IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAA 33 OF 2014

BETWEEN : **VILIAME UQEUQE**

APPELLANT

AND : **THE STATE**

RESPONDENT

Counsel : **Mr. K. Tunidau for the Appellant**
Ms. L. Latu for the Respondent

Date of Hearing : 13th of April 2015
Date of Judgment : 10th of June 2015

JUDGMENT

1. The appellant files this appeal against the conviction and the sentence of the learned Resident Magistrate of Tavua dated 21st of July 2014. The grounds of appeal against the conviction and the sentence are inter alia;

   i. *The guilty plea entered by the appellant was equivocal upon the following grounds;*

      a. *The appellant was threatened to plead guilty by the police as the complainant was also a police officer; and*

b. *The appellant was induced and promised of a suspended sentence by the police and in particular the police prosecuting officer,*

ii. *The sentence is harsh and excessive in all circumstances of the case; and*

iii. *The trial magistrate took into account irrelevant matters when imposing the sentence,*

2. Upon being served with this notice and grounds of appeal, the Respondent appeared in court on 11th of September 2014. Both parties were given directions to file their respective objections and written submissions, which they filed accordingly. Having carefully considered the respective objections and submissions of the appellant and the respondent, I now proceed to pronounce my judgment as follows.

Background

3. The appellant was charged for one count of sexual assault contrary to section 210 (1) (a) of the Crimes Decree in the Magistrate's court of Tavua on 9th of May 2014. He pleaded guilty for this charge on the 9th of July 2014. The learned magistrate then convicted him for the offence of sexual assault and sentenced him on 21st of July 2014 for a period of 4 years with 3 years of non-parole period. The appellant has appealed against the said conviction and the sentence of the learned magistrate.

4. The first ground of appeal against the conviction is based on the allegation that he was threatened to plead guilty and also promised of a suspended sentence by the police. The appellant deposed in his affidavit that due to the fear of the police and their promise of suspended sentence he had to plead guilty for this offence. Wherefore his plea is not an unequivocal plea of guilty, thus making the conviction void and invalid.

5. Having carefully perused the case record of the magistrate court, I find that the accused was produced before the learned magistrate on 9th of May 2014, where he was explained the charge and he understood it. He was then released on bail. The matter was then adjourned to 9th of June 2014 for disclosures. It appears that the appellant was granted bail on 9th of May 2014, and was no longer under the influence or custody of the police. He was free to complain or inform any other relevant authority about any alleged force or threat made by the police officers. He would have sought legal assistance from a lawyer or legal aid. However, the appellant has done nothing as such.

6. The appellant again appeared in the magistrate's court on 9th of June 2014, where he was served his disclosures and explained his right to counsel. He has selected to defend by himself. He chooses the magistrate's court proceedings. Once again he was given another month's adjournment for his plea. He had a month to consider his disclosures and plea. Again he chose not get any legal assistance or report those alleged forces or threats made by the police to anyone.

7. On the 14th of July 2014, his charge was read over to him and explained once again in the court. He then pleaded guilty for the offence on his own free will. He did not inform the learned magistrate about any of those allegations which he is advancing in this appeal. The summery of facts were read over to him and he admitted them in open court. He then made his mitigation submissions, where he sought forgiveness for this offence. Based on his plea of guilty and admission of summery of facts, the learned magistrate then pronounced his sentence on 21st of July 2014.

8. In view of the chronological background of this case in the magistrate's court, it appears that the appellant was on bail from 9th of May 2014 and also has chosen to represent by himself when he was explained the right of counsel. It is my opinion that he had opportunities to either seek legal assistance from a private

lawyer or legal aid, or report to the higher police authority if he was threatened, forced or promised to plead guilty as he alleges in this application.

9. The Fiji Court of Appeal in **Tuisavusavu v State [2009] FJCA 50; AAU0064.2004S (3 April 2009)** held that;

"Whether a guilty plea is effective and binding is a question of fact to be determined by the appellate court ascertaining from the record and from any other evidence tendered what took place at the time the plea was entered. We are in no doubt from the material before us that the 1st appellant's plea was not in any way equivocal. As the 1st appellant admitted to us during argument, he pleaded guilty to the charge after having been advised to do so by his counsel in the hope of obtaining a reduced sentence. As was stated by the High Court of Australia in Meissner v The Queen [1995] HCA 41; (1995) 184 CLR 132);

"It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence."

10. Accordingly, the court is required to consider whether the appellant properly understood the charge and he intended to plead guilty before the learned magistrate. It appears, as I mentioned above that the appellant had sufficient time to consider his defence and plea. He was also explained his right of counsel,

which he chose not to exercise. He sought forgiveness in his mitigation, which indicates that he had properly understood the charge and his culpability in this offence.

11. Having considered the reasons set out above, I am satisfied that the appellant properly understood the charge and intended to plead guilty for this offence. Accordingly, it is my opinion that the appellant failed to satisfy the court that his plea was equivocal. Hence I find the grounds of appeal against the conviction have no merit.

12. I now turn on to the second ground of appeal that the sentence is harsh and excessive in all circumstance of the case and the trial magistrate has taken into account irrelevant matters when imposing the sentence.

13. The offence of sexual assault carries a maximum penalty of ten years of imprisonment period. The tariff for the offence of sexual assault is between two to eight years of imprisonment period. (**The State v Epeli Ratabacaca Laca, HAC 252 of 2011).**

14. Justice Madigan in **Epeli Ratabacaca Laca (supra)** has discussed a very helpful guideline of sentencing for sexual assault based on the United Kingdom's legal guidelines for sentencing, where his lordship held that;

    Category 1 (the most serious)

    Contact between the naked genitalia of the offender and naked genitalia face or mouth of the victim,

    Category 2

    i. Contact between the naked genitalia of the offender and another part of the victim's body,

    ii. Contact with the genitalia of the victim by the offender using part of his or her body other than the genitalia, or an object,

iii. The contact between either the clothed genitalia of the offender and the naked genitalia of the victim, or the naked genitalia of the offender and the clothed genitalia of the victim.

Category 3

Contact between part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia).

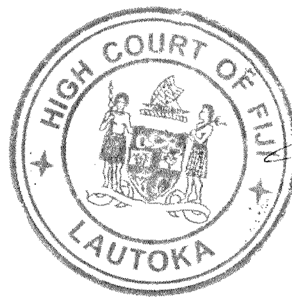
15. In view of the summery of facts, which the appellant admitted in the magistrate's court, this alleged incident constitutes two parts. The appellant has first sucked the penis of the victim. He then inserted the victim's penis into his anus. According to the guideline discussed in **Epeli Ratabacaca Laca (supra),** the first part of this crime falls within the scope of category two and the second part falls within the scope of category one which is the most serious form of sexual assault. The learned magistrate has correctly and accurately selected 6 years as the starting point, which is at the higher end of the tariff, as this offence falls within the first and second categories of sexual assault.

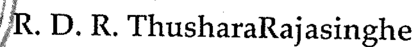
16. The appellant further contended that the learned magistrate has taken into account the recording and posting of this incident through internet as an aggravating factor in the sentencing.

17. According to the summery of facts admitted by the appellant in the magistrate's court, it was revealed that the appellant knew about the recording of the incident. He started making gestures and actions for the recording. In deed this is an aggravating factor of this offence. It has aggravated the damage and the seriousness of this crime. The learned magistrate has correctly considered that fact as an aggravating factor. Having correctly selected his starting point, the learned magistrate finally reached to a sentence of 4 years which is within the

accepted tariff of this offence. Wherefore, I hold that the grounds of appeal against the sentence have no merit.

18. Upon consideration of the reasons discussed above, it is my opinion that the grounds of appeal advanced by the appellant have no merit. I accordingly uphold the conviction and the sentence of the learned magistrate dated 21st of July 2014 and dismiss this appeal of the appellant.





R. D. R. ThusharaRajasinghe

Judge

At Lautoka

10th of June 2015

Solicitors : Office of the Director of Public Prosecutions

Kevueli Tunidau Lawyers for the Appellant