RATU PENIONI ROKOTA v STATE

HIGH COURT — APPELLATE JURISDICTION

SHAMEEM J

20, 23 August 2002

[2002] FJHC 168

Criminal law — sentencing — appeal — indecent assault — appeal against conviction and sentence — sentencing principles — 10 years' imprisonment reduced to 5 years — Criminal Procedure Code s 148 — Penal Code Cap 17 s 154(1).

Appellant was convicted and was sentenced to 10 years' imprisonment on all nine counts of indecent assault. Counts one to four were to be served concurrently, while counts five to nine was to be served consecutively but concurrently to counts one to four. Appellant appealed the conviction and sentence. He alleged that the sentence of 10 years' imprisonment was harsh and excessive.

Held — (1) Sentences for indecent assault range from 12 months' imprisonment to 4 years. The gravity of the offence will determine the starting point for the sentence. The Indecent Assault of Small Children reflects on the gravity of the offence.

(2) The 9–year term of imprisonment is excessive in totality. A 5–year term is appropriate because it reflects the seriousness of the offending, but takes into account the age of the Appellant. The sentences on counts one to five are to be served consecutively. The remaining terms of imprisonment on counts six to nine, are to be served concurrently to the terms on counts one to five.

Appeal allowed. Ten years' imprisonment reduced to 5 years.

Cases referred to

Ram Khelawan v State Crim App No HAA0038/1998L, cited.

DPP v Saviriano Radovu Crim App No 0006/1996; *Krishna v Reg* (1962) FLR 236; *Mark Mutch v State* Crim App No AAU0060/1999; *Mosese Naisoroi v State* Crim App No 53/93; *R v Helliwell* (1987) 5 Crim App Rep (S) 357; *R v Renouf* (1988) 10 Crim App Rep (S) 157; *Ratu Veretariki Kadavu v State* Crim App No HAA0049/2000L; *Robin Abhinesh Lal v State* Crim App No 29/98, considered.

S. Matawalu for the Appellant

K. Bavou for the State

Judgment

Shameem J. The Appellant was charged on nine counts of Indecent Assault, in the Suva Magistrates Court. The charges read as follows:

FIRST COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to section 154(1) of the Penal Code, Cap 17.

Particulars of Offence

RATU PENIONI ROKOTA, between the 1st day of January 2000 and 31st day of December 2000 at Ucunivanua Village, Verata in the Central Division, unlawfully and indecently assaulted a girl namely VILISITA CUANILAWA.

SECOND COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to section 154(1) of the Penal Code, Cap 17.

Particulars of Offence

RATU PENIONI ROKOTA, between the 1st day of January 2001 and the 31st day of December 2001 at Ucunivanua Village, Verata in the Central Division unlawfully and indecently assaulted a girl namely VUETI KORO.

THIRD COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to section 154(1) of the Penal Code, Cap 17.

Particulars of Offence

RATU PENIONI ROKOTA, between the 1st day of January 2001 and the 31st day of December 2001 at Ucunivanua Village, Verata in the Central Division unlawfully and indecently assaulted a girl namely JULIA CUANILAWA.

FOURTH COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to section 154(1) of the Penal Code, Cap 17.

Particulars of Offence

RATU PENIONI ROKOTA, between the 1st day of January 2001 and the 31st day of December 2001 at Ucunivanua Village, Verata in the Central Division unlawfully and indecently assaulted a girl namely ASENA LEWENI.

FIFTH COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to section 154(1) of the Penal Code, Cap 17.

Particulars of Offence

RATU PENIONI ROKOTA, between the 1st day of January 2002 and the 1st day of June 2002 at Ucunivanua Village, Verata in the Central Division unlawfully and indecently assaulted a girl namely AMELIA LEBA.

SIXTH COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to section 154(1) of the Penal Code, Cap 17.

Particulars of Offence

RATU PENIONI ROKOTA, between the 3rd day of June 2002 at Ucunivanua Village, Verata in the Central Division unlawfully and indecently assaulted a girl namely LAISA VAKALALA.

SEVENTH COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to section 154(1) of the Penal Code, Cap 17.

Particulars of Offence

RATU PENIONI ROKOTA, between the 2nd day of June, 2002 at Ucunivanua Village, Verata in the Central Division unlawfully and indecently assaulted a girl namely AMELIA LEBA.

EIGHTH COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to section 154(1) of the Penal Code, Cap 17.

Particulars of Offence

RATU PENIONI ROKOTA, between the 1st day of January 2002 to the 6th day of June 2002 at Ucunivanua Village, Verata in the Central Division unlawfully and indecently assaulted a girl namely ADI LISI KOVENI.

NINTH COUNT

Statement of Offence

INDECENT ASSAULT: Contrary to section 154(1) of the Penal Code, Cap 17.

Particulars of Offence

RATU PENIONI ROKOTA, between the 1st day of January 2002 to the 6th day of June 2002 at Ucunivanua Village, Verata in the Central Division unlawfully and indecently assaulted a girl namely INISE TINAI.

The case was first called on 11th June 2002. The Appellant was read the charges and he said he understood them. No plea was taken. The prosecution asked for time to prepare summary of facts and antecedent report. The record then reads:

> *Court* — Do you want a lawyer?
> *Accused* — I don't need one.
> *Court* — Right to counsel explained.

The case was then adjourned to the next day. The next day, the prosecution asked for a name suppression order to protect the identities of the complainants. The order was given. The charges were then read and explained again to the Appellant. He pleaded guilty on all counts. The summary of facts on each count was then read out by the prosecutor. The facts on each count were similar. The Appellant, who is 64 years old, a retired tradesman and a Sunday school teacher, lives at Ucunivanua Village, Verata, Tailevu. Between the 1st of January and the 6th of June 2002, he indecently assaulted nine girls aged between 4–9 years old. In each case he would call the girl into his house and tell her to lie down and remove her underwear. He would then indecently assault her by putting his tongue into her vagina, touching her nipples and inserting his fingers into her vagina. He would then tell the girl to get dressed and go home. The girls complained to their school teacher and then to the police, but only when other such incidents were reported. All the children were examined and no injuries were found.

The Appellant agreed with all the facts, except for the facts on count 3, in relation to the indecent assault of Julia Cuanilawa. However when the facts were read again and explained to him, he agreed to them. The Appellant had no previous convictions.

In mitigation he said he had never offended before, that he had been arrested and reported by his villagers, that he was 64 years old and was in his second year of retirement. Sentencing was delayed because the prosecution then made an application to commit to the High Court for sentencing. The application was refused on 27th June 2002. On that day, the Appellant tendered letters from the parents of the children assaulted, and from the pastor of the church. The letters showed that the Appellant had apologised to the parents and the pastor, and that they had forgiven him. The learned Magistrate considered this evidence "in light of the fact that … mitigation was very brief. This is not a reconcilable offence".

She then sentenced the Appellant as follows:

> Counts 1 to 4 — 1 year imprisonment on each count;
> Counts 5 to 9 — 2 years imprisonment on each count.
> Counts 1 to 4 were to be served concurrently to each other.
> Counts 5, 6, 7, 8 and 9 were to be served consecutive to each other but concurrent to Counts 1, 2, 3 and 4. The total sentence to be served is 10 years imprisonment.

The Appellant now appeals against convictions and sentences. His grounds of appeal (in the amended petition of appeal) are as follows:

(a) that the learned magistrate erred in law and in fact in not referring the Appellant to be assisted by a Legal Aid Officer, due to the nature and seriousness of the charge;

(b) that it was more prudent for the learned magistrate to have the Appellant represented by a Legal Aid Officer is borne out by the fact that the learned Magistrate records on p 4 of her sentencing

"I have considered the Accused's circumstances, his age, his plea of guilty in the first instance and his very brief mitigation";

(c) that the learned magistrate ought to have considered having a psychiatrist report before asking the Appellant to take his plea due to the facts of the case and the age of the appellant.

(4) That the said sentence of ten years imprisonment was harsh and excessive on the following grounds:

(a) that the learned magistrate failed to take into account that the Appellant had no previous convictions;

(b) that the learned Magistrate failed to give any reason why Counts 5, 6, 7, 8 and 9 were consecutive to each other and concurrent to Counts 1, 2, 3 and 4.

(5) That further to the grounds of appeal numbers 3(a), (b), (c) and 4(a) and (b) the Appellant wishes to add a further grounds of appeal that the plea was an equivocal plea.

The appeal against conviction

The first ground of appeal is that the Appellant was prejudiced by absence of counsel. On the 11th of June 2002, when the case was first called, the charges were read and explained to the Appellant. Then, before pleas were taken the court asked the Appellant if he wanted a lawyer. When he said he did not need one the learned magistrate then explained the right to counsel. The plea was not taken on that day. The case was adjourned to the 13th of June. The Appellant continued to be unrepresented. The pleas were taken at 2.15 pm and the facts outlined and mitigation heard. The court then adjourned the proceedings to the 27th of June, 11 days later for sentence. In the meantime, the Appellant obtained letters in support of his mitigation. He remained unrepresented although he had the opportunity to obtain legal advice. I consider that in these circumstances the Appellant clearly and competently waived his right to counsel. Further, the learned magistrate was scrupulous in explaining to the Appellant the reason for each adjournment, and the nature of the prosecution's submissions. The record shows that he understood the proceedings and was not prejudiced in any way by lack of legal representation. On one occasion when he had doubts about the summary of facts outlined, he asserted himself by changing his plea to not guilty. This then led the magistrate to explain the facts carefully to him to ensure his understanding. Counsel referred to the brevity of mitigation as evidence of prejudice. However, the mitigation advanced by the Appellant shows that he brought all relevant matters to the attention of the court. These matters were his previous good character, his advanced years, his remorse, and the fact that he was in his second year of retirement. Further, during the 11 day adjournment, he obtained letters to show that his community, including the parents of the victims, had accepted his apologies. Counsel did not refer to any other matters which might have been relevant, but which were not disclosed in mitigation.

In the circumstances I find that the Appellant was not prejudiced by lack of legal representation. This ground fails. It follows that ground (b) is also unsuccessful.

Ground (c) is that the learned magistrate ought to have called for a psychiatric report before pleas were taken. State counsel referred me to s 148 of the Criminal Procedure Code. That section provides:

> (1) When, in the course of a trial or preliminary inquiry or at anytime after a formal charge has been presented or drawn up, the court has reason to believe that the accused

> may be of unsound mind so as to be incapable of making his defence, it shall inquire into the fact of such unsoundness and may adjourn the case under the provisions of section 202 for the purposes of obtaining a medical report and of making such other enquiries as it shall deem to be necessary.

On a perusal of the court record, no grounds appear to give rise to a belief that the Appellant may have been of unsound mind. On the contrary, the Appellant appears to have understood the nature of the proceedings, and indeed to have questioned the validity of some of the facts outlined. I consider that there was no reason apparent on the record to indicate unsoundness of mind. This ground is unsuccessful.

Appeal against sentence

The total sentence imposed was 10 years' imprisonment. Counsel for the Appellant said that although the individual sentence of 1 years' imprisonment on counts 1 to 4 was right in principle, no reason was given for the 2 years given on the remaining counts, and the total term was harsh and excessive. State counsel agreed that there seemed to be no reason for different sentences passed on some of the counts, but that the total term was a proper term for a person who on nine different occasions indecently assaulted nine children.

In *Ratu Veretariki Kadavu v State* Crim App No HAA0049 of 2000L, Prakash J reviewed local sentences for indecent assault. In that case the appellant was convicted of one count of indecently assaulting his 17-year-old daughter. The judgment does not specify the nature of the indecent assault, but there was reconciliation between father and daughter. On a review of comparable cases of indecent assault, Prakash J observed that while sentences as low as 1 months imprisonment had been imposed (*Ram Khelawan v State* Crim App HAA0038 of 1998L), the general trend was to pass sentences of about 1–2 years' imprisonment. A review of English authorities produced a not dissimilar result, of around 2 years' imprisonment. In *R v Helliwell* (1987) 5 Cr App R(s) 357, the appellant pleaded guilty to two counts of indecent assault on his twin daughter who were 4 years old. The nature of the assault was similar to the assault in this case, of fingering the vaginal area. His sentence was reduced from 22 years' imprisonment to 9 months. In *R v Renouf* (1988) 10 Cr App R(s) 157, (also referred to by Prakash J in *Kadavu*) the Appellant's sentence of 3 years' imprisonment was reduced to 2 years on three counts of indecent assault. The victim was his step-daughter. Although there were only three counts, the assaults covered a period of 12 months, and the assault consisted of fondling of breasts and vagina, and prevailing upon the victim to masturbate the appellant and suck his penis.

In *Mark Mutch v State* Crim App No AAU0060.1999, the Appellant had been found guilty on two counts of rape and four counts of indecent assault. The trial judge had sentenced him to 7 years' imprisonment for the counts of rape, and 4 years' imprisonment on the counts of indecent assault. The sentences were to be served concurrently. The State cross-appealed against sentence. The facts disclosed offences committed on girls aged between 9–15 years old. The evidence on the counts of indecent assault was of fondling of breasts and the inserting of fingers into the vagina. The Court of Appeal held that concurrent sentences of 4 years' imprisonment on each of the indecent assault counts, were not manifestly lenient. The sentence for one count of rape (the conviction on the other count having been quashed) was increased to 10 years to be served concurrent to the other terms imposed.

In *Mosese Naisoroi v State* Crim App No 53/93, the appellant was sentenced to 2 years' imprisonment for several counts of indecent assault. The sentences were concurrent to each other. In *Robin Abhinesh Lal v State* Crim App No 29/98, Townsley J upheld a sentence of 18 months' imprisonment for an 18-year-old who indecently assaulted a 22-year-old child. In *DPP v Saviriano Radovu* Crim App 0006 of 1996, Fatiaki J upheld a 9-month sentence for a 42-year-old Appellant who indecently assaulted an 8-year-old girl.

From these cases a number of principles emerge. Sentences for indecent assault range from 12 months' imprisonment to 4 years. The gravity of the offence will determine the starting point for the sentence. The indecent assault of small children reflects on the gravity of the offence. The nature of the assault, whether it was penetrative, whether gratuitous violence was used, whether weapons or other implements were used and the length of time over which the assaults were perpetrated, all reflect on the gravity of the offence. Mitigating factors might be the previous good character of the accused, honest attempts to effect apology and reparation to the victim, and a prompt plea of guilty which saves the victim the trauma of giving evidence.

These are the general principles which affect sentencing under s 154 of the Penal Code. Generally, the sentence will fall within the tariff, although in particularly serious cases, a 5-year sentence may be appropriate. A non-custodial sentence will only be appropriate in cases where the ages of the victim and the accused are similar, and the assault of a non-penetrative and fleeting type. Because of the vast differences in different types of indecent assault, it is difficult to refer to any more specific guidelines than these.

In this case the learned Magistrate imposed sentences in the lowest end of the tariff on counts 1 to 4. There is no apparent reason for the different sentences on the remaining counts. The facts on the counts are very similar. No reason was given for the 2-year terms given on counts 5–9. The disparity in the sentences on the different counts is wrong in principle. The 1 year term given on Counts 1–4 are on the lowest end of the tariff, but are not wrong in principle. It appears that the learned Magistrate scaled the sentence down considerably to reflect previous good character and evidence of remorse and traditional apology. Although another sentencer may have given a slightly higher sentence on each count, an appellate court should not interfere with a sentence simply because a higher sentence might have been given by another court. The 1-year terms are not wrong in principle and fall within the tariff for indecent assault cases. The sentences on counts 5–9 are quashed and substituted with a term of 1 year each.

Each count was a separate transaction. As McDuff CJ said in *Krishna v Reg* (1962) FLR 236, the general principle is that distinct offences should lead to separate and distinct sentences. The aggregate of the sentences on all counts, if they are to be served consecutively is 9 years' imprisonment. This would be considered an appropriate sentence for persons who indecently assault children, who are the most vulnerable members of society. Further the repeated nature of the offending, and the penetrative nature of the assaults on some counts, certainly call for a deterrent sentence.

However, the Appellant is 64 years old. There are special sentencing principles for the sentencing of the elderly, particularly those of previous good character. D A Thomas in his *Principles of Sentencing* , 2nd ed, at p 196 wrote:

> Recognition of age as a mitigating factor does not mean that imprisonment should never be imposed on elderly offenders, and the Court has upheld sentences of imprisonment

on men in their seventies. It is however a long-established principle that a sentence should normally be shortened so as to avoid the possibility that the offender will not live to be released.

Thus in *Wilkinson* (1974) (unreported but referred to in *Thomas* (above), at 196) a 60-year-old man who was sentenced to 5 years' imprisonment for indecently assaulting his grand-nieces over a period of several years, and had no previous convictions, had his sentence reduced to 30 months by the Court of Criminal Appeal. Similarly in *Greenlees* (1975) (unreported but cited in *Thomas* at 196) a 10-year-old term for a 62-year-old man who committed multiple acts of indecency on girls and boys, was reduced to 3 years.

In the light of this principle, to avoid sending the elderly to prison for very long terms, the 9-year term of imprisonment is excessive in totality. A 5-year term is appropriate in the circumstances because it reflects the seriousness of the offending, but takes into account the age of the appellant. For this reason, the sentences on counts 1–5 are to be served consecutively to each other. The remaining terms of imprisonment on counts 6–9, are to be served concurrently to the terms on counts 1–5.

In summary the sentences are now as follows:

count 2 — 1 year
count 3 — 1 year
count 4 — 1 year
count 5 — 1 year

To be served consecutively to each other.

count 6 — 1 year
count 7 — 1 year
count 8 — 1 year
count 9 — 1 year

To be served concurrently with each other and with the terms on counts 1–5.

In total the Appellant will serve 5 years' imprisonment. The appeal against sentence succeeds to this extent.

Appeal allowed.