct his defence.

[11] The question for this court is whether there is a possibility that he was adversely prejudiced by his lack of representation. In the present case, the record shows that he was given more than adequate time to find counsel, he was advised correctly of his rights by the trial judge and conducted his case competently.

[12] From the record and after considering the Appellant's submissions we find no reason to doubt that he had a fair trial and the appeal against conviction is dismissed.

Ground 2

[13] The Appellant suggests that the sentence of 11 years for rape was excessive and outside the tariff for such offences. He claims the tariff has been raised recently and was lower in 2000–03 when these offences were committed. At that time, he suggests the appropriate range of sentences for rape was 3–5 years and, for more serious cases, 5–7 years.

[14] That is not correct. The courts in Fiji for many years followed the guideline laid down in the English case of *Billam v R* [1986] 8 Cr App Rep (S) 48 in which the court stated that 5 years' imprisonment should be taken as the starting point for rape committed by an adult and with no aggravating or mitigating circumstances. However, in 1994, this court in the unreported case of *Mohammed Kasim v State* [1994] FJCA 25 (*Mohammed Kasim*), noted the gravity of rape and stated:

> We consider that in a rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment for seven years. It must be recognised by the courts that the crime of rape has become altogether too frequent and that the sentences imposed by the courts for that crime must more nearly reflect understandable public outrage. 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 that that starting point.

[15] The continuing frequency of such cases has resulted in a general increase in the levels of sentences ordered in rape cases by the courts in Fiji. We endorse that trend. We do not suggest that the starting point described in *Mohammed Kasim's* case should be altered in rape cases in general but the sentencing court should not hesitate to increase the sentence substantially where there are further aggravating factors.

[16] There are few more serious aggravating circumstances than where the rape is committed on a juvenile girl by a family member or someone who is in a position of special trust. The seriousness of the offence is exaggerated by the fact that family loyalties and emotions all too often enable the offender or other family members to prevent a complaint going outside the family. If the child then remains in the family home, the rapist often has the opportunity to repeat the offence and to hope for the same protection from the rest of the family.

[17] Cases of rape by fathers or stepfathers appear before the courts in Fiji far too frequently and, in such cases, the starting point should be increased to 10 years. Where there are further aggravating circumstances beyond those basic circumstances, such as repeated sexual molestation of any nature, threats of violence or actual violence or evidence that the offender has attempted to persuade other family members to help cover up the offences or discourage complaint to the police, there should be substantial increases above that starting point.

[18] In any such case, there are few possible mitigating circumstances beyond a plea of guilty and the sentencing court should be careful to evaluate any matters put forward as suggested mitigation against the family situation. Thus, for example, while subsequent concern for, or assistance of, the victim following rape on a stranger may be accepted as some mitigation of the offence, a similar

situation in a family rape would do little to mitigate the initial breach of trust. In the present case, the Appellant made no attempt to avoid his daughter becoming pregnant and we regard that as a substantial aggravation of the breach of trust.

[19] The Appellant pleaded not guilty and then, having put his stepdaughter through the trauma of giving evidence and being cross-examined by him, declined to go into the witness box himself. There was no mitigation.

[20] The learned judge sentenced with these words:

> These were terrible and horrific acts by a father on a girl of extra tender years. She was in class four when you started … It was an age when young girls are in the greatest need of security, comfort, understanding and love from their parents but you completely and criminally distorted that role. Instead of giving her love and protection, you made her the target of your lustful desires causing her not only physical pain but unimaginable mental trauma. You used your authority not to protect her but to violate her. You have broken all the rules not only of a father daughter relationship but of civilised human society.
>
> By not pleading guilty … you also made the girl go through a trial having to repeat and relive those painful vile moments again.

We endorse those comments.

[21] We consider that the facts of this case merited a sentence of more than 11 years but we do not consider the sentence so manifestly lenient that we should interfere.

[22] The appeals against conviction and sentences are dismissed and the total sentences of 11 years confirmed.

Appeals dismissed.