IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA
Appellate Jursidiction
Criminal Appeal No. 91 of 1979

Between

REGINA — Appellant

- and -

SAHADEWAN GAUNDAR
s/o Kista Gaundar — Respondent

Mr. A. Gates, Counsel for the Appellant
Messrs. Pillai & Co., Counsel for the Respodent

JUDGMENT

The accused was charged with two offences, wrongful confinement contrary to section 288 of the Penal Code and assault occasioning actual bodily harm contraryto section 277 of the Penal Code. The charges arose out of an incident in which the complainant lady Kaniamma Naicker was being given a lift in the accused's car. The accused asked her to have sexual intercorse with him which she refused. He drove away from where she wanted to go and would not stop to let her out in spite of her cries and entreaties. Finally she jumped out of the moving car and received injuries. She was 7 months pregnant at the time.

After hearing evidence including the sworn evidence of accused himself the magistrate convicted him of the offence of wrongful confinement, but rather surprisingly acquitted him of the offence of assault occasioning actual bodily

harm, the only very brief reason being apparently that he was not satisfied that her reaction to her confinement was such as any reasonable person would foresee. Since she was apparently clamouring to get out and crying out for help so that persons the car passed could clearly hear her this was a somewhat surprising finding. I should think that anyone familiar with work in the courts of Fiji would be well aware of the many similar cases where women have leapt out of moving cars to escape men wishing to have sex with them.

On count 1 the magistrate passed the maximum sentence possible under section 288 of the Penal Code because as he said "The offence is a serious one calling for a deterrent custodial sentence." He then referred to a similar charge coming before the Supreme Court where the maximum custodial sentence was called for and imposed. But he then suspended the sentence for 2 years conditionally.

The Crown now appeals against the acquittal of the accused on Count 2 and against the sentence imposed on the accused on Count 1.

However the Crown has omitted the preliminary statutory requirement in respect of the appeal against the acquittal, namely the consent of the D.P.P. in writing. This requirement was pointed out by Williams, J in the case of R v Ram Narayan Sharma Lautoka Criminal Appeal No.88 of 1979. In the absence of such written consent I have no option but to dismiss the appeal against the acquittal on Count 2.

In respect of the sentence passed in count 1 I accept all the arguments put forward by counsel for the accused that I should not lightly interfere

with the discretion of the magistrate. I accept that an appellate court should not substitute its own discretion for that of the magistrate, but there are factors which cause me to believe that the magistrate has not properly exercised his discretion. He was correct in emphasizing the seriousness of the need for a deterrent custodial sentence. But in view of the incidence of this type of offence in Fiji, and the need to make the sentence truly deterrent, the sentence passed should not have been suspended.

On the other hand a custodial sentence of 12 months is the maximum sentence permitted under section 288 of the Penal Code. Whilst the offence committed is a serious offence the particulars of this incident scarcely called for the maximum punishment possible - as did the two cases R v Shiu Narayan (Lautoka Criminal Appeal No. 14 of 1976) and R v William Kitchener (1979 Suva Criminal Case No.9) to which I was referred. Tuivaga,J. (as he then was) pointed out in the William Kitchener case that the sentence provided by Parliament for this offence is quite inadequate considering the incidence of the offence in Fiji, and it is to be hoped that Parliament will soon rectify the position. However until the statutory sentence is altered the courts must do the best they can to grade sentences according to the relative seriousness of particular offences committed.

This case did not call for the maximum sentence permitted so in the event I will aside the sentence passed by the magistrate and in lieu sentence the respondent to 6 months imprisonment nº part of which shall be suspended.

LAUTOKA,
20th June, 1980.

(G.O.L. Dyke)
JUDGE