

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No: HAC 259 of 2013

BETWEEN : **THE STATE**
AND : **LEONE KOTOBALAVU VERESA**
BEFORE : **HON. MR. JUSTICE PAUL MADIGAN**
Counsel : Ms. L. Latu for the State
Mr. S. Waqainabete (L.A.C.) for the accused
Date of Hearing : 15 July 2013
Date of Sentence : 29 July 2013

SENTENCE

Background

- [1] On the 17th July 2012, in the Magistrates Court at Nasinu, this accused was convicted after trial of one count of rape, contrary to sections 149 and 150 of the Penal Code, Chapter 17, Laws of Fiji.
- [2] He was sentenced on the 25th January 2013 to a term of imprisonment of eight years which was partially suspended to the extent that he was to serve the term *intra muros* during the weekends and at large in the community during the week. There was no minimum term imposed.
- [3] The State appealed this sentence, not on the basis that the term of imprisonment was insufficient, but on the basis that the suspension of the term was *ultra vires* the Magistrate's powers and that a minimum term should have been imposed.
- [4] The appeal succeeded (see Cr. App. 014 of 2013S) and in the process this Court, after setting aside the sentence passed below and in

assuming the role of the Magistrate pursuant to section 256(2)(e) of the Criminal Procedure Decree ("the Decree"), ordered that the matter be sent up to the High Court for sentencing in accordance with section 190 of the Decree.

[5] This then is that fresh sentencing exercise in the High Court.

Facts

[6] The facts of the case were that the accused, an ex-Police Officer, was celebrating with his friends a Police win in a Rugby match. The celebrations had been on-going for some time and it is not in dispute that the accused was heavily intoxicated. He was aged 32 at the time. He had heard rumours that his biological sister, who was the victim in this case then aged 22, was involved in a lesbian relationship and he summonsed her to his home. He questioned her about this relationship and she denied it. He told her that he would "do something to her to make her forget she was a lesbian". She attempted to run away from him and ran onto the street outside. In the sight of neighbours and his drinking friends he chased her and caught her and put her in so much fear that she lost control of her bladder and bowels. He took her back into the house. His wife was there and she made the sister clean herself up after which the accused kept her in a locked bedroom over a period of three hours while he subjected her to sexual indignities and penile rape. His wife was at all times inside an adjacent room. The accused when giving evidence of the matter says that he was too drunk to remember the details but he did remember having sex with somebody but could not remember who with.

Mitigation

[7] The mitigation advanced on behalf of the accused below and mitigation that the learned Magistrate found valid included:

- First offender and ex-Special Police Inspector;
- 33 years of age;
- Married with 4 children;
- Care giver of wife's 64 year old grandmother;
- Matter hanging over his head for 5 years;
- Suffered humiliation and mental agony;
- Total remorse;
- Seeks suspended sentence.

- [8] The only possibly valid mitigating items in this list could be first offender and total remorse (if indeed there was such). Being an ex-Policeman is an aggravating feature, not mitigating; his family circumstances are not mitigating and to say that he suffered humiliation and mental agony is a finding by the Magistrate that is breathtakingly antithetical to what must have been the emotional state of the victim herself.
- [9] As the State Counsel submits in her sentencing submissions, the fact that the accused was at the time a Police Officer belies his oath to uphold the law to the best of his ability.
- [10] The aggravating features in this case are both manifold and grave.
- [11] Figuring high in this list is the fact that the victim was the accused's biological sister. To have forceful sex with her demonstrates a complete disregard for well established social, religious and traditional mores, not to mention legal restrictions, and in so doing he was destroying the fabric of an acceptable family relationship.
- [12] Almost as seriously aggravating was the accused's homophobic wish to "correct" what he perceived to be his sister's divergent sexual "journey". To impose one's own perception of what is normal in a sexual context and to deny another the right to choose his or her own sexual orientation is a denial of a basic human right. It may have been thought noble in the past to insist on sexual conformity but in

these days when we see many countries allowing civic recognition to, and even marriage of same sex partners, then nobody (and especially not one's sibling) has the right to dictate what another's sexuality should be.

[13] Also aggravating is the violence occasioned to the victim in this episode. She had escaped to the street in such fear that had soiled herself and in full view of the neighbours the accused ran out to pull her back into the house. He physically assaulted her by throwing punches to her face causing her nose to bleed. She also sustained bruises to her back.

[14] There is very little to be said in mitigation for the accused. I am told that he is remorseful but I have seen no evidence of that in this Court. He does have a clear record however which will afford him some credit.

The Law

[15] The Court of Appeal in ***Mohammed Kasim*** C.A. 21 of 1993 stipulated that sentences for rape must incur a starting point of at least 7 years imprisonment and maybe more if the circumstances warrant it. In recent times with the ever increasing counts of rape coming before the High Court, sentences of 7 to 15 years have been handed down. A completely different band of sentences have established a tariff for rapes of children.

The Sentence

[16] Considering the aggravating features in this case which will add a significant period to any starting point adopted, I start the sentence with a figure at the lower end of the band and in adopting the sentence arrived at by the Magistrate below for that purpose, I take a starting point for sentence of 8 years.

- [17] For the socially proscribed sororal rape and sexual abuse I add a further term of 5 years.
- [18] For the uncultured and reactionary intolerance of altered sexual orientation and the attempt to "right" this perceived deviance, I add another 3 years to the sentence.
- [19] For the violence in the public gaze and the violence perpetrated within the bedroom, I add a further 2 years.
- [20] For the fact that he was a Police Officer and should have been aware of the need to obey the law and to conform to conventional social behaviour I add a further 2 years.
- [21] The sentence now standing at 20 years I make allowance for his thitherto clear record and what his Counsel submits is his remorse, by deducting two years.
- [22] The Court is advised that the accused has already served 95 days, made up of his weekend custody and time spent in remand awaiting this sentence and for that I allow him a credit of 4 months.
- [23] The total sentence that the accused will serve for this crime is 17 years and 8 months. He will serve a minimum term of 15 years before being eligible for parole.

Paul K. Madigan
JUDGE

At Suva
29 July 2013