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

Criminal Appeal No. AAU 32/05
(High Court Criminal Case No. HAC 60/03S)

BETWEEN:

NACANIELI MARAWA

Appellant

AND

THE STATE

Respondent

Coram:	**Gallen, JA** **Ellis, JA** **Scott, JA**
Date of Hearing:	**26 July 2006**
Counsel:	***Appellant in Person*** **D.D. Gounder for the Respondent**
Date of Judgment:	**28 July 2006**

JUDGMENT OF THE COURT

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[1] This is an application to the full court, brought pursuant to section 35 (3) of the Act, for leave to appeal against a judgment entered against the Appellant on 23 April 2004.

[2] The Appellant was sentenced to 13 years imprisonment after being convicted of two counts of rape. It was not entirely clear whether he wished to appeal against both his conviction and his sentence or against the sentence only. When he appeared before the President in June 2005 he stated: "I really appealed against conviction because the sentence is extreme". He handed us two letters he had written on 24 and 25 July 2006. The first appeared to question the correctness of his conviction but in the second he stated: "I wish to apologise for what I did. I know it was wrong and against the law."

[3] As the Appellant was representing himself we considered the various points raised by him against his conviction. We are satisfied that each of the matters addressed was either fairly placed before the assessors for their opinion or was not raised at the trial. We can find no fault in the way in which any of these matters was dealt with and accordingly the appeal against conviction fails.

[4] The complainant was the Appellant's niece. She was aged fourteen at the time these offences were committed. She had been sent by her parents from her home in Vunidawa to live with her aunt and uncle in Suva in order to further her schooling. As the result of the Appellant's behaviour the complainant became pregnant. In due course she gave birth and was forced to leave school and return to Vunidawa.

[5] In support of his appeal against sentence the Appellant submitted that the High Court had erred by not taking sufficient account of the mitigating factors placed before it.

[6] In arriving at the sentence which he passed, the judge took as his starting point the seven year term established in Mohammed Kasim v. The State HAC 14/1993. He then listed six aggravating factors, adding one year's imprisonment for each, before arriving at the total of 13 years. The terms imposed on each count were ordered to be served concurrently.

[7] Mr. Gounder accepted that the total arrived at was "on the high side" but suggested that it was well within the sentencing bracket and was therefore not manifestly excessive. He did, however, concede that the mitigating factors available to the Appellant were not separately dealt with. The only mention by the judge of mitigation was when, referring at the start of his sentencing remarks to another case, he stated:

> "the Appellant had pleaded guilty and spared his daughter from having to give evidence. The Appellant was also given a discount for the time spent in custody awaiting trial. He was of previous good character. None of the mitigating factors allowing the court to reduce the appropriate term of imprisonment, save perhaps that I shall treat you as having a clean record, are present in this case."

[8] Before sentence was passed upon him the Appellant said:

> "I would like to thank the court for its time, the Judge and the assessors. I would like ask for forgiveness of the relatives of the complainant. I am a sickly man. I have injuries on my knees. I retired in 1997."

[9] At the time of his sentencing the Appellant was aged about 54. In the Fiji context he must be regarded as elderly. He told us again that he was sickly. We think insufficient regard was had to these two considerations.

[10] The Appellant's previous convictions, the most serious of which attracted a penalty of $20 and the most recent of which was recorded in 1980, were, within the terms of the Rehabilitation of Offenders Act 11/1997, irrelevant. They were not sexual offences. They should not have been disclosed without an application beforehand being made to the judge. In our view the Appellant was entitled to be regarded as a person of good character.

[11] So far as the trial itself was concerned, while it is correct that the Appellant did not enter a guilty plea, the record suggests that his participation was minimal. With the exception of a brief challenge to the complainant the remaining evidence was accepted without demur. A 13 paragraph statement of facts was agreed by the Appellant which resulted in the trial being considerably shortened.

[12] We entirely agree with the judge that these were very serious offences indeed. A lengthy prison term was inevitable. The Appellant's hope for a suspended sentence was quite unrealistic. We are, however, of the view that insufficient regard was had to the mitigating factors which we have outlined. Taking them into account we are satisfied that the term of imprisonment imposed on the Appellant should be reduced to one of ten years.

RESULT

Appeal allowed; term of imprisonment reduced to 10 years.

Gallen J.A.

Ellis J.A.

Scott J.A.

Solicitors:

Office of the Director of Public Prosecutions, for the Respondent