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

CRIMINAL APPEAL NO. AAU0015 OF 2003S
CRIMINAL APPEAL NO.AAU0009 OF 2003S
(High Court Criminal Action No. HAC011 of 1997L)

BETWEEN:

KALIVATI VEIBA VUNISA
SEMI BALEDROKADROKA
SITIVENI MUA
MALELI NASILASILA

Appellants

AND:

THE STATE

Respondent

Coram: Ward, President
Penlington, JA
Wood, JA

Hearing: Monday 8th November 2004, Suva

Counsel: Appellants in Person
Ms. A. Prasad for the Respondent

Date of Judgment: Thursday, 11th November 2004

JUDGMENT OF THE COURT

The appellants were all convicted of rape following a trial in the Lautoka High Court. Each appellant was charged with a separate rape but the prosecution case was that the second, third and fourth appellants joined in what was effectively a gang rape at the invitation of the first appellant after he had himself raped the victim.

All four appellants filed notice of appeal against sentence but their submissions show that they had included matters which amount to an appeal against conviction.

The first appellant has been granted leave to appeal against sentence. No leave has been sought or granted for an appeal by the other three against sentence or by any appellant for an appeal against conviction.

The grounds of appeal against conviction are similar for each appellant and it is challenged on two grounds; first, that the victim consented and the learned judge failed to deal with this in his summing up and, second, that counsel who was representing the accused withdrew during the case and the appellants had to continue unrepresented.

We have considered the first ground and are satisfied it has no merit. It raises a matter of fact and the learned judge covered it fully and carefully in his summing up. We refuse leave to appeal on that ground.

However, the withdrawal of counsel during the trial is a matter which may raise a question of prejudice and we give leave to proceed with that.

The charge states that offence was committed "between (sic) 22 and 23 April 1997". The record shows that this case was first called before the High Court on 2 February 1998. Counsel for the State indicated that the prosecution would be ready for trial in 8 weeks. The accused were represented by Mr Vuataki and were remanded on bail.

From then there were no less than 25 dates upon which the case was called for mention or trial. There were various reasons why it did not proceed - frequently because of the absence of one or more of the appellants. Mr Vuataki appeared either himself or by another lawyer on his behalf at the first twelve of those. There followed a period when no defence counsel appeared until 11 November 2002 when Mr Vuataki again appeared and asked for a hearing date. The case was set for 15 November 2002 but, on that date, the first appellant failed to appear. It was adjourned to 26 November 2002 when the record states, "Mr Vuataki – ask for adjournment. Mix up."

The adjournment was granted to 3 February 2003 when it is recorded that Mr Vuataki told the court, "I have withdrawn." The first appellant then told the court he had asked for legal aid.

In this Court, the first appellant said that his brother had arranged to pay counsel but he understood he had withdrawn because of "financial problems." He confirmed that he had applied for legal aid but it had been declined. It was unfortunate that counsel withdrew but it is clear the appellants were unable to pay him. We do not know the reason the legal aid authorities declined to represent them.

The record shows that the appellants cross examined the complainant and other witnesses in some detail. The first appellant gave evidence, the second and third made unsworn statements and the fourth remained silent. During the case the learned judge gave them advice and assistance. We are satisfied that they were not prejudiced by the lack of counsel and the appeals against conviction are dismissed.

As we have stated, only the first appellant has been granted leave to appeal against sentence and we give leave to the other three to do so.

The first appellant was sentenced to 9 years imprisonment and the others to 8 years. None of the appellants had previous convictions and the learned judge made it clear that the first appellant received the longer sentence because he was the ringleader.

Each appellant seeks to raise the same matters as were raised as mitigation in the trial. The learned judge had made it clear he had taken those matters into consideration and then concluded his remarks when sentencing:

> "The Court of Appeal has stated that the starting point for rape should be 7 years. Apart from the fact that all the accused are first offenders and the fact that it has taken 6 years for this matter to come to trial, I find little else to make a revision downwards. As against that the victim was beaten into submission and was gang raped by the four accused. The first accused was obviously the ringleader who

devised this diabolical plan to "exact revenge" as he says. The other three accused stood by and watched the beating of the victim in order that they may also satisfy their lust. If they had any decency they would have stopped this degradation and not have been part of it. Their culpability is only slightly less than that of the 1st accused."

This court has the power to alter any sentence passed in the High Court but will only do so if it considers that it was manifestly excessive or wrong in law or principle.

Gang rape is a terrible offence. Any person involved in such an offence must understand he will go to prison for a long time. In determining the appropriate sentence, the court will bear in mind that an innocent victim has suffered severe trauma as a result of the actions of her attackers. Quite apart from the horror of the offence itself, its effect is likely to be a lasting legacy of fear and shame as a result of the manner in which this offence was committed. The sentence passed must reflect the attackers' responsibility for those consequences.

The learned trial judge clearly took all relevant mitigation into consideration. We would only comment that the sentencing guidelines stated in ***Mohammed Kasim v. The State,*** FCA No 21of 1993, set the starting point at seven years for rape before any matters of mitigation or aggravation are considered. In a case of gang rape such as this, involving considerable violence and added humiliation of the victim by the public manner in which the others were called to take part, the court would have been justified in enhancing the sentence by a greater margin.

The sentences passed, however, fall within the acceptable range for such an offence and the appeals against sentence are dismissed.

Orders

1. Leave granted to appeal against conviction on the ground of withdrawal by counsel only.

2. Leave granted to the second, third and fourth appellants to appeal against Sentence.

3. Appeals against conviction and sentence dismissed

Ward, President

Penlington, JA

Wood, JA

Solicitors:

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

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