

# HIGH COURT OF SOLOMON ISLANDS

## NELSON KONAI -V- REGINA

**Criminal Case No. 12305**

**Date of Hearing: 14 April 2005**

**Date of Sentence: 14 April 2005**

**Colin Baker for the Appellant  
David Kausimae for the Respondent**

### Criminal Appeal from Magistrate's Court

#### Reason for decision

**Brown J:** I gave short reasons on the 14 April and now provide written reasons. This appeal against a concurrent sentence of 4 years 8 months for three counts of unlawful sexual intercourse by a father against his daughter (incest) lies on four grounds. They are:

1. the Magistrate erred in not having sufficient regard to the age of the prisoner's daughter at the time of the offences (17 when first act, then subsequent act when daughter 21 and 23).
2. not having sufficient regard to the prisoner's psychological state.
3. failing to have sufficient regard to the wishes of the complainant in relation to a non or minimal custodial sentence and finally;
4. that on the totality principle, the sentence was manifestly excessive.

The Crown argues that on the face of the record, the Magistrate did take account of the age of the complainant (since the complainant's wishes about a custodial sentence were conveyed to the Magistrate by a male nephew Ishmael Nori), the Magistrate may place what weight as he sees fit on that aspect, (although Mr. Kausimae does not address that aspect directly). His criticism of the appellant's argument was directed more to the psychological state argued by Mr. Baker before me and spoke of matters which were touched on in a report (exhibit 1) given by Mr. Baker. Mr. Baker further stated that the appellant had been physically assaulted in the late 80's and suffered head injuries.

Mr. Kausimae criticized the appellant for that the material Mr. Baker sought to rely on before me, had not been before the Magistrate.

Nori was before the Magistrate. In so far as the report is concerned. Mr. Baker's recollection was that it was read and handed back by the Magistrate. I am satisfied then that the material was before the Magistrate when he sentenced.

Of course Mr. Kausimae's criticism of the psychological state of the appellant addressed the lack of supporting evidence, but in the circumstances it is hardly likely such evidence would be easily obtained in time to place before the Magistrate and in any event, the report of Mr. Kwai'ioloa which raises the issues about the appellant's background was before the Magistrate and this court. It would seem that the appellant is no different in his psychological state, (since he purports to know of his "problems") than others in the community in the East Kwara'ae, for the Co-ordinator Secretary General does not differentiate this appellant from others who have grown up in the same culture and has treated this man, when I read his report, as one on whom the community depends. Hardly a person seen by the community as one not worthy of notice by virtue of his psychological state. That would clearly have been apparent to the Magistrate although his remarks fail to mention his approach to that 3 page report.

The Co-ordinator/Secretary General, Solomon Islands Traditional Cultural Environment Conservations Foundation focused on the appellant as victim in this Report except for the short implied reference to these offences, I take it to be, on page 2 where Mr. Kwai'ioloa says:

*He pledges before the Worship of Court that due to an inconvenient occasion which he was unable to make a choice he committed such misbehaviour. Therefore he greatly regretted his misbehaviour and apologises for it".*

What the community in East Kwara'ae thinks of incest in circumstances such as this is not touched on and I cannot speculate. The Magistrate did espouse the accepted court approach to cases such as this, "that it evidenced a breach of trust".

However I am not enlightened as to how this community views the offence, although not seriously if I read the underlying premise in that Report, that this man the appellant, is of great importance in his community and his position deserves to be recognized.

*"Mr. Nelson Konai is an expert custodian of tribal land and genealogy in our region and has contributed a lot towards the cultural development in East Kwara'ae region since then, is an absolute major factor that only a few people with intelligence of traditional skills and knowledge transferred from the ancestors to the present generation".*

None of this addresses the very real shame the young woman must have felt when obliged to succumb to her father's propositioning for sexual congress. Even in that community, she obviously would have an awareness the act was contrary to natural law and in law, a violation of human rights. (see appendix)

It behooves this court to seek to apply the law to protect those vulnerable in society, (despite the wishes of the woman victim, that this man her father, be dealt with in some fashion which does not involve imprisonment). Perhaps that is her filial

feelings, or the suggestions of Nori, but the fact remains the appellant had on 3 separate occasions, offended and when one realizes how old the girl was, it becomes clear the power and influence this man must wield in his traditional society, over even his own grown-up daughter who on these facts, appears to have no real option but to succumb.

On a reading of my brother judge, Mwanosalua J's reasons on appeal in *Jacob Hudson Zole -v- R* (unreported decision CRC495/04 dated 30 March 2005) it is clear, the defilement of a young daughter (aged 13 and one month at the time of the 1<sup>st</sup> of three separate offences) by her father, initially affected by liquor, attracting a total sentence of 27 months (2 years 3 months) for the three offences, that the nature of such offence does not attract the opprobrium that perhaps one might expect. The sentence was reduced to 9 months in total.

This appeal before me needs to be dealt with in terms of identifying the error, if any, disclosed in the record of the Magistrate's reasons for unless error can be shown, this court cannot, of its own volition, substitute its own sentence.

Again, when the appeal is argued on "facts" agreed on a plea of guilty in the Magistrate's Court, it is not open to the appellant to enter upon an argument about the circumstance giving rise to the commission of the offence.

I cannot agree with my brother judge's approach where he appears to have entertained such an argument, and accepted the suggestion of the offender that his daughter condoned the offence, for there the judge accepted, where facts were disputed in the appeal court it would seem, the assertions of the father against that of the daughter. ("The appellant disputed certain matters on the prosecution facts. The first is that he said he removed the victim's clothes before he had sex with her. He said the victim removed her own clothes before they had sex on all three occasions").

On a plea of facts in the lower court, it is not open to reargue those facts in the appeal court.

To make a finding on facts not forming part of the "agreed facts" on the original plea, on assertion of counsel in the appeal court is not available to an appeal court. I am consequently not minded to use the sentence of 9 months for defilement of a girl of 13 by her father as a guide in this case before me.

The range in other cases whilst helpful cannot inhibit this court's responsibility to consider the appeal on the particular facts of this case. I address the facts and the Report in my reasons; for they formed part of the material in which the sentencing court worked.

Sentences ranged from 3, 4 through to 8 years for this offence (although that latter involved a rape). I note and accept Mr. Baker's argument that this case cannot be said to be in the worst case scenario, it was a case where a plea was given and the age of the victim, the daughter was not so young to take the matter into that more serious category of a girl under 13.

I will take account however of his age.

I am unimpressed by the community's reference which ignores to a large extent, the need to address the nature of this offence to show that the author is cognizant of the type of offence involving as it does incest of his daughter yet speaks of his man's position of authority and importance in such community as if that absolved, as the author puts it, "such misbehavior". It should be a matter of shame to the community but attitudes may not be openly expressed, least of all shame. Then again, it may be a manifestation of the first banana syndrome, yet the community views were not canvassed before sentence.

### Order

The appeal is dismissed.

The sentence is varied by providing for a suspension of 12 months of the total sentence of 4 years 8 months; upon the prisoner entering into a recognisance to keep the peace on his release, not approach or reside near the victim and to come up for sentence to serve the balance of this term suspended upon breach of any of these conditions or in the event that he subsequently is charged with and convicted of an offence of assault whether of a sexual nature or not, at any time during this period of suspension

### **BY THE COURT**

Appendix: *Law for Pacific Women- A legal rights handbook* P. Imrana Jalal , Fiji Womans Rights Movement 1998, 84, 85