

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

APPELLATE JURISDICTION

CRIMINAL APPEAL NO: AAU0042 OF 2007
(HIGH COURT CRIMINAL CASE NO: HAC 11 OF 2006)

BETWEEN:

KELEPI TAQA

-APPELLANT-

AND:

THE STATE

-RESPONDENT-

Counsel: Appellant in Person
Ms. A. Driu for the State

Date of Hearing: 24th March, 2009
Date of Judgment: 26th June, 2009

JUDGMENT

- [1] The appellant was convicted on his pleas of guilty on one count each of rape and assault occasioning actual bodily harm. He was sentenced on 19 March 2007 to seven years imprisonment for rape and twelve months imprisonment for assault occasioning actual bodily harm and the sentences were ordered to be served concurrently with each other, giving a total sentence of seven years.
- [2] He submitted an application for leave to appeal against conviction and sentence on 30 April 2007. On 1 June 2007, Ward P directed that the record should be prepared so that the application for leave could be considered.

- [3] On 24 March 2009, the appellant appeared in person and informed the Court that he wanted to pursue appeal against sentence alone. The application for leave and the substantive appeal were heard together.
- [4] The facts were that on 8 March 2006 at around 1am, the appellant and the complainant left a nightclub together. As they walked down the street, the appellant punched the complainant on her mouth. She fell down and sustained cuts and bruises. She rolled down a slope.
- [5] The appellant followed her and after forcefully removing her clothes, raped her. When they returned to the nightclub, the complainant complained to a police officer.
- [6] The principal ground of appeal is that the sentence is harsh and excessive. The appellant repeats the mitigating factors which were raised at the trial.
- [7] In passing sentence the judge explained the matters of which she took account:

“The starting point on Count 1 for rape is 7 years imprisonment. I do not take into account the assault, because you are charged separately for that. However I consider the breach of trust because you and the complainant are already known to each other, and the dragging down the slope which must have added to the trauma of the rape. For these factors I increase your sentence to 9 years imprisonment.

For your good character, guilty plea, remorse and family circumstances, I reduce your sentence by two years, to 7 years imprisonment.

On Count 1, I sentence you to 7 years imprisonment.

On Count 2, you assaulted someone known to you and caused injuries to her lip and hip. After taking into account all aggravating and mitigating circumstances I sentence you on Count 2 to 12 months imprisonment. Because I have not considered the injuries to the complainant on Count 1, I would be expected to order the sentences to be served consecutively. However I consider the 7

year term imposed on Count 1 to properly reflect the totality of the offending. The sentences on Counts 1 and 2 are therefore to be served concurrently.”

[8] It is trite law that an appellate court will only interfere with a sentence if it is manifestly excessive or wrong in principle.

[9] Over the years the courts have considered rape a serious offence. The gravity of this offence has led the Court of Appeal in the case of *Kasim v. State Criminal Appeal No. 21 of 1993 (27 May 1994)* to fix a starting point. The Court said:

“While it is undoubted that the gravity of rape cases will differ widely depending on all the circumstances, we think the time has come for this Court to give a clear guidance to the Courts in Fiji generally on this matter. We consider that in any rape case without aggravating or mitigating features the starting point for sentencing an adult should be a term of imprisonment of seven years. It must be recognized by the Courts that the crime of rape has become altogether too frequent and that the sentences imposed by the Courts for that crime must more nearly reflect the understandable public outrage. We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than that starting point.”

[10] Albeit *Kasim* was considered fifteen years ago and the starting point may need revisiting in the current sentencing climate, we consider the starting point of seven years imprisonment for rape in this case was an appropriate term.

[11] However, we are concerned about two aspects of the sentence. The judge considered the complainant’s relationship with the appellant and the fact that she was dragged down a slope as aggravating factors to justify an increase of the sentence by two years. In a case where the offender is in a position of trust arising from special position he or she holds, such as that of an employer or of a public transport operator, or is related to the victim, or is an authority figure to the victim, any breach of that trust is justified to be used as an aggravating factor to increase the sentence.

- [12] In the present case, while the complainant knew the appellant through previous relationship, there was no evidence that at the time the offence was committed, they were in an existing relationship to give rise to a breach of trust. Previous relationship between the appellant and the complainant was irrelevant and should not have been considered either a mitigating or an aggravating factor. We find the judge fell in error when she considered the breach of trust as an aggravating factor to enhance the sentence.
- [13] Our second concern is the amount of credit given to the compelling mitigating factors present in this case. The appellant showed genuine remorse by admitting the offence to the police and by pleading guilty at the first reasonable opportunity. He not only saved the court time and the resources but relieved the complainant from giving evidence of sexual nature which would have been a distasteful experience for her. The appellant was a person of previous good character and came from a disadvantaged background. We take the view that the discount of two years did not sufficiently account for these mitigating factors.
- [14] We bear in mind that different judges may give different weight to the mitigating factors and that this Court should be slow to intervene in a sentence on the ground of insufficient weight given by the sentencing court to the various mitigating factors, we nevertheless, are satisfied that this is a case where our intervention is justified. Rape cases pose an inherent difficulty in its prosecution because of the nature of evidence that the complainant has to recollect and testify. When an accused pleads guilty, substantial discount should be given for relieving the complainant from giving evidence of sexual nature.
- [15] In *Navuniani Koroï v. The State Criminal Appeal No: AAU0037 of 2002S* this court said:

“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."

- [16] We would start with seven years imprisonment and add one year for the use of violence in committing the rape. For the early guilty plea, remorse, previous good character and family circumstances we would reduce the sentence by three years and arrive at a term of five years imprisonment.
- [17] We would not interfere with the sentence imposed for assault occasioning actual bodily harm and with the order making the sentences concurrent.


Result

- [18] Leave to appeal out of time is granted. The appeal against sentence is allowed.
- [19] Sentence of seven years imprisonment for rape is quashed and a sentence of five years substituted.





 Devendra Pathik
JUDGE OF APPEAL



 Daniel Goundar
JUDGE OF APPEAL

At Suva
 26th June 2009

Solicitors:

Appellant in person
 Office of the Director of Public Prosecutions for State