STATE v NAVAUNIANI KOROI

HIGH COURT — APPELLATE JURISDICTION

SHAMEEM J

7, 12 August 2002

[2002] FJHC 144

Criminal law — Rape — appeal against sentence — committal to High Court for sentencing — learned magistrate erred — factors relating to character and antecedents — Criminal Procedure Code s 222(1) — Penal Code (Cap 17) ss 149, 150.

Respondent pleaded guilty to five counts of rape and mitigated for previous convictions. The State then made an application that the learned Magistrate commit the matter to the High Court for sentencing. The learned Magistrate refused the application and sentenced Respondent to 9 years' imprisonment. The State sought an appeal against sentence.

Held — (1) Given the starting point for Rape, which is 7 years imprisonment, the gravity of the offence, including the resulting pregnancy of the Complainant would have justified a significant increase. Any reduction for the guilty plea could not have brought the sentence within the jurisdiction (on one count) of the Magistrates' Court. Further, the relationship between the Respondent and the Complainant and the on-going nature of the offending in relation to incidents not alleged in the charges, should have led to committal.

(2) The learned Magistrate erred in failing to take into account factors relating to character and antecedents, and in refusing the State's application to commit to the High Court for sentence.

Appeal allowed.

Cases referred to

Mohammed Kasim v State [1994] FJCA 25; Criminal Appeal No AAU 21 of 1993; *R v King's Lynn Justices, Ex parte Carte* [1969] 1 QB 488; [1968] 3 All ER 858; *R v Lynn Justices, Ex parte Brown* [1973] 1 All ER 716; *R v Tower Bridge Magistrate, Ex parte Osman* [1971] 2 All ER 1018; *R v Vallett* [1951] 1 All ER 231; *Sisa Kanaveilomani v State* [2001] FJHC 36; Criminal Appeal No HAA 15 of 2001S; *Umesh Kumar v State* Criminal Appeal No AAU 9 of 1997S; *Waisake Navunigasau v State* [1997] FJCA 52; Criminal Appeal No AAU 12 of 1996S, cited.

Timoci Momotu v State [1995] FJCA 2; Criminal Appeal No AAU 18J of 1994, considered.

V. Vosarogo for the Appellant

Nair for the Respondent

Judgment

Shameem J. On the 11th of February 2002, the Respondent pleaded guilty in the Suva Magistrates Court to the following offences:

FIRST COUNT

Statement of Offence

Rape: Contrary to ss 149 and 150 of the Penal Code, Cap 17.

Particulars of Offence

Navuaniani Koroi between the 15th day of December and the 31st day of December, 1999 at Suva in Central Division, had unlawful carnal knowledge of (the Complainant), without her consent.

SECOND COUNT

Statement of Offence

Rape: Contrary to ss 149 and 150 of the Penal Code, Cap 17.

Particulars of Offence

Navuaniani Koroi between the 1st day of July and the 31st day of July, 2001 at Suva in Central Division, had unlawful carnal knowledge of (the Complainant), without her consent.

THIRD COUNT

Statement of Offence

Rape: Contrary to ss 149 and 150 of the Penal Code, Cap 17.

Particulars of Offence

Navuaniani Koroi on the 4th day of January, 2002 at Suva in Central Division, had unlawful carnal knowledge of (the Complainant), without her consent.

FOURTH COUNT

Statement of Offence

Rape: Contrary to ss 149 and 150 of the Penal Code, Cap 17.

Particulars of Offence

Navuaniani Koroi on the 6th day of January 2002 at Suva in Central Division, had unlawful carnal knowledge of (the Complainant), without her consent.

FIFTH COUNT

Statement of Offence

Rape: Contrary to ss 149 and 150 of the Penal Code, Cap 17.

Particulars of Offence

Navuaniani Koroi on the 1st day of February, 2002 at Suva in Central Division, had unlawful carnal knowledge of (the Complainant), without her consent.

The facts were outlined by the prosecution and the Respondent admitted them. State counsel tendered the antecedent report and list of previous convictions. The previous convictions which dated 1981 were for the offences of Obstructing Police Officer In Due Execution of His Duty, and Drunk and Disorderly Behaviour. The Respondent mitigated.

The State then made an application under s 222(1) of the Criminal Procedure Code, that the learned Magistrate commit the matter to the High Court for sentencing. The learned Magistrate refused the application and sentenced the Respondent to 4 years' imprisonment on Count 1, and 5 years' imprisonment on each of the remaining counts. The sentences on Count 1 and 2 were to be served consecutively, the remaining counts were to be served concurrent to the other counts. In total, the Respondent was to serve 9 years' imprisonment.

The Director of Public Prosecutions now appeals against sentence on the following grounds:

(a) That the learned Magistrate erred in law when he refused to remit the matter to the High Court for sentencing in accordance with the provisions of s 222(1) of the Criminal Procedure Code, Cap 21 and proceeded to sentence the Respondent.

(b) That the learned Magistrate erred in law and in fact when he rejected the antecedent record of the Respondent and found that he was a person of prior good character.

(c) That the sentence was wrong in law and manifestly lenient having regard to the aggravated features and circumstances of the case.

Grounds (a) and (b):

Because these grounds are closely connected, I deal with them together. The facts of this case, were that the Respondent who is 44 years old and a soldier is married to Sera Koroi. They have five children, four sons and one daughter. In 1999 the Respondent's daughter was 13 years old and a student in Class 7. Between the 15th and 31st of December, she was playing with her friends outside their home when the Respondent asked her if she wanted to be caned or punished. He then told her to go and lie on the bed. He proceeded to rape her. He then had sexual intercourse with her without her consent three or four times a week until February 2002. On the 2nd of February 2002, the Respondent's wife, suspecting that her daughter was pregnant, asked her if she was. Her daughter said that she was, and that the person with whom she had had sexual intercourse was her father. Her mother, on the recommendation of the Church Minister, referred the matter to the police. She was then 7 months pregnant. A medical report, tendered in court by the prosecution states that the Complainant said that her father had raped her, and threatened to kill her if she told anyone about it. The report confirmed the pregnancy and the finding that the Complainant's hymen was not intact, and that the posterior vagina was smooth. She was referred to a psychiatrist and to the Women's Crisis Centre for counselling.

The antecedent history states that the Respondent is originally from Nayavu Village, Wainibuka and has been married for 20 years. He is a Lance Corporal in the army. He attended school until Form 3, and was employed as a labourer at Casco Steel from 1974 to 1977. He then joined the Special Constabulary in 1999, and joined the Military Forces in 1981. Apart from the two previous convictions in 1981, he is a first offender.

In mitigation the Respondent said that he had pleaded guilty, that he had sought forgiveness from his wife and children, that his eldest son was studying towards a Masters Degree, his second child attended secondary school and his two younger children were still in primary school. He said he was the sole breadwinner in the family.

The learned Magistrate then refused the State's application to commit to the High Court for sentencing. He relied on the Fiji Court of Appeal decision in *Timoci Momotu v The State* Crim App AAU0018/1994 saying:

> **6.** The antecedent of the accused, supplied to the Court by the prosecution, does not entitle me, to refer this matter to the High Court for sentencing.
>
> **7.** The antecedent of the accused appears to show, that he is a 1st offender, as far as, sexual offences are concerned.
>
> **8.** If the prosecution had wanted a penalty more than that allowed by the Magistrates' Court, they should have used their powers under s 220 of the CPC at the outset.
>
> **9.** It is not safe, given the legal difficulties presented by Timoci Momotu to rely on s 222(1) of the CPC when the antecedent of the accused, does not satisfy the test laid out in that case.

The State's submission, in respect of this decision, can be summarised thus. The learned Magistrate erred in failing to consider the facts of the case pertinent to character, other than the previous convictions, such as the relationship between the Respondent and the Complainant, and the repeated sexual acts committed on her over a period of 4 years, which were not the subject of the charges. He further erred in failing to follow the sentencing guidelines of the Court of Appeal in *Mohammed Kasim v The State* Crim App No AAU0021 of 1992 and of the High Court in *Sisa Kanaveilomani* Crim App No HAA0015 of 2001S. These

guidelines would have made clear to the learned Magistrate that he could not pass a sentence for a term less than 5 years imprisonment on each count.

Counsel for the Respondent submits that the Respondent was of good character, and that the learned Magistrate could not have committed to the High Court for sentence because he had already taken into account the relationship between the Respondent and the Complainant in considering seriousness of the offence. She further submits that the sentence of 9 years' imprisonment was correct in principle, and in line with other cases such as *Umesh Kumar v The State* Crim App No AAU0009/1997S and *Waisake Navunigasau v The State* Crim App No AAU0012/1996S.

The scope of s 222 of the Criminal Procedure Code has been ruled upon by the Court of Appeal. In *Timoci Momotu v The State* (above), the Magistrate referred the sentencing of an accused who had pleaded guilty to Rape, to the High Court on the basis of the gravity of the offence. The sentence in the High Court was quashed by the Court of Appeal, which held that the discretion to commit must be made on the basis of the accused's character and antecedents. At 14 of the judgment the Court (per Thompson and Quilliam JJA) said:

> *It is inevitable that in any rape case the details of the offence will tell the Court something of the character of the accused. If that were all that was necessary to justify committal then there would be no need for the words under consideration in s 222 (1) to have been included. We are, however, obliged to give those words some meaning. We can only conclude that they mean information of something additional to the physical details of the offence. A very clear example of this was to be found in R v King's Lynn Justices (above) where it appeared that two of the accused, although not previously convicted, had been stealing from their employer for years.*

In *R v King's Lynn Justices, Ex parte Carter and Others* (1968) 3 ALL ER 358, Lord Parker CJ held that "character and antecedents" included matters revealed at the hearing, such as a breach of trust by the accused, or evidence of a long pattern of conduct. At 862, he said, in a passage cited and approved by the majority decision in *Timoci Momotu* (above):

> *As I see it, speaking for myself, the expression "character and antecedents" being as wide as it possibly can be, justices are entitled to take into consideration in deciding whether or not to commit, not merely previous convictions, not merely offences which they are asked to take into consideration, but matters revealed in the course of the case* ***connected with the offence charged which reflects in any way on the accused's character*** (my emphasis).

Referring to a judgment of the Court of Criminal Appeal in *R v Vallett* (1951) 1 ALL ER 231 (per Goddard CJ) Lord Parker went on to say that the power to commit was not limited to case where there were previous convictions or offences to be taken into consideration for sentencing:

> *Indeed his judgment is on the basis that the justices were entitled to commit once it had been shown that she had been a shameless thief, and also that she had committed those thefts while in a position of trust.*

It was on the basis of these decisions, that I found in *Sisa Kanaveilomani v State* Crim App No HAA0015 of 2001S that a relationship of trust with the victim may be a relevant factor in considering committal under s 222 of the Criminal Procedure Code. In *R v Lynn Justices, Ex parte Brown* (1973) 1 ALL ER 716, offences committed by a police officer of stealing from persons he had been employed to protect, were held to be sufficient grounds for committing for sentence. The police officer had no previous convictions. However, in *R v Tower*

Bridge Magistrate Ex parte Osman (1971) 2 ALL ER 1018, evidence of stealing from his employer, which was already alleged in the charge, was held not to be additional evidence of character because it was already reflected in the charge.

Turning therefore to the case before me, the learned Magistrate held that the Respondent was of good character and that committal was not justified. I do not consider that he erred in ignoring the two previous convictions of the Respondent. They are more than 20 years old and were rightly disregarded. However I consider that he did err in disregarding the fact that the Respondent had raped his daughter (which was not alleged in the charge) and that the Respondent had committed other offences of rape against his daughter which were not specified in the charges. According to the authorities I have cited, these factors were additional to the facts disclosing the offences charged and were both relevant to the discretion to commit.

Given the starting point for rape, which is 7 years' imprisonment, the gravity of the offence, including the resulting pregnancy of the Complainant would have justified a significant increase. Any reduction for the guilty plea could not have brought the sentence within the jurisdiction (on one count) of the Magistrates' Court. Further the relationship between the Respondent and the Complainant and the on-going nature of the offending in relation to incidents not alleged in the charges, should have led to committal.

I find therefore that the learned Magistrate erred in failing to take into account factors relating to character and antecedents, and in refusing the State's application to commit to the High Court for sentence.

His decision is quashed and substituted with an order to commit to the High Court under s 222(1) of the Criminal Procedure Code.

Ground (c)

It follows that the sentence passed was a nullity. It is therefore not necessary to consider the appeal against leniency of sentence. Sentence will be considered afresh at a date to be fixed after consultation with counsel.

Summary

This appeal against the Magistrate's refusal to order committal to the High Court for sentence, succeeds. The sentence is quashed and a date will be fixed for sentence by the High Court. The Respondent is to be remanded in custody until sentence is passed.

Sentence

14th August 2002

Navauniani Koroi, you are convicted on your pleas of guilty to five counts of Rape. The facts as read by the prosecution disclose that in December 1999, July 2001, January 2002 and February 2002 you raped your daughter, a school girl Ana Tavaciri Koroi. On Count 1, she was only 13 years old. She became pregnant as a result of the rapes and has now delivered your child. The child is now in the care of Social Welfare.

The tariff for Rape

In *Mohammed Kasim v The State* Crim App 21/93, the Fiji Court of Appeal recommended that the starting point for rape should be 7 years imprisonment where there are no aggravating or mitigating circumstances, to be adjusted up or down to take them into account. In *Maika Soqonaivi v The State* Crim App No

AAU008 of 1997, a 6 year term for a rape where violence was used, and the victim a young adult and a co-worker, was held to be "appropriate", although the Court commented that: "Having regard to the aggravating features, particularly the violence, the appellant may have been fortunate to have received a sentence less than the 7 year starting point". In *Mark Mutch v The State* Crim App No AAU0060 of 1999, the Appellant was sentenced to 7 years imprisonment on one count of rape, and 4 years on four counts of Indecent Assault. The Court of Appeal held that:

> *The Court has recommended that the starting point for rape should be 7 years where there are no aggravating or mitigating circumstances, to be adjusted up or down to take them into account: see Mohammed Kasim v The State (Crim App 21/93) and Maika Soqonaivi v The State. His Lordship referred to these guidelines in his sentencing remarks and it is difficult to understand his failure to go beyond the starting point of 7 years to take into account the seriousness of the aggravating features of this offence against a nine year old girl whom the appellant had befriended and who regarded him as a trusted adult. A prison term of ten years must be regarded as the minimum appropriate in the circumstances and the appeal is allowed to the extent of increasing that sentence accordingly.*

Turning to this case, I have noted all that has been said on your behalf by counsel including your age, your service in the Military Forces and the fact that your family is now suffering. I also take into account your guilty plea which means that your daughter is spared the ordeal of giving evidence.

However, the offences you have committed are extremely grave. Not only have you committed the offences of rape on a child, but that child was your daughter. You are the one person in the world that she should have been able to trust absolutely with her life and her welfare. You have grossly abused that trust. Further you caused her to have a child which in turn has robbed your daughter of her childhood.

Taking 7 years as the starting point, I increase that term by 2 years for the young age of the complainant, and a further 3 years for the fact that she is your daughter. I add a further year for the resulting pregnancy. I reduce the term by 1 year for the guilty plea and other mitigation. The sentence on each count is therefore 12 years imprisonment. The total term would be manifestly excessive if I were to order each term to be served consecutively, as would normally be the case.

I therefore order that the sentence on each count be served concurrently with each other.

The sentences are as follows:

Count 1: 12 years imprisonment;
Count 2: 12 years imprisonment;
Count 3: 12 years imprisonment;
Count 4: 12 years imprisonment;
Count 5: 12 years imprisonment.

They are to be served concurrently and must run from the 12th of February 2002 when you were first sentenced in the Magistrates Court.

Appeal allowed.