IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU0018 OF 1994
(High Court Criminal Case No. HAM0006 of 1994)

BETWEEN:

TIMOCI MOMOTU	APPELLANT
-and-	
S T A T E	RESPONDENT

Appellant in Person
Mr. C. Hook for the Respondent

Date and Place of Hearing : 23rd February, 1995 Suva
Date of Delivery of Judgment : 2nd March, 1995

JUDGMENT OF QUILLIAM AND THOMPSON J.J.A.

The Appellant was charged in the Magistrates' Court with having committed rape on 1 July 1994. He was unrepresented and pleaded not guilty. On 2 September 1994, following a trial, he was convicted. For the reasons given by the Magistrate he was then committed to the High Court for sentence in accordance with the provisions of s.222 of the Criminal Procedure Code (Cap.21), and on 21 September 1994 he was sentenced to 8 years' imprisonment. He now appeals against both his conviction and sentence.

We deal first with the appeal against conviction and for that purpose it is necessary to give an outline of the facts.

The complainant was a staff nurse stationed temporarily at the Nairai Nursing Station. On 1 July 1994, during her lunch hour, she was in her living quarters preparing a meal when the Appellant called and asked her to dress his hand. She went with him to the clinic for that purpose. Her evidence was that the Appellant then threatened and indecently assaulted her, made her go to her quarters, and there raped her. It is unnecessary to give any greater detail of what she said occurred. Shortly after this incident she complained to a villager about what had happened and was seen to be distressed. The police were informed and the Appellant was apprehended the next morning.

When interviewed the Appellant admitted in his caution statement that he had had intercourse with the complainant, but the effect of his statement was that she had consented.

At his trial the Appellant, having been given the customary warning in terms of s.211 of the Criminal Procedure Code, elected to give evidence. He said that although the complainant initially said she did not want to have intercourse with him, she had in the end done so on two occasions and had shown no signs of distress.

The Appellant has given several grounds of appeal which we deal with separately.

(a) "I was not legally represented. I did not know how to present myself especially when the charge was of a complex nature."

Upon a criminal charge as serious as rape there is little doubt that legal representation is desirable. This cannot, of course, be forced upon a defendant. It is plainly most desirable that, upon a charge as serious as rape, an accused person should be able to be represented by counsel. In the present case the circumstances were sufficiently grave as to have meant that an application for legal aid would have had considerable merit. There is no indication, however, that he made such an application and there is no indication in the record that he raised the matter of representation in the course of the trial. He was on bail from 18 July to 2 September and had the opportunity to seek representation but does not appear to have done so.

The Appellant cross-examined the witnesses and gave evidence on his own behalf.

We are unable to treat the fact alone of his lack of representation as a good ground of appeal.

(b) "In that the complainant was a willing partner who fabricated her story to PW2 to the police and even lied in Court."

(c) "In that the complainant had deliberately informed me of her intention to report the matter to the police in order for her to get an automatic transfer out of the Island Nursing Station. In that she badly wanted a transfer for reasons well

known to her and the village community."

We can deal with these two grounds together. They concern the differing evidence given by the complainant and the Appellant, involving the credibility of each, which were the very matters the Magistrate, who saw and heard both, was required to determine.

We can see no basis upon which we ought to interfere with the Magistrate's decision on these matters.

(d) "In that the Court did not allow further adjournment to enable my two main witnesses to attend, for they were still in the Island of Nairai quite far by sea from Levuka. This had caused confusion in me and was left defenceless."

The Magistrate's notes record that the Appellant indicated he had one witness he wished to call but that witness did not appear and was apparently not in the vicinity of the Courthouse. It is not recorded that the witness was not in Levuka, nor that any adjournment was requested. As previously mentioned, the Appellant was on bail and in a position to arrange for the attendance of his witness. On the hearing of the appeal the Appellant asked to be able to call that witness whom he had available in Court. In response to questions from the Court as to the nature of the evidence he said that the witness would say he had seen the complainant and the Appellant sitting talking together in the

Nursing Station after the events complained of. No doubt the witness would also have said that the complainant showed at that time no signs of distress. In view of the fact that the complainant's evidence was that, after the events complained of, and before she was seen to be distressed, she had attended to some patients the evidence of the proposed witness would not have added anything of significance. We accordingly declined to allow the witness to be called.

We are unable to accept that the inability to call the witness at the trial is a good ground of appeal.

(e) "In that the police pressured me to admit even when I resisted. This led me to go along with them to avoid further harassment."

The question of the circumstances in which the statement was taken was canvassed before the Magistrate and he made his finding on it. In any event, the effect of the statement was that there had been consensual intercourse and admission of the statement was to the Appellant's advantage.

(f) "In that I felt there was a total miscarriage of justice and totally disapprove of the conviction."

In the light of what we have already said we do not need to deal with this ground.

We are unable to see any basis upon which we should interfere with the conviction and the appeal against conviction must accordingly be dismissed.

In the High Court Pain J. reviewed the evidence and imposed a sentence of 8 years' imprisonment. In considering the appeal against sentence we have found it necessary to examine the jurisdiction of the High Court in a case such as the present one.

Section 222 of the Criminal Procedure Code, so far as is material, provides:-

> *"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 the 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 in accordance with the following provisions of this section.*
>
> *(2) Where the offender is so committed for sentence as aforesaid the following provisions shall have effect, that is to say:-*
>
> *(a) The (High) Court shall enquire into the*

circumstances of the case, and shall have power to deal with the offender in any manner in which he could be dealt with if he had been convicted by the (High) Court..."

In his remarks at the conclusion of the trial after having convicted the Appellant, the Magistrate made a number of comments about the gravity of the offence. He noted the complainant's distress and the impact which the offence will have made on her, the differing physiques of the Appellant and the complainant (she "a young lady, with a small figure", and he "a strong man, with a facial expression of a drug addicted person"), and the "despicable and atrocious" method employed by the Appellant. With none of these comments would we wish to disagree. The Magistrate then observed that a sentence of 5 years' imprisonment was insufficient for "this horrific crime". Again, we have little hesitation in agreeing and can find no reason for saying that a sentence of 8 years' imprisonment was manifestly excessive for what the Appellant did.

We note, however, that nowhere in his comments did the Magistrate refer specifically to the Appellant's character and antecedents. This raises the question of whether that omission precluded the Magistrate from committing the Appellant to the High Court for sentence under s.222(1). If that was the case then the maximum sentence which could be imposed was a term of 5 years' imprisonment (s.7 Criminal Procedure Code). The question is whether "obtaining information as to his character and precedents",

as distinct from having obtained information as to the circumstances of the offence, is to be regarded as a condition precedent to the decision to commit for sentence.

Because this is a matter which was not raised in the High Court and was not in any way foreshadowed in the record we informed counsel for the Respondent of it and then adjourned the hearing in order to give him an opportunity to consider it. He did so and on the resumption of the hearing was able to give us a full argument the effect of which was that the Magistrate must in this case be taken to have obtained information about character and antecedents and accordingly was entitled to commit for sentence.

In order for us to decide on the interpretation to be given to s.222(1) it is necessary for us first to set out the procedure which is prescribed for the prosecution of criminal offences. This is governed in the first instance by s.78 of the Criminal Procedure Code which provides that any complaint alleging a criminal offence and any person arrested without warrant is to be brought before a Magistrate. The question of whether any such matter is in the end to be dealt with summarily in the Magistrates' Court, or upon indictment in the High Court depends upon the application of the subsequent provisions of the Code.

Section 3 of the Electable Offences Decree 1988 provides:-

> *"3. No person charged with an offence under the Penal Code shall be entitled to elect to be tried before the High Court unless the offence with which he has been charged is an electable offence."*

"Electable offences" are those set out in the schedule to the Decree and, for present purposes, it is sufficient to observe that rape is one of those.

Accordingly, a person charged with rape is entitled to elect trial in the High Court instead of summary trial in the Magistrates' Court. In this case the Appellant duly made his election to be tried summarily.

This, however, was not the end of the matter. Notwithstanding the Appellant's election it was still possible for the case to go to the High Court for trial.

Section 6 of the Decree provides:

> *"6. To the extent that this Decree deals with the right of trial in the High Court of offences prescribed in the Schedule, the Criminal Procedure Code is amended and shall be read subject to this Decree."*

Accordingly, in considering the provisions of the Code to which we are about to refer it is necessary to pay regard to the question of whether any of them must be taken to have been amended.

The first provision in the Code for consideration is s.220:-

> *"220. If before or during the course of a trial before a Magistrates' Court it appears to the Magistrate that the case is one which ought to be tried by the (High) Court or if before the commencement of the trial an application in that behalf is made by a public prosecutor that it shall be so tried, the Magistrate shall not proceed with the trial but in lieu thereof he shall hold a preliminary inquiry in accordance with the provisions hereinafter contained, and in such case the provisions of section 235 shall not apply."*

At the outset, therefore, either the Magistrate or the prosecutor can decide that the matter is one which ought to be tried on indictment and if either of them makes such a decision the case cannot proceed summarily.

There can be no question of s.220 being regarded as amended by the Decree. There is no conflict between the right of the accused to elect trial in the High Court, and the right of the Magistrate or prosecutor to make a similar election. The significance of this in the present case, as we will refer to again later, is that the prosecution, who should be aware of the gravity of the case, can decide from the outset that the case is, or is likely to be, of too serious a nature to justify summary trial and a maximum sentence of 5 years' imprisonment.

Section 224 sets out the procedure to be followed in a case which is to go to the High Court for trial, namely:

> *"224. Whenever any charge has been brought against any person of an offence not triable by a Magistrates' Court or as to which the Magistrate is of opinion that it ought to be tried by the (High) Court or where an application in that behalf has been made by a public prosecutor a preliminary inquiry shall be held, according to the provisions hereinafter contained, by a Magistrates' Court, locally and otherwise competent."*

This provision re-states and therefore reinforces the power given both to a Magistrate and to a prosecutor to decide on a trial in the High Court, and again is not to be regarded as having been amended by the Decree.

We come then to s.222(1) which we have set out earlier. 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.

We were referred to three decisions of the English Divisional Court in which the provision corresponding to s.222(1) - namely s.29 of the Magistrates' Court Act 1952 - was under consideration. R. v King's Lynn Justices, Ex parte Carter and Others (1968) 3 All E.R. 858 was a case in which three men were charged with theft from their employer. In the course of the trial it emerged that, although none of the defendants had any previous convictions, two of them had been involved in thefts from their employer for a long time, and the third was in a special position of trust as second to the Supervisor. In his judgment, at p.862, Lord Parker C.J. said:-

> *"As I see it, speaking for myself, the expression "character and antecedents" being as wide as it possibly can be, justices are entitled to take into consideration in deciding whether or not to commit, not merely previous convictions, not merely offences which they are asked to take into consideration, but matters revealed in the course of the case connected with the offence charged which reflects in any way on the accused's character. Of course, in the ordinary way where justices do their duty under s.19(2) of the Act of 1952, the circumstances of the offence which reflect on character and antecedents will already have emerged, and if, notwithstanding that, the justices decide to deal with the case summarily, they cannot take those matters into consideration again when they are considering committal under s.29; there must be something more than has been revealed at the stage when they decided to deal with the case summarily. On the other hand where, as in the present case, they have either been persuaded to deal with the case summarily, or have embarked on the summary trial without making any proper inquiry, or without conducting their inquiry as examining magistrates far enough to understand the nature of the case, then, as it seems to me, they are fully entitled to take into consideration those matters relating to the*

offence which had been revealed at the trial and which do reflect on the character and antecedents."

The other cases cited to us were R. v Tower Bridge Magistrate, ex parte Osman (1971) 2 All E.R. 1018 and R. v Lymm Justices, ex parte Brown (1973) 1 All E.R. 716 but they add nothing to the observations of Lord Parker C.J set out above.

We return to the present case in order to determine whether there were matters of character and antecedents which entitled the Magistrate to regard the offence as more serious than the facts of the offence itself disclosed.

While it was undoubted that the nature of the offence and the way in which it was carried out will have told the Magistrate something of the Appellant's character and although he also had a list of the Appellant's previous offending, he unfortunately said nothing of these matters. What he said was this:-

"During the trial, the court cannot help but notice an expression of distress from the victim. This frightening experience is very much noticeable, may still be clearly visible and lingering in her mind.

The victim is a young lady, with a small figure. If she alleges that she was too frightened to resist, because of her own life which might be taken away unnecessarily, if she gives a wrong decision at that point in time, she is not to be blamed.

The Accused person is a strong man, with a

facial expression of a drug addicted person.

The method applied by the Accused can only be described as despicable and atrocious.

The normal sentence of 5 years imprisonment passed in the lower Court is not sufficient for this horrific crime. The Accused should be placed away from society for a very long time. It is recommended that a longer sentence of more than 5 years be imposed by the High Court."

There can be little doubt that the reason for the Magistrate deciding to commit was solely the gravity of the offence. If there was in his mind something relating to character and antecedents then he certainly did not indicate what that was. Moreover, there would appear to be little in those matters to make the difference between committing and not doing so. If the Appellant's list of previous offending had included sexual offences to which the Magistrate had turned his mind then that may well have been significant, but that was not the case.

It is inevitable that in any rape case the details of the offence will tell the Court something of the character of the accused. If that were all that was necessary to justify committal then there would be no need for the words under consideration in s.222(1) to have been included. We are, however, obliged to give those words some meaning. We can only conclude that they mean information of something additional to the physical details of the offence. A very clear example of this was to be found in R. v King's Lynn Justices (supra) where it appeared that two of the

accused, although not previously convicted, had been stealing from their employer for years.

The decision as to whether, because of the gravity of the circumstances, a case should go to the High Court rather than be dealt with summarily, is one which should be made at the outset or during the trial and this is the reason we have set out the relevant provisions of the Code.

In the present case, it must have become apparent to the Magistrate in the course of the trial, if not sooner, that this was the kind of case in which the maximum sentence of 5 years was unlikely to be sufficient, and particularly in view of the observations of this Court, made a few months earlier, that the starting point for sentencing for rape should now be 7 years (see Mohammed Kasim v State FCA No. 21 of 1993, delivered 27 May 1994). No doubt there may still be cases in which a term of 5 years or less will be appropriate but they are likely to be increasingly rare.

We should also expect the prosecution to give closer attention to whether a rape trial should take place in the Magistrates Court or the High Court. While the charge must first be filed in the Magistrates Court it is open to the prosecution under s.220 to apply at once for a preliminary inquiry. The prosecution will be aware of the nature of the evidence to be offered and we consider

that a deliberate decision should be made in each case as to whether the case is one which is likely to attract a sentence of more than 5 years. In view of what we have already said we consider a decision to accept summary trial of a rape charge should rarely be made.

For the reasons given, and notwithstanding that the gravity of the offence merited the sentence imposed, we consider the Court is obliged to allow the appeal against sentence and to set aside the sentence of 8 years' imprisonment and substitute a sentence of 5 years'imprisonment. That being the opinion of the majority.

The decision of the Court is:

The appeal against conviction is dismissed.

The appeal against sentence is allowed and the sentence of 8 years' imprisonment is substituted by a sentence of 5 years' imprisonment.

.....
Sir Peter Quilliam
Judge of Appeal

.....
Mr Justice Ian R. Thompson
Judge of Appeal

A:\AAU0018J.94S