IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO.AAU0037 OF 2002S
(High Court Criminal Action No. HAA050 of 2002S)

BETWEEN:

NAVUNIANI KOROI

Appellant

AND:

THE STATE

Respondent

Coram: Reddy, P
Ward, JA
Davies, JA

Hearing: Tuesday 11th February, 2003, Suva

Counsel: Appellant in Person
Mr. G.H. Allan for the Respondent

Date of Judgment: Friday 14th February 2003

JUDGMENT OF THE COURT

The appellant appeared before the Suva Magistrates' Court on 1 February 2002 charged with five counts of rape. The particulars showed that the victim in each case was the same person and that the charges covered a period from December 1999 to February 2002. The appellant elected summary trial and pleaded guilty to all charges.

When the facts were presented to the court by the prosecution, it became apparent that the victim was the accused's daughter, the rapes started when she was only 13 years old, the victim had been threatened and subjected to physical violence, on one occasion the appellant had taken her to a hotel to commit the offence and he had obtained her silence by a threat to kill her if she told anyone. The offences came to light when her mother noticed that she looked as if she may be pregnant and the victim disclosed the rapes and the identity of her attacker. A medical examination confirmed that she was a week over seven months pregnant.

The only indication in the original charges which might have alerted the court to the fact that the victim was the appellant's daughter was that the victim had the same family name as the accused.

The appellant admitted the facts that had been outlined and also admitted two minor convictions both of which were more than 20 years old. Having passed in a copy of the appellant's antecedent history, the prosecutor applied to the magistrate to commit the case to the High Court for sentencing under section 222 (1) of the Criminal Procedure Code.

At that stage the magistrate indicated that he would hear the application after the appellant had mitigated. Once that was done and, following further submissions by the prosecutor, the magistrate's notes recorded, inter alia:

"1. I will first rule on the prosecution application to refer this matter to the High Court for sentencing under section 222 (1) of the Criminal Procedure Code.

2. I thank the prosecution for referring this court to the various authorities cited in the record. All those authorities are binding in this case. However, in my view, the Court of Appeal case of Timoci Momotu v State is crucial for the success or otherwise of the State's application.

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4. Of importance is the requirement that this court must consider his character and antecedents of the accused supplied by the State. This is to be an added inquiry separate from his circumstances and gravity of the offences to which the accused has pleaded guilty to.

.....

6. The antecedent of the accused supplied to the court by the prosecution does not entitle me to refer this matter to the High court for sentencing.

7. The antecedent of the accused appears to show that he is a first offender as far as sexual offences are concerned.

8. If the prosecution had wanted a penalty more than that allowed by the magistrates' court, they should have used their powers under section 220 of the CPC at the outset.

9. It is not safe, given the legal difficulties presented by Timoci Momotu to rely on section 222 (1) of the CPC when the antecedent of the accused does not satisfy the test laid out in that case.

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12. The facts of this case is very disturbing. The accused has seriously abused his right as a parent. He has seriously abused the trust his daughter placed in him. He has, in effect, ruined his family."

He then sentenced the appellant 4 years imprisonment on count 1, 5 years consecutive on count 2 and 5 years concurrent on the remaining counts giving a total of 9 years.

The State appealed against conviction and sentence and the appeal was heard by Justice Shameem.

On conviction, the learned judge considered the The State v.Timoci Momotu, Crim App AAU18/94 and the authorities cited. She then concluded:

"Turning therefore to the case before me, the learned Magistrate held that the respondent was of good character and that the committal was not justified. I do not consider that he erred in ignoring the two previous convictions for the respondent. They are more than 20 years old and were rightly disregarded. However, I consider that he did err in disregarding the fact that respondent had raped his daughter (which was not alleged in the charge) and that the respondent had committed other offences of rape against his daughter which were not specified in the charges. According to the authorities I have cited, these factors were additional to the facts disclosed in the offences charged and were both relevant to the discretion to commit.

Given the starting point for rape, which is 7 years imprisonment, the gravity of the offence, including the resulting pregnancy of the complainant, would have justified a significant increase. Any reduction for the guilty plea could not have brought the sentence within the jurisdiction (on one count) of the magistrates' court. Further the relationship between the respondent and the complainant and the on-going nature of the offending in relation to incidents not alleged in the charges, should have led to committal [for sentence].

I therefore find that the learned magistrate erred in failing to take into account factors relating to character and antecedents, and in refusing the State's application to commit to the High Court for sentence."

The learned judge then quashed the decision by the magistrate not to commit to the High Court for sentence and substituted such an order.

The appellant was unrepresented before this Court. He had put in written submissions which related to sentence only. We shall return to those when dealing with sentence. However, his grounds suggest he does not understand the procedure that was followed and so we have reviewed the decision of the learned High Court judge on appeal.

We are satisfied that the learned judge's conclusions were correct. The effect of the requirement in section 222 (1) of the Criminal Procedure Code that "... if on obtaining information as to [the accused's] character and antecedents, the magistrate is of opinion that they are such that greater punishment should be inflicted in respect of the offence than the magistrate has power to inflict.." was extensively discussed in Momotu's case. The Court cited the case of R v King's Lynn Justices, ex parte Carter and others (1968) 3 All ER 858 in which Lord Parker CJ stated at 862:

> ***"As I see it, ... 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."***

The majority in Momotu considered that the sole reason for the magistrate's decision to commit for sentence in that case was the gravity of the offence. Dillon JA, differed from the majority in finding that the gravity of the offence also provided information relating the character of the offender.

We agree that some facts may, in a particular case, point both to the gravity of the offence and to the character of the offender. In the present case the learned judge clearly formed that conclusion. The fact the rapes were committed on his own daughter, that she was a child at the time, that there were more instances than were actually charged, that they resulted in her becoming pregnant, that he was willing to use violence to facilitate the rapes and threats to procure her silence all supply information about the character of the appellant what was not apparent in the charges.

The decision of the learned judge to quash the magistrate's order and commit the case to the High Court for sentence was clearly correct.

When the case was brought up for sentence, the learned judge referred to the guidelines in Mohammed Kasim v The State Crim App 21/93 and sentenced the appellant in the following terms:

> ***"Taking 7 years as the starting point, I increase that term by two years for the young age of the complainant and a further 3 years for the fact that she is your daughter. I add a further year for the resulting pregnancy. I reduce the term by one year for the guilty plea and other mitigation."***

She then sentenced the appellant to 12 years imprisonment on each court concurrent.

This court can only alter that sentence if it is manifestly excessive or wrong in law.

The appellant had placed a letter before the High Court from his family pleading for a non-custodial sentence. He submitted a further letter each from the complainant and from his wife. They repeat in strong terms their need for the appellant to be free to provide for his family and point out the suffering his incarceration will have on the family members. No court could fail to be moved by such letters but the duty of the court is to pass a sentence for the offence that is appropriate to its gravity. It must consider all matters that may mitigate the penalty but the consequences of the sentence on the accused man's family cannot be properly taken into account. Clearly the learned judge would have been affected by that plea. It is impossible not to feel sympathy for the plight of the family as a result of a custodial sentence and to realise that the effect of the sentence will inevitably, in a case such as this, cause great hardship to the victim also.

We also bear that in mind but, in view of the guidelines in Mohammed Kasim, we cannot say that the sentence was manifestly excessive

In one aspect of the sentence however, we do consider the learned judge erred. It has long been the practice of the courts to reduce a sentence where the accused person has pleaded guilty. In most cases that is a recognition of his contrition as expressed by an early admission and the fact that it will save the witnesses and the court a great deal of time and expense. In offences of a sexual nature, the amount of reduction is generally more because the plea

saves the victim from having to attend the trial and relive her experience in the witness box.

The learned trial judge, as had the magistrate, indicated that the sentence was reduced as a result of the plea of guilty by one year.

In this case, the learned judge was right to pass a sentence well above the starting point suggested in Mohammed Kasim and the total sentence arrived at was, as we have stated, unchallengeable. The facts of this case suggest that the appellant had little choice but to plead guilty and so the reduction such a plea would earn would not be as great as in many other cases. However, we feel that a reduction of one thirteenth does not adequately reflect the fact that his daughter was saved from having to give evidence. We feel that a reduction of approximately one sixth would reflect that more accurately and to that extent only do we feel the learned judge's decision should be changed.

The appeal against sentence is allowed to the extent that the sentence is reduced to one of 11 years on each count to be served concurrently.

Before leaving this case we would make a further observation.

In a case where the accused has elected to be tried summarily, the court should always be careful, as the facts unfold, to bear in mind the possibility

that the offences are too serious for him to be able to pass an adequate sentence. If he does he has the power at any stage to stop trying the case and to continue as a preliminary inquiry.

The prosecutor has the right to require the case to be tried in the High Court if he makes an application to that effect before the commencement of the trial. The prosecutor will know better than the magistrate the nature and seriousness of the offence and should always be prepared to make such an application in an appropriate case. If there is any doubt, the magistrate should be given the full facts before he makes a decision whether or not to proceed summarily. In this case, the prosecutor should have done so. Once he had let it proceed to trial, his ability to seek a committal for sentence under section 222 (1) could have been restricted by the terms of the section.

Quillam and Thompson JJA made this clear in Momotu's case:

> ***"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 terms 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 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."

We would suggest that all rape cases should be tried in the High Court. The reduction from the basic sentence needed to bring it within the magistrate's jurisdiction is such that it will only be in appropriate in the most unusual case. Where the likelihood of committal to the High Court for sentence is so great, it is unfair to the accused to start to hear the case summarily and so, before embarking on such a trial, the magistrate should make careful inquiry of the prosecution as to the details of the case.

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Reddy, P

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Ward, JA

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Davies, JA

FIJI COURT OF APPEAL

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions, Suva for the Respondent

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